



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, AS, FFT, RP, MN

### Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on October 26, 2018, wherein the Tenant requested an Order canceling a 1 Month Notice to End Tenancy for Cause issued on October 26, 2018 (the "Notice"), an Order that the Landlords make repairs to the rental unit, an Order that the Landlords allow the Tenant to sublet or assign their tenancy and to recover the filing fee. By Amendment filed November 16, 2018 the Tenant also sought monetary compensation from the Landlords in the amount of \$29,000.00.

The hearing was conducted by teleconference at 11:00 a.m. on December 4, 2018.

Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenant appeared on his own behalf. The Landlords were represented by an agent W.H.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter—Landlord Named on Application

The Tenant named the Landlord's Agent as Landlord on the Application for Dispute Resolution.

Introduced in evidence was an affidavit sworn November 15, 2018 wherein the Landlord, H.H., confirmed W.H.'s agency status. The Tenant provided the first page of the tenancy agreement which confirmed that a corporation and H.H. were noted as the Landlords. Pursuant to section 64(3)(c) of the *Residential Tenancy Act* I amend the Tenant's Application to correctly note the Landlords as the corporation and H.H.

Preliminary Matters—Matters to be Decided

Hearings before the Residential Tenancy Branch are conducted in accordance with the *Residential Tenancy Branch Rules of Procedure*. Rule 2.3 provides that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Hearings before the Residential Tenancy Branch are scheduled on a priority basis. Time sensitive matters such as a tenant's request for emergency repairs or the validity of a notice to end tenancy are given priority over monetary claims.

It is my determination that the priority claim before me is the validity of the Notice. Accordingly I exercise my discretion and dismiss, with leave to reapply, the Tenant's claim for an Order that the Landlords make repairs to the rental unit, the Tenant's claim that he be permitted to sublet or assign his tenancy, and the Tenant's monetary claim.

Preliminary Matters—Delivery of Decision

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to both parties and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Should the Notice be cancelled?
2. Should the Tenant recover the filing fee?

### Background and Evidence

*Residential Tenancy Branch Rules of Procedure—Rule 6.6* provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlords presented their evidence first.

The Landlords' Agent testified that this tenancy began approximately five years ago. He confirmed that he was unable to locate a copy of the residential tenancy agreement.

Although the Tenant provided a copy of the tenancy agreement in evidence, the copy was incomplete and did not include any provisions as to the date rent was due.

The Landlords issued the Notice on October 26, 2018. The reasons cited on the Notice are as follows:

- the Tenant is repeatedly late paying rent; and,
- the Tenant has assigned or sublet the rental unit/site without the landlord's written consent.

The Landlords' Agent stated that rent is due on the 1<sup>st</sup> of the month in coordination with all the other renters in the building. He further stated that he has helped the Landlords collect the rent for five years. He claimed that historically the Landlord, H.H., picked up the rent cheque from the Tenant's mailbox on the 1<sup>st</sup> of the month. He noted that this has transitioned from cheque to electronic transfer and that now the Tenant regularly pays rent on the 3<sup>rd</sup> or 4<sup>th</sup> of the month. In written submissions the Landlords allege the Tenant paid rent late as follows:

- January's rent paid on January 4, 2018;
- April's rent paid on April 3, 2018;
- June's rent paid on June 4, 2018;
- July's rent paid on July 5, 2018; and,
- August's rent paid on August 4, 2018.

In terms of the second reason cited on the Notice, the Landlords' Agent alleged the Tenant has sublet or assigned his tenancy to others without the Landlords' consent.

He confirmed that the rental unit is a three bedroom apartment in a small low rise apartment building with two other units.

The Landlord's Agent testified that he believes the Tenant is not residing in the rental property and has thereby sublet his rental unit to others. He stated that for periods of time the Tenant has informed the Landlords that he is out of country. He stated that most recently in September of 2018 the Tenant indicated that he was in Mexico and he planned to be there for several months. He was not able to provide dates the Tenant was allegedly away from the rental unit.

