



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNL, CNC, LRE, OLC, FF

### Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70;
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

The tenants, J.C. and T.A. attended the hearing via conference call and provided affirmed testimony. The tenant, M.L. was unrepresented. The landlord and her agents attended the hearing via conference call and provided affirmed testimony. Both parties confirmed that the tenants served the landlord with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail. Both parties also confirmed the landlord served the tenants with the submitted documentary evidence by posting it to the rental unit door. Neither party raised any other service issues. As both parties have attended and confirmed receipt of the notice of hearing package and the submitted documentary evidence, I am satisfied that both parties have been sufficiently served.

### Preliminary Issue(s)

At the outset discussion between the parties regarding the named landlord revealed that the actual landlord is L.Y. and not the property management company. Both parties confirmed that all communications were through the landlord's agents (the property management company). Both parties consented to the tenants application being amended to reflect the actual landlord instead of the landlord' agent. As such, the Residential Tenancy Branch File shall be amended to reflect this change.

At the end of the hearing the tenants application requesting an order to suspend or sent conditions on the landlord's right to enter the rental unit and an order for the landlord to comply were dismissed with leave to reapply. The tenants confirmed that these issues were unrelated to the 2 notice(s). RTB Rules of Procedure 2.3 states that "if in the course of a dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so, the Arbitrator may dismiss unrelated disputes contained in a single application with or without leave to reapply." These portions of the tenants application are dismissed with leave to reapply.

#### Issue(s) to be Decided

Are the tenants entitled to an order cancelling the 2 month notice?  
Are the tenants entitled to an order cancelling the 1 month notice?  
Are the tenants entitled to recovery of the filing fee?

#### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on June 25, 2018 on a fixed tem tenancy ending on October 31, 2018 and then thereafter on a month-to-month basis. The monthly rent is \$2,900.00 payable on the 1<sup>st</sup> day of each month. A security deposit of \$1,450.00 was paid.

The tenants seek orders cancelling the landlord's 2 month and 1 month notice(s).

Both parties confirmed that the landlord served the tenants with the 2 month notice for landlord's use of property dated November 28, 2018 in person on November 30, 2018. The 2 month notice provides for an effective end of tenancy date of January 31, 2019 and the reason provided as:

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 tenants have argued that a previous dispute resolution hearing on an end to the tenancy pursuant to section 13.1 was conducted in which the tenancy was ordered to continue. The tenants argue that the landlord is still not acting in good faith and has no intention of using the property.

The landlord has disputed the tenants' claims stating that the landlord has "always intended to occupy" the rental space. The landlord claims that she has a history of employment for the last 3 years and occupying the rental premises in Whistler. The landlord has provided a copy of communications "terminating" her tenancy in Toronto and her planned travel itinerary to Whistler in 2019. The landlord has referenced a submitted copy of an email from a prospective employer regarding employment condition, but that no actual confirmation of employment was made.

The tenants argue that this reference does not confirm any type of employment and refers only to a limited 5 days of work.

The landlord did not provide any further evidence of the landlord's commitment of employment in Whistler requiring her to occupy the rental space.

On December 6, 2018, the landlord served the tenant with the 1 Month Notice dated December 6, 2018. The 1 Month Notice sets out an effective end of tenancy date of January 31, 2019 and that it was being given as:

- the tenant or person permitted on the property by the tenant has:
  - put the landlord's property at significant risk; or
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The details of cause listed:

The tenants Breached a Material Term of the Tenancy Agreement (Addendum Clause #11) in failing to purchase & carry Tenants personal belongings and third party liability insurance. (Tenants had also indicated on 2 applications for tenancy that they would have this insurance in place.)

During the hearing the landlord corrected the 1 month notice by cancelling the first reason for cause listed and will now only proceed on the second reason for Breach of a Material Term of the Tenancy.

Both parties confirmed that addendum clause #11 does reflect an agreement for the tenants to have personal content and liability insurance.

The tenants argue that they do in fact have personal content and liability insurance. Both parties made frequent reference to communication exchanges made with the tenants' insurance broker and the insurance carrier. The tenants argued that their insurance is in place and covers the required personal content liability coverage, whereas the landlord has argued that based upon the insurance carriers communication exchanges that there is not coverage for the tenants in personal content and liability insurance. The landlord has argued that the type of insurance in place for the tenants is considered "travel insurance" for medical issues.

### Analysis

Where a tenant applies to dispute a 2 Month Notice, the onus is on the landlord to prove, on a balance of probabilities, the reasons on which the 2 Month Notice is based.

*Residential Tenancy Policy Guideline* "2. Good Faith Requirement when Ending a Tenancy" helps explain this "good faith" requirement:

A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy...

If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.

The landlord's prior history as reflected in the previous Residential Tenancy Branch Dispute Resolution Hearing Decision raises serious question as to whether the landlord is acting in good faith in her issuance of the 2 Month Notice. I accept the affirmed testimony of both parties that the 2 month notice was properly served. I find that the landlord has failed to provide sufficient evidence to satisfy me of her intent to occupy the rental space. The landlord's main point was that it was her intent to occupy the rental space for employment purposes during the winter season. The landlord has submitted evidence of terminating her tenancy in Toronto and her travel plans to Vancouver, but has failed to provide sufficient evidence of employment in the Whistler area. The landlord can only refer to an email exchange with a local company in which it speaks to the potential employment for the landlord for an approximate 15 day period in April 2019. As such, the tenants' application to cancel the 2 month notice is granted. The 2 month notice is set aside and tenancy shall continue.

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met. The landlord claims that the tenants have breached a material term of the tenancy agreement, in this case the requirement to have personal content and liability insurance.

Residential Tenancy Branch Policy Guideline #8 states in part,

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.

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. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

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.

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:

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.

In this case, both parties have confirmed that the landlord has notified the tenants of the breach, but that an ongoing argument has occurred on whether there is actual insurance coverage. I find based upon the evidence provided by both parties that the tenants assertion that their insurance is adequate for personal content and liability to be incorrect. Based upon my reading of the provided material, the tenants' insurance is for travel purposes only and not for "tenant's insurance" as claimed by the landlord. However, the term agreed to by both parties for personal content and liability insurance is considered an unconscionable term.

Residential Tenancy Branch Policy Guideline #8, Unconscionable Terms states in part,

*Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*

*Terms that are unconscionable are not enforceable<sup>1</sup>. Whether a term is unconscionable depends upon a variety of factors.*

*A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.*

I find that addendum clause #11 is unconscionable as it cannot be said to be a material term of the tenancy. I find that this term is strictly for the benefit of the landlord. The 1 Month Notice is set aside and is of no force and effect. This tenancy will continue until ended in accordance with the Act.

The tenants having been successful are entitled to recovery of the \$100.00 filing fee. I authorize the tenants to withhold one-time \$100.00 from the monthly rent upon receipt of this decision.

Conclusion

The tenants' application to cancel the 2 month and the 1 month notice(s) are granted. The tenancy shall continue.

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: February 4, 2019

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Residential Tenancy Branch