



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes            CNC, FFT

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on October 1, 2018 (the "Application"). The Tenants applied to dispute a One Month Notice to End Tenancy for Cause dated September 23, 2018 (the "Notice"). The Tenants also sought reimbursement for the filing fee.

The Tenants and Landlord appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose in this regard.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence submitted and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, should the Landlords be issued an Order of Possession?
3. Are the Tenants entitled to reimbursement for the filing fee?

### Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. It is between the Landlords and Tenants in relation to the rental unit. The tenancy started November 1, 2010. There is no term noted on the agreement. The Tenants testified that this was a fixed term tenancy for one year and then became a month-to-month tenancy. The Landlord testified that this was a month-to-month tenancy from the start. At the start of the

tenancy, rent was \$1,100.00 per month plus utilities and due on the first day of each month. The agreement is signed by all parties.

The tenancy agreement includes the following notes and terms:

NOTE: This tenancy agreement is limited to the 2 tenants as named herein and their 2 children only.

2. Laundry use is one day per week...

5. Quiet tenancy is a condition of this rental agreement. No loud disturbing conduct or activities...

Two different One Month Notices to End Tenancy for Cause were submitted as evidence. I confirmed which copy was received by the Tenants.

The Notice is addressed to the Tenants and refers to the rental unit. It is signed and dated by the Landlord. It has an effective date of October 31, 2018. It lists the following grounds:

1. Tenant has allowed an unreasonable number of occupants in the unit;
2. Tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and put the landlord's property at significant risk; and
3. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Landlord testified that she sent the Notice to the Tenants by registered mail on September 24, 2018. Tenant 1 testified that the Tenants received the Notice September 26, 2018 by registered mail. The Tenants testified that they filed the Application September 30, 2018. From our records, it appears the Application was completed October 1, 2018.

In relation to the grounds for the Notice, the Landlord confirmed that the Notice was issued because the Tenants had two children when they moved into the rental unit and now have four children. The Landlord submitted that this is an unreasonable number of occupants and negatively affects the rental unit.

The rental unit address was described as having three separate units, one of which is occupied by the Tenants. The Landlord testified that 12 people are currently living at the rental unit address in the three units. The Landlord testified that the rental unit address was designed for a specific number of people. At first, she said the septic system is only designed for nine to ten people. She then said the septic system is designed for seven to nine people. The Landlord

testified that the hot water tank is only able to provide hot water for a specific number of people. She said the hot water tank is only designed for use by a family of average size so a couple and one or two children.

The Landlord said the Tenants' four children amount to an unreasonable number of occupants because of the issues the number of occupants is causing. She said the number of occupants puts stress on the property. The examples she gave related to the septic tank and hot water tank.

The Landlord acknowledged that there have been no issues with the septic tank. She said that "according to the septic people" if the tank was to fail, it would be very expensive to replace. The Landlord testified that the septic tank could fail given the number of people in the rental unit address. The Landlord said that if the tank does fail, all the tenants at the rental unit address will have to move out.

In relation to the Tenants causing a significant interference, the Landlord testified that the downstairs tenants do not have enough hot water. The Landlord further testified that the downstairs tenants have noticed a difference in the noise level given the Tenants now have four children. She said this tenancy was supposed to be a quiet tenancy. The Landlord said I could call the downstairs tenants to confirm this with them. I explained to the Landlord that I would not follow up with the downstairs tenants given the Landlord did not call them as witnesses at this hearing.

In relation to the Tenants causing a significant risk to the landlord's property, the Landlord confirmed this ground relates to the septic tank issue. She also submitted that the rental unit itself will take more wear and tear given the Tenants have four children now rather than two.

In relation to breaches of material terms of the tenancy agreement, the Landlord submitted that the Tenants have breached term 2, term 5 and the note on the front of the tenancy agreement. The Landlord testified that the Tenants have been using the laundry more than once per week. She submitted that the Tenants having two additional children since entering the tenancy agreement is a breach of the note on the front of the agreement about the number of occupants. The Landlord testified that the number of occupants was an important issue at the start of the tenancy which is why it is on the front page of the tenancy agreement. The Landlord testified that she spoke to the Tenants about them having additional children and reminded them about the note on the front of the tenancy agreement.

