



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      DRI, CNL, MNDCT, OLC, FFT

### Introduction

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

- 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;
- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order regarding a disputed additional rent increase pursuant to section 43; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenants confirmed that they were handed the 2 Month Notice by one of the landlords on May 31, 2019, I find that the tenants were duly served with this Notice in accordance with section 88 of the *Act*. As Landlord HB (the landlord) confirmed that they received copies of the tenants' dispute resolution hearing package and written evidence sent by the tenants by registered mail on June 22, 2019, I find that the landlords were duly served with this package in accordance with section 88 and 89 of the *Act*. As the landlord confirmed that they did not send copies of their written evidence to the tenants, I advised the parties that I would be unable to consider any of

the landlords' written evidence as it had not been served to the tenants in accordance with section 88 of the *Act*.

The landlord advised that they had two witnesses who were expecting to be called to provide testimony at this hearing, witnesses who had signed sworn Affidavits. As noted above, I could not consider these Affidavits because the landlords had not served them to the tenants. When the Telus Operator attempted to call these witnesses, only one answered their phones at the number provided by the landlord.

At the commencement of the hearing, the tenants confirmed that they have paid monthly rent in the amount of \$2,100.00 for July 2019, the month after they filed their application for dispute resolution. On this basis, I allowed the tenants to update their application for a monetary award from \$1,300.00 to \$1,400.00 to reflect the additional month of rent which they maintain they have paid and which contravenes the *Act*.

#### Issues(s) to be Decided

Should the landlords' 2 Month Notice be cancelled? If not, are the landlords entitled to an Order of Possession? What is the correct monthly rent and term for this tenancy? Have the landlords undertaken a rent increase that contravenes the *Act*, the *Regulation* or the tenancy agreement between the parties? Are the tenants entitled to a monetary award for losses or other money owed arising out of this tenancy? Are the tenants entitled to recover the filing fee for this application from the landlords?

#### Background and Evidence

Although there is no written Residential Tenancy Agreement between these parties, they agree that this tenancy began on the basis of an oral agreement enabling the tenants to take possession of the rental unit in March 2018. The tenants gave undisputed sworn testimony that they took possession of the rental unit on March 5, 2018, paying a full month's rent for that month.

The tenants maintained that they have a two-year fixed term tenancy agreement with the landlords. They entered into written evidence a copy of a March 5, 2018 receipt, which they maintain they wrote but which was initialled as accurate by Landlord SB (the landlord). This receipt shows that monthly rent of \$2,000.00 was paid to the landlord by the tenants that day, as were cash payments of \$1,000.00 for a "damage deposit" and \$1,000.00 for a "pet damage deposit." In addition, this receipt has the following

notation, which the tenants maintained confirmed that the landlord agreed that they had a two year fixed term tenancy for the rental unit:

*2 year fixed lease until April 2020*

The tenants applied for a monetary award of \$1,300.00, as they maintained that the landlords commenced charging them \$2,100.00, instead of the \$2,000.00 stated in the March 5, 2018 receipt, as of June 1, 2018. The tenants testified that Landlord SB advised them when they had \$2,000.00 in rent money to pay the landlords that their monthly rent had increased to \$2,100.00, as of that month. They gave undisputed sworn testimony supported by written evidence that the landlords never issued them any Notice of Rent Increase on the prescribed Residential Tenancy Branch form. They maintained that the landlords illegally raised their rent by \$100.00, within the first twelve months of the commencement of their two year fixed term tenancy, and without providing them with the proper three month notice on the prescribed form to do so.

The landlords maintained that Witness PSM (the witness) and another individual PD represented the tenants in sourcing out this rental unit and entering into the oral tenancy agreement with the landlords on the tenants' behalf. The landlords claimed that the original monthly rent was set at \$2,100.00, but that the landlords agreed to allow the tenants to pay \$2,000.00 for the first three months of their tenancy, as a means of assisting them in their move from another province. They maintained that there was no commitment by the landlords to rent these premises to the tenants for any fixed term. The landlords testified that no pet damage deposit was paid by the tenants, as the tenants had never alerted the landlords that they planned to keep a pet (or pets) in the rental unit. The landlord gave sworn testimony that the signature on the March 5, 2018 receipt was not that of the landlord. The parties agreed that the tenants have two cats and one dog living with them. Landlords SB and HB testified that during the course of this tenancy no receipts have been issued to the tenants, nor have any receipts been requested by the tenants. They claimed that all of the receipts entered into written evidence by the tenants have been created by the tenants and that the landlords have not signed any of them. The landlord alleged that they did not advertise this rental unit on rental websites and did not advertise it in local stores. Instead, they passed word along to friends and co-workers of Landlord SB. The landlord said that the witness, a long-time co-worker of Landlord SB located the tenants through a friend (PD) who knew the tenants were looking at moving to this province from Alberta.

