



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNL FFT

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's Two Month Notice to End Tenancy for Landlord's Use (Two Month Notice) pursuant to section 49 of the *Act*, and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 11:17 a.m. in order to enable the landlord to call into this teleconference hearing scheduled for 11:00 a.m. The tenant attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

As only the tenant attended the hearing, I asked the tenant to confirm that he had served the landlord with the Notice of Dispute Resolution Proceeding for this hearing.

### Preliminary Issue – Service of Documents

The tenant testified that the landlord had been served with the notice of this hearing to the address for service of the landlord provided on the Two Month Notice by Canada Post registered mail on September 21, 2018. As proof of this service, the tenant submitted into evidence a Canada Post registered mail receipt with tracking number (noted on the cover sheet of this decision), and a copy of the tracking report which confirms that the tenant's notice of this hearing was "unclaimed" by the landlord and returned to the tenant.

Section 90 of the *Act* sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received on the fifth day after mailing when it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt for service of documents by registered mail, as follows:

*Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.*

As such, I find that the landlord was served with the notice of this hearing in accordance with section 89 of the *Act* and deemed to have received the notice of this hearing on September 26, 2018, the fifth day after mailing, in accordance with section 90 of the *Act*.

### Procedural Matters

Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the tenant's Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Further to this, the standard of proof in a dispute resolution hearing is on a balance of probabilities. Usually the onus to prove the case is on the person making the claim. However, in situations such as in the current matter, where a tenant has applied to cancel a landlord's Notice to End Tenancy, the onus to prove the reasons for ending the tenancy transfers to the landlord as they issued the Notice and are seeking to end the tenancy.

### Issue(s) to be Decided

Should the landlord's Two Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the cost of this application from the landlord?

### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The tenant provided unchallenged testimony regarding the terms of this verbal tenancy agreement:

- This tenancy began July 2015 and is currently ongoing on a month-to-month basis.
- Monthly rent in the amount of \$600.00 is payable on the first day of each month.
- The tenant confirmed that he did not pay the landlord a security deposit.

The tenant submitted into evidence a copy of the Two Month Notice which the landlord personally served to the tenant on August 29, 2018.

The Two Month Notice stated the following reasons for the issuance of the notice:

*The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).*

The notice is signed and dated by the landlord on August 28, 2018, provides the address of the rental unit, states an effective vacancy date of November 30, 2018, and is on a Residential Tenancy Branch approved form.

On September 12, 2018, the tenant filed an application for dispute resolution to dispute the good faith intention of the landlord to use the rental unit for the purpose stated on the Two Month Notice.

The tenant testified that when the landlord served him with the Two Month Notice the landlord stated that his nephew would be moving into the rental unit. The tenant asserts that a "nephew" is not included in the definition of a "close family member" for the purposes of issuing a Two Month Notice.

### Analysis

Section 49(3) of the *Act*, as noted below, allows a landlord to end a tenancy for their own use:

A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a **close family member** of the landlord intends in good faith to occupy the rental unit.

**(My emphasis added)**

"Close family member" of a landlord is defined in section 49(1) of the *Act* as:

- (a) the landlord's parent, spouse or child, or
- (b) the parent or child of the landlord's spouse;

As the notice was issued under section 49(3) of the *Act*, the tenant had 15 days to dispute the notice pursuant to section 49(8)(a) of the *Act*. There is no issue that the tenant filed the Application within the 15-day time limit set out in the *Act*.

As explained earlier in the decision under the section pertaining to "Procedural Matters", and pursuant to Rule 6.6 of the Residential Tenancy Branch Rules of Procedure, the landlord has the onus to prove the grounds for the Two Month Notice as they issued the Notice and are seeking to end the tenancy.

I accept the tenant's unchallenged testimony disputing the landlord's reasons for ending the tenant. As noted above, a "nephew" does not meet the definition of a "close family member" under the *Act*. In the absence of the landlord at the hearing to provide testimony and evidence to support the reasons for ending the tenancy, I find that the landlord has failed to satisfy the burden of proof for the reasons to end the tenancy provided on the Notice.

Therefore, based on the unchallenged testimony of the tenant and the evidence before me, on a balance of probabilities, I find that the landlord has not provided sufficient evidence to establish that he that he intends in good faith to do what he said on the Two Month Notice and to establish that he does not have another purpose or an ulterior motive for ending the tenancy.

As such, I allow the tenant's Application to cancel the landlord's Two Month Notice. The landlord's notice dated August 28, 2018 is cancelled and of no force or effect.

The tenancy will continue until ended in accordance with the *Act*.

As the tenant was successful in his application, he may, pursuant to section 72 of the *Act*, recover the \$100.00 filing fee from the landlord. In place of a monetary award, **I order that the tenant withhold \$100.00 from a future rent payment on one occasion.**

#### Conclusion

The tenant's application to cancel the Two Month Notice is granted. The landlord's Two Month Notice is cancelled and of no force or effect. Therefore, this tenancy shall continue until it is ended in accordance with the *Act*.

**I order the tenant to withhold \$100.00 from a future rent payment on one occasion** in satisfaction of the recovery of the filing fee for this application.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 29, 2018

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Residential Tenancy Branch