# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNC, FFT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution filed on November 8, 2018, wherein the Tenant sought to cancel a 1 Month Notice to End Tenancy for Cause issued on October 30, 2018 (the "Notice"), and to recover the filing fee.

The hearing was conducted by teleconference at 11:00 a.m. on December 17, 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 her own behalf. The Tenant's husband, A.C. also attended. In attendance for the Landlord were the Property Manager, J.M., the Landlord's Clerk, L.Z., and the Resident Manager, M.A.

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—Naming of the Parties*

The Tenants named the property manager as Landlord on their Application for Dispute Resolution. The Landlord, as set out in the tenancy agreement, is a corporation.

The Tenant also named her husband, A.C., as a Tenant. The parties agreed that A.C. is an occupant, and not a tenant pursuant to the agreement.

Pursuant to section 64(3)(c) I amend the Tenant's Application to remove her husband as Tenant and to correctly note the corporate Landlord.

*Preliminary Matter—Delivery of Decision by Email*

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

Issue 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 Landlord presented their evidence first.

The Property Manager, J.M. testified on behalf of the Landlord. Also introduced in evidence was a copy of the tenancy agreement confirming that this tenancy began June 1, 2009. At the start of the tenancy the Tenant paid $745.00 in rent; J.M. confirmed that currently the rent is $920.00.

J.M. stated that the rental unit is located in a mixed residential building. There are some single occupancy units and other larger units. This rental unit subject to these proceedings is a one bedroom rental unit, which J.M. estimated at approximately 425 square feet.

Notably, the tenancy agreement appears to be a compilation of several documents based on the change in font and style throughout the agreement.

The Landlord issued the Notice on October 30, 2018. The reasons cited in the Notice were as follows:

- the Tenant has allowed an unreasonable number of occupants in a rental unit; and,

- Breach of a material term that was not corrected within a reasonable time after written notice to do so;

J.M. stated that the Tenant's husband, A.C., resides in the rental unit with the Tenant. This was not disputed by the Tenant.

In terms of the material breach, J.M. drew my attention to sections 12 and 20 of the tenancy agreement which read as follows:

> **12. Occupants and Guests**
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> 1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.
> 2) The landlord must not impose restrictions on guests and must not require or accept any charge for daytime visits or overnight accommodation of guests.
> 3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenancy and may serve a notice to end tenancy. Disputes regarding the notice may be resolved through arbitration under the Residential Tenancy Act.
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> **20. Additional Occupants**
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> The named tenants in this agreement are the sole occupants of the rental unit. When a person who is not listed on this agreement resides in the premises for a period in excess of two weeks in any calendar year they shall no longer be considered a gust and shall be considered occupying the premises contrary to this agreement, and without the right or permission of the Landlord. This person is considered a trespasser and the tenant in breach of this agreement. When the tenant anticipates an additional person in the rental premises, they shall promptly apply in writing for the permission from the landlord for such person to become a permanent occupant.
> Acceptance of any additional occupant not named in this agreement is at the full discretion of the landlord.
> Failure to apply and obtain the necessary approval of the landlord in writing is considered a fundamental breach of this agreement. At the option of the Landlord, either immediate notice to end the agreement may be given to the tenant, or notice to

> the tenant to immediately correct the breach. The Landlord has the right to end the tenancy, if the tenant fails to correct the breach within a reasonable time after having given written notice by the Landlord.

The Landlord stated that on October 17, 2018 they found out that the Tenant had another person living in the rental unit. The Landlord then gave the Tenant a letter about this reminding her that all people living in the suite must be on the tenancy agreement. The Landlord asked the Tenant to contact them at this time. A copy of this letter was provided in evidence.

J.M. testified that the Tenant came in to the Landlord's office on October 18, 2018 and received the application for an additional occupant. She then came in on October 22, 2018 and they discussed the application at which time the Tenant expressed some concerns on it as the Landlord wanted to charge her $1,200.00 in rent.

The Landlord stated that they agreed the Tenant would have the application to them by October 29, 2018. This was confirmed in a letter to the Tenant dated October 22, 2018.

Introduced in evidence was a letter from the Tenant to the Landlord wherein she writes that she is prepared to complete the application form for her husband, but does not agree to the $1,200.00 in rent requested by the Landlord.