The Landlord testified that the terms noted above were reviewed with the Tenants upon signing the agreement. The Landlord testified that the Tenants were sent a written warning in May about the issues raised. The Landlord said this warning indicated that the Tenants were breaching material terms of the tenancy agreement. She said the warning told the Tenants they had to vacate the rental unit given the breaches. The Landlord submitted that the terms noted

are material terms because of the issues created by the Tenants having too many occupants in the rental unit.

Tenant 1 testified that there was a hot water issue that got worse and worse up to the point when the hot water tank broke. He said the hot water tank was replaced and that there have been no issues since. Tenant 1 testified that he has asked the Landlord for further information about the septic tank issue and that no further information has been provided. He pointed out that the Landlord has submitted no evidence in support of her position about the septic tank. He also pointed out that the Landlord provided different testimony during the hearing about the number of people the septic tank is designed for.

Tenant 2 testified that the Tenants have had no problems with the downstairs tenants. She said there was an issue with the hot water when the tank was on its way out but that there have been no problems since the hot water tank was replaced. Tenant 2 testified that the tenants at the rental unit address all have children and that it does get noisy; however, nobody complains about the noise.

Tenant 2 testified that there is no issue with the laundry use and that the Tenants and downstairs tenants do their laundry at their respective times. Tenant 1 said the only issue in relation to laundry is that sometimes the downstairs tenants think they are taking too long. The Tenants explained that the Tenants and downstairs tenants work on opposite schedules.

In relation to the tenancy agreement, Tenant 1 testified that the Tenants quickly signed the agreement at the start of the tenancy. Tenant 2 testified that the terms noted above were not specifically reviewed with the Tenants upon signing the agreement.

The Tenants acknowledged receiving a written warning in May about the issue of too many occupants. Tenant 1 testified that the warning says nothing about noise, the septic tank issue or hot water tank issue. Tenant 2 pointed out that their third child is now four years old and this is the first time they are hearing about the issue of too many occupants. The Tenants took the position that the terms noted above are not material terms and that they did not breach these terms. Tenant 1 said that if the Tenants have breached a material term, they have not received proper notice to correct the situation.

In reply, the Landlord testified that the hot water tank was replaced but that the downstairs tenants are still having issues with a lack of hot water.

The Tenants submitted a copy of the May 24<sup>th</sup> warning letter.

### Analysis

The Landlords were permitted to serve the Notice based on the grounds noted pursuant to sections 47(1)(c), 47(1)(d) and 47(1)(h) of the *Residential Tenancy Act* (the “Act”). The Tenants had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*.

I accept the undisputed testimony of Tenant 1 that the Tenants received the Notice September 26, 2018. Based on our records, I find the Tenants disputed the Notice October 1, 2018, within the time limit set out in section 47(4) of the *Act*.

The Landlords have the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

I am not satisfied that the Tenants have an unreasonable number of occupants in the rental unit. There is no issue that the Tenants had two children when they moved into the rental unit and now have four children. I do not find the two additional children to amount to an unreasonable number of occupants in and of themselves. The Landlord submitted that the two additional children do amount to an unreasonable number of occupants because of the affect this has on the rental unit. The issues raised by the Landlord were the septic tank and hot water tank.

I do not accept that the two additional children pose a risk to the septic tank without some evidence to support the Landlord’s position in relation to the septic tank. The Landlord acknowledged that there have been no issues with the septic tank. The Landlord submitted no evidence to support the position that the two additional children pose a risk to the septic tank failing.

In relation to the hot water tank, the Landlord testified that the downstairs tenants do not have enough hot water. The Tenants testified that there are no issues with the amount of hot water now that the tank has been replaced. The Landlord provided no evidence to support her position that the downstairs tenants do not have enough hot water. Given the conflicting testimony on this point, and the lack of evidence to support the Landlord’s position, I am not satisfied that there are issues with hot water at the rental unit address.