The tenants denied ever having given either of the individuals cited by the landlords as witnesses or potential witnesses authorization to act on their behalf with respect to this tenancy. Tenant GD (the tenant) said that they did not even know these people. The tenant testified that they first became aware of the availability of this rental unit when they were visiting this province from the neighbouring province looking for potential accommodation by the end of February. In mid-February 2019, they noticed an advertisement in a local fruit store in which the landlords were seeking tenants for this three bedroom rental home, plus a separate legal suite. The tenant said that they viewed the premises when they were in the province and when young students were still living there. The tenant said that they conducted negotiations about the terms of the tenancy, including the monthly rent by telephone after they returned to their province. They said that the landlord told them that they would likely not be able to move into the rental unit by the end of February 2019, because the current tenants had damaged the rental unit and the premises needed to be cleaned and repaired.

The landlords 2 Month Notice, seeking an end to this tenancy by July 31, 2019, identified the following reason for ending this tenancy:

- *The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse...*

The landlords testified that Landlord PB, the father of Landlord HB, planned to move into this rental home with three other family members. The landlord said that two of these family members had been living in another country. Until now, Landlord PB said that he has been living with Landlord HB.

The parties agreed that monthly rent in the amount of \$2,100.00 was paid by the tenants for both June and July 2019. The tenants said that they attempted to pay that amount to the landlords for August 2019, but the landlords refused to accept this payment. As monthly rent for August 2019 would have become due after the July 31, 2019 effective date of the landlords' 2 Month Notice, the landlords may very well have refused this payment on the basis that they did not wish to reinstate this tenancy. I also note that were the landlords' 2 Month Notice to lead to an end to this tenancy, section 51(1) of the *Act* would have allowed the tenants to withhold paying one month's rent on the basis of having received a notice to end tenancy pursuant to section 49 of the *Act*.

## Analysis

Section 49(8) of the *Act* provides that upon receipt of a 2 Month Notice the tenant may, within fifteen days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. Pursuant to section 49(8) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within fifteen days after the date the tenant received the notice. If the tenant makes such an application, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 2 Month Notice. As the tenants submitted their application to cancel the 2 Month Notice on June 13, 2019, they were within the time limit for doing so, and the landlords must demonstrate that they meet the requirements of the following provisions of section 49(3) of the *Act* to end this tenancy:

As legal counsel for the tenants correctly noted in their written evidence, section 13(1) of the *Act* requires landlords to create a written Residential Tenancy Agreement for all tenancies established in this province since January 1, 2004. Although the *Act* does have provisions that give legal effect to residential tenancies created before that date and to tenancies established without a written tenancy agreement after that date, landlords bear the responsibility for misunderstandings that arise when they have not established proper residential tenancy agreements.

In this case, the parties presented very different versions of the terms of their oral agreement for this tenancy. The tenants claimed that they have a two year fixed term with a monthly rent of \$2,000.00, while the landlords claimed that this is a month-to-month tenancy in which the monthly rent was set at \$2,100.00, although Landlord SB allowed the tenants to pay only \$2,000.00 for the first three months.

Under such circumstances and without the benefit of any written tenancy agreement, arbitrators may be assisted by any documentary or circumstantial evidence or third-party sworn evidence or testimony that may lend credence to the positions taken by the parties.

In this case, the only third-party evidence available is the sworn testimony of the landlord's Witness, whose testimony must be considered in light of their confirmation that they are a long-time friend and co-worker of Landlord SB. When asked, the Witness was unclear as to how they knew the tenants, as this was through a third-party. The Witness provided little information to call into question the tenants' assertion that they had never given the Witness authorization to act on their behalf in negotiating the

terms of their tenancy. In fact, the tenants denied even knowing this individual, let alone authorizing them to enter into a contractual agreement on their behalf. The description provided by the Witness of sitting down with PD, Landlord SB and the tenants was of a meeting that occurred in the rental unit after the tenants had already moved into the rental unit. This occurred after the tenants had agreed to move into the rental unit and were already living there. For these reasons, I attach very little weight to the sworn testimony provided by the Witness.

While the landlords claimed to have never signed any of the receipts prepared by the tenants and entered into written evidence, I find on a balance of probabilities it more likely than not that the tenants would not have made cash payments to the landlords on an ongoing basis without obtaining some form of receipt for these payments. Section 26(2) of the *Act* requires a landlord to provide a tenant with a receipt for rent paid in cash. If the landlords sworn testimony is to be believed, they fully admit to never having followed this statutory requirement of the *Act*, in addition to having failed to create a written tenancy agreement. As the sequence and timing of these payments matched with the landlords' own claim that these payments were made, albeit often late, I find that the receipts entered into written evidence by the tenants are more likely than not genuine and reflect actual payments made on those dates by the tenants to one or another of the landlords during the course of this tenancy.

It would certainly have been better had the landlords created some form of written tenancy agreement for this tenancy to establish with clarity the monthly rent to be paid, the amount of security deposit paid and the amount of pet damage deposit paid, as well as the two-year fixed term of the tenancy agreement. In the absence of such a document, I find that the best evidence of the agreement reached between the parties is the March 5, 2018 receipt, which the tenants maintained was initialled by Landlord SB, at the start of this tenancy. The landlord is correct in noting that the tenants never signed this receipt and this document is not a proper Residential Tenancy Agreement. However, this document was prepared by the tenants and appears to have been initialled as an accurate reflection of the terms of their oral agreement by at least one of the landlords (i.e., Landlord SB). In the absence of anything substantive from the landlords in this regard, this document carries significant weight in determining the rent, the amounts of the deposits and the term of this tenancy.

I have also given consideration to the amount of security deposit and pet damage deposit identified on the March 5, 2018 receipt. The landlord confirmed that the amount of the security deposit paid at the beginning of this tenancy was \$1,000.00. This

amount reflects the maximum amount that the landlords could have charged for the security deposit for a tenancy where the monthly rent was set at \$2,000.00. Had the monthly rent been set at \$2,100.00 from the outset of this tenancy, as the landlords claim to have been the case, I find on a balance of probabilities it more likely than not that the landlords would have charged the tenants a security deposit of \$1,050.00, fully one-half of the \$2,100.00 monthly rent. While this evidence is not determinative on its own as to the amount of monthly rent agreed upon at the beginning of this tenancy, I do find that it once more lends more credence to the tenants' claim with respect to the amount of the monthly rent that was to be paid during this tenancy.

Separate from the written and circumstantial evidence that I find favours the tenants' position, I find that the landlord is responsible for any lack of clarity regarding the terms of the oral agreement between the parties when the landlord failed to establish a written agreement regarding this tenancy. For these reasons, and having considered the tenant's written evidence, and the testimony of the parties and the landlord's Witness, I find on a balance of probabilities that this is a two year fixed term tenancy that began on March 5, 2018 and scheduled to end on April 4, 2020, with rent payable in advance on the fifth day of each month. I find that the correct monthly rent as per the oral agreement between the parties is \$2,000.00.

As a landlord cannot end a fixed term tenancy on the basis of a 2 Month Notice prior to the end date of the fixed term, I allow the tenants' application to set aside the 2 Month Notice. I also order the landlords to refrain from issuing any further 2 Month Notices with respect to this tenancy that would take effect any earlier than April 4, 2020.

Legal counsel for the tenants entered into written evidence copies of the relevant portions of the *Act*, which apply to rent increases. Section 41 of the *Act* establishes that a landlord must not increase rent except in accordance with the relevant portion of the *Act*, which include the following:

**42** (1) *A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:*

*(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;..*

*(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.*

*(3)A notice of a rent increase must be in the approved form.*

*(4)If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.*

**43** *(1)A landlord may impose a rent increase only up to the amount*

*(a)calculated in accordance with the regulations,*

*(b)ordered by the director on an application under subsection (3), or*

*(c)agreed to by the tenant in writing...*

*(5)If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase...*

While I have given the landlords' claim that they allowed the tenants to pay \$100.00 less in rent for the first three months of this tenancy, I find on a balance of probabilities that the landlords have not followed the proper process for obtaining an increase in rent as of June 1, 2018, an increase that the landlords were not entitled to receive. For this reason, and as the landlords have charged \$100.00 more in monthly rent than they should have charged, I allow the tenants' application for a monetary award of \$1,400.00, the overcharged monthly rent from June 2018 until and including July 2019.

Since the tenants have been successful in their application, I allow them to recover their \$100.00 filing fee from the landlords.

As there is undisputed sworn testimony that the landlords have not yet accepted monthly rent for August 2019, I order that the tenants withhold \$1,500.00 from their monthly rent for August 2019, which became due on August 5, 2019. Monthly rent in the amount of \$500.00 is now due. Monthly rent in the amount of \$2,000.00 for September 2019 becomes due on September 5, 2019. This amount continues in effect until modified in accordance with the *Act*.

### Conclusion

The tenants' application to cancel the 2 Month Notice is allowed. The landlords' 2 Month Notice is set aside and of no continuing force or effect. This tenancy continues until ended in accordance with the *Act*.



I also order the landlords to refrain from issuing any new 2 Month Notices for this tenancy that would take effect any earlier than April 4, 2020.

I order that monthly rent for this tenancy is set at \$2,000.00 as per the terms of this fixed term tenancy which lasts until April 4, 2020. I