The Landlord testified that the Tenant failed to provide the application on the 29th following which the Landlord issued the Notice.

The Landlord stated that they received the application on November 1, 2018 which had been put through the mail slot with the Tenant's rent. A copy of this application was provided in evidence; notably the rent of $1,200.00 was crossed out and $920.00 handwritten on the document.

The Landlord confirmed that while the Tenant has filled out the application, she refuses to pay the $1,200.00 requested by the Landlord.

In response to the Landlord's submissions the Tenant testified as follows. The Tenant stated that she did not have a copy of her tenancy agreement and was not given a copy until October 17, 2018 when she received the Landlord's letter.

The Tenant confirmed that three and a half years ago, in February 2015, her husband moved into the rental unit. She stated that she did not hide this fact, and rather stated that the Landlord's staff were all aware of her husband living with her. She confirmed

that M.A., the Resident Manager, has been the resident manager for three years and she knows that the Tenant's husband lives with her. She also stated that the previous building manager, R., also knew her husband. Finally, she testified that the maintenance man, F., has been there as long as she has lived there and also knows her husband A. lives with her. She also confirmed that no concern has ever been shown about her husband being there.

The Tenant stated that her neighbour, E.L, had her husband D., living with her as well and their rent remained the same.

The Tenant also noted that if you move in as a couple, there is no additional charge for a couple as you pay for the unit, not by the number of people living there.

The Tenant stated that the rental unit is 600 square feet (not 425 as stated by the Property Manager) and is comfortable for two people. The Tenant also stated that it is certainly not a small one bedroom rental unit and it is not unreasonable to have two people living there.

The Tenant stated that the rental building has three floors, perhaps four including the basement. She estimated the building has 30 rental units.

The Tenant also stated that she was surprised when she received the letter from the Landlord on October 17, 2018 as she has always had a good relationship with the people who take care of the building.

The Tenant stated that she believes this issue arose because her husband was parking his van in the parking lot without it being properly registered. She confirmed that this was cleared up immediately such that they no longer park there. The Tenant said that she thinks that it is $15 per month for parking although she could not remember how much it was.

The Tenant also stated that she now realizes, based on seeing the tenancy agreement with the Landlord's evidence, that she was in breach of her "additional occupants clause". She noted however that she never disagreed that her husband should be added as a Tenant, but the price seemed arbitrary, particularly as other one bedroom suites do not pay for an additional occupant. She also stated that she asked the Property Manager, if she had moved in with her husband at the beginning, would her rent have been increased and he responded that they rent by the unit, not the occupant.

The Tenant also testified that she did not immediately sign the form because the form indicated that they would have to sign a new tenancy agreement and that new tenancy agreement was not provided to her for review. Additionally, she did not agree to the amount requested by the Landlord. The Tenant also stated that she was told that she did not have to agree to the new rent, and could have signed the application and crossed off the new rate; as such, if she had known this she would have signed it prior to the requested date as she had no problem signing the application but could not agree to the new rate.

The Tenant submitted that if her husband living in the rental unit without being added as a tenant is in breach of a material term of her tenancy agreement, that she did her best to correct the breach in a reasonable time.

In reply, J.M. confirmed that the resident manager, M.A., has been the resident manager for three years.

J.M. claimed that the Tenant never introduced her husband to the resident manager.

In reply to the Tenant's claim that other people don't pay more for additional occupants, J.M. stated that they do adjust the rent and sign a new agreement when other occupants move in and did so as recently as in March and June of 2018 for two other units.

Analysis

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

Ending a tenancy for cause is a significant request. As noted, the Landlord bears the burden of proving the reasons cited in the Notice.

In this case, the Landlord alleged two reasons for ending the tenancy. First, the Landlord claimed the Tenant had an *unreasonable* number of occupants in the rental unit.

I accept the Tenant's evidence that the rental unit is approximately 600 square feet. I find that two people living in a one bedroom rental unit is not unreasonable, and as such I find the Landlord has failed to prove this reason for ending the tenancy.

The second reason indicated on the Notice was: “breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so”. In this respect, the Landlord relies on section 20, which is included in the addendum to the body of the tenancy agreement.

Guidance can be found in *Residential Tenancy Policy Guideline 8—Unconscionable and Material Terms* which provides as follows:

> **Material Terms**
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> 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.
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> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach.
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> It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
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> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> - that there is a problem;
> - that they believe the problem is a breach of a material term of the tenancy agreement;
> - that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
> - that if the problem is not fixed by the deadline, the party will end the tenancy.
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I accept the Tenant’s evidence that she did not have a copy of the tenancy agreement prior to receiving the Landlord’s evidence. This tenancy began nine years ago, such that

it is not surprising that the Tenant has misplaced her copy, if in fact one was provided to her. I find it likely that she was not aware that she was in breach of her tenancy agreement.

I also accept the Tenant's evidence that her husband has lived with her for the past two and a half years. As noted in the *Guidelines,* having a clause designated as a material term in a tenancy agreement is not conclusive. Had clause 20 been a material term, one would have expected the Landlord's agents to ensure strict compliance. In this case, I find that the Landlord did not raise the issue of the Tenant's husband living with her, until an issue arose with parking. I therefore find clause 20 is not a material term of this tenancy agreement.

That said, even in the event I had found clause 20 to be a material term of this tenancy agreement, I would not end this tenancy for the reasons cited on the Notice. A landlord cannot consent, explicitly, or implicitly, with a breach of a material term and then use the breach as a grounds to end a tenancy. This is prohibited by the legal principle of *estoppel*.

The simplest meaning of *estoppel,* is that a person is prohibited from "going back on their word". More formally, in a 2005 decision of the Supreme Court of Canada, *Ryan v. Moore,* 2005 2 S.C.R. 53, the court explained the issue of estoppel by convention as follows:

> 59 …. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:
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> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
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> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
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> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

Applying the foregoing to the case before me, I find as follows:

(1) The Landlord, having permitted the Tenant's husband to reside in the rental unit for at least three years, created a mutual assumption upon which the Tenant relied.

(2) The Tenant relied on this shared assumption and did not seek written permission to have her husband reside with her.

(3) It would be unjust and unfair to allow the Landlord to resile or depart from the common assumption that her husband was permitted to reside in the rental unit, and rely on the strict terms of the tenancy agreement as a means to end the tenancy.

I find that the Landlord is estopped from relying on the strict wording of the tenancy agreement as it relates to additional occupants and as such I grant the Tenants' application to cancel the Notice. The tenancy shall continue until ended in accordance with the *Act.*

I remind the parties that pursuant to section 5 of the *Act,* the parties may not avoid or contract out of the *Residential Tenancy Act* or the *Residential Tenancy Regulation* and that any such attempt is of no effect.

Section 9 of the *Schedule* to the *Residential Tenancy Regulation* deals with occupants and guests and provides as follows:

> **9** (1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.
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> (2) The landlord must not impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.
> (2.1) Despite subsection (2) of this section but subject to section 27 of the Act *[terminating or restricting services or facilities]*, the landlord may impose reasonable restrictions on guests' use of common areas of the residential property.
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> (3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved by applying for dispute resolution under the *Residential Tenancy Act*.

The above allows a tenant to have occupants in the rental unit, provided they do not have an unreasonable number of occupants. Similarly, the above prohibits a landlord from charging for daytime or overnight guests. I find that clause 20 of the tenancy

agreement to be contrary to section 9 of the *Regulations* and is therefore of no force and effect pursuant to section 5 of the *Residential Tenancy Act.*

I also remind the Landlord that rent can only be raised in accordance with Part 3 of the *Residential Tenancy Act* and Part 4 of the *Residential Tenancy Agreement.* While a Landlord may increase rent for additional occupants (pursuant to sections 13(2)(f)(iv) and 40 of the *Act*), such a clause must be specifically provided for in the tenancy agreement. This tenancy agreement has no such clause, and as such the Landlord may not request additional rent for the Tenant's husband.

Conclusion

The Tenant's Application to cancel the Notice is granted.

Pursuant to section 72 of the *Act,* the Tenant is entitled to recover the filing fee paid and may reduce her next months' rent by $100.00 to recover this amount.

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 19, 2018

Residential Tenancy Branch