Given I am not satisfied that the two additional children have caused issues in relation to the septic tank or hot water tank, I am not satisfied that the two additional children amount to an unreasonable number of occupants in the rental unit. I am not satisfied that the Landlords have proven the first ground on the Notice.

In relation to the Tenants causing a significant interference, the Landlord testified that the downstairs tenants do not have enough hot water and have experienced an increased amount of noise because of the two additional children. As stated above, I do not accept that the downstairs tenants do not have enough hot water given the lack of evidence provided by the Landlords in this regard.

In relation to the noise, the Tenants disputed that the downstairs tenants have issues with noise levels at the rental unit. Again, the Landlords provided no evidence in support of their position on this issue such as witness statements from the downstairs tenants or written complaints received from the downstairs tenants. Nor did the Landlord call the downstairs tenants as witnesses at the hearing. I do not accept that there is a noise issue in the absence of any evidence to support the Landlord's position on this.

I do not accept that the Tenants have significantly interfered with or unreasonably disturbed the downstairs tenants.

In relation to the Tenants causing a significant risk to the landlord's property, the Landlord said this ground relates to the septic tank issue and increased wear and tear on the rental unit. As noted above, I do not accept the Landlord's position in relation to the septic tank in the absence of any evidence to support the position. Nor do I accept that the wear and tear that two additional children may cause to the rental unit amounts to a "significant risk" as required by section 47(1)(d)(iii) of the *Act*. The Landlord submitted no evidence that the two additional children have in fact caused increased wear and tear to the rental unit. In any event, I do not find additional wear and tear by two additional children to be significant or a basis to end the tenancy.

The Landlord submitted that the Tenants have breached term 2, term 5 and the note on the front of the tenancy agreement.

In relation to term 2, the Tenants testified that they have not been doing laundry more than one day per week. The Landlord provided no evidence that the Tenants have been doing laundry more than one day per week. I find the Landlords have failed to prove the Tenants have breached term 2 of the agreement. I do not find it necessary to determine whether this is a material term.

In relation to term 5, the Tenants testified that there is no noise issue at the rental unit address. Again, the Landlord provided no evidence that the Tenants have disturbed the other tenants at the rental unit address. In the absence of evidence to support the Landlord's position, I find the Landlord has failed to prove that the Tenants have breached term 5 of the tenancy agreement. I do not find it necessary to determine whether this is a material term.

Policy Guideline 8 deals with material terms in a tenancy agreement and states in part the following at page one:

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

The parties disagreed about whether the terms noted are material terms in the tenancy agreement. It is the Landlords who have the onus to prove the note on the front page of the

tenancy agreement is a material term of the agreement. I am not satisfied that it is. The tenancy agreement does not state that the note on the front page is a material term of the agreement. The Tenants disagreed that the note was specifically reviewed with them upon signing the agreement. The Landlords provided no evidence that the note was specifically reviewed or discussed with the Tenants at the outset of the tenancy.

The Tenants testified that they had their third child four years ago. The Landlord did not dispute this. There is no evidence before me that the Landlords took any steps to end the tenancy when the Tenants had their third child which, based on the position of the Landlords, would have been a breach of the note on the front page of the tenancy agreement. I do not accept that the note is a material term when the Landlords did nothing to end the tenancy based on an apparent breach of the term for four years.

Given the above, I am not satisfied that the Landlords have established the grounds for the Notice. The Notice is therefore cancelled. The tenancy will continue until ended in accordance with the *Act*.

Given the Tenants were successful in this application, I grant them reimbursement for the filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenants are permitted to deduct \$100.00 from one future rent payment as reimbursement for the \$100.00 filing fee.

### Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*. I grant the Tenants reimbursement for the filing fee. The Tenants are permitted to deduct \$100.00 from one future rent payment as reimbursement for the filing fee.

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

Dated: November 14, 2018

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Residential Tenancy Branch