The Landlords also alleged that the Tenant has also operated an AirBnB out of the rental unit. They claimed that the Tenant has also installed a keypad which gives access to the rental unit to anyone the Tenant gives the code to. They did not provide any documentary evidence to support this claim.

The Landlords' Agent also stated that he has spoken to persons who appear to be living in the rental unit and they have refused to provide their names.

The Landlord's Agent further claimed that he was required to provide a full list of names of occupants to his financial institution as well as to the fire department in the case of an emergency.

In response the Tenant alleged that he was obligated to pay rent as of the 4<sup>th</sup> of the month, based on the date he originally moved into the rental unit.

In written submissions the Tenant wrote that he originally dealt with the Landlord, H.H. who gave him permission to have roommates in the rental unit. The Tenant also stated that he continues to reside in the rental unit and has only had roommates. Two of those roommates, D.G. and K.U. were available to provide testimony at the hearing, although I did not hear from them.

For reasons set out in the Analysis portion of this my Decision I did not need to hear further submissions by the Tenant.

### Analysis

After consideration of the evidence before me, the testimony of the parties and on a balance of probabilities I find as follows.

As noted earlier in this my Decision the Landlords bear the burden of proving the reasons for ending the tenancy. I find the Landlords have failed to meet this burden for the following reasons.

Neither party submitted a complete copy of the tenancy agreement. The Landlords' Agent alleged rent was due on the first of the month; the Tenant stated it was due on the 4<sup>th</sup>. Without documentary evidence to support either parties' position, I am unable to find that rent is due on the 1<sup>st</sup> and that the Tenant has been repeatedly late paying rent.

Similarly, I find the Landlords have failed to prove the Tenant has *sublet* or *assigned* his tenancy.

*Residential Tenancy Branch Policy Guideline 19—Assignment and Sublet* provides that

“assignment is the act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.”

In terms of “sublet” *Policy Guideline 19* provides the following guidance:

“When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant’s tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the “landlord” of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.”

In both an assignment or sublet, the original tenant vacates the rental unit. Based on the evidence before me, I find that the Tenant continues to occupy the rental unit and has taken in roommates or other occupants, not assigned or sublet his tenancy as contemplated by the *Act*.

*Guideline 19* provides the following additional guidance with respect to roommates and occupants.

### **Occupants/roommates**

Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the *Residential Tenancy Act*.

The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. However, under the Act, this is not considered to be a sublet. If the original tenant transfers their rights to a subtenant under a sublease agreement and vacates the rental unit, a landlord/tenant relationship is created and the provisions of the Act apply to the parties. If there is no landlord/tenant relationship, the Act does not apply. Roommates and landlords may wish to enter into a separate tenancy agreement to establish a landlord/tenant relationship between them or to add the roommate to the existing tenancy agreement in order to provide protection to all parties under the legislation.

The Landlords allege the Tenant is operating an AirBnB and that this is disturbing other occupants of the rental building as well as putting the property at risk for financing and insurance purposes. The Landlords failed to provide any supporting documentary evidence, such as AirBnB listings or reviews to support a finding that such a business exists. Further, they failed to provide any evidence to support a finding that this alleged business was disturbing others or putting the property at risk.

More importantly, while a landlord may issue a Notice to End Tenancy for Cause in the event a tenant operates a business from the rental unit, alleging this is a breach of a material term of the tenancy agreement, disturbing others and putting the landlord's property at risk, the Notice must specifically cite such reasons.

In this case, the reasons set out on the Notice were that the Tenant was repeatedly late paying rent and assigned or sublet his tenancy. As I have found the Landlords failed to prove these reasons, **I hereby cancel the Notice.**

Conclusion

The Tenant's Application for an Order canceling the Notice is granted. The tenancy shall continue until ended in accordance with the *Act*.

Pursuant to section 72 of the *Act*, the Tenant is entitled to recover the \$100.00 filing fee and may withhold this sum from his next month's rent as repayment of same.

The balance of the relief sought in the Tenant's Application for Dispute Resolution filed on October 26, 2018 and the Tenant's Amendment filed on November 16, 2018 are dismissed with leave to reapply.

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: December 04, 2018

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Residential Tenancy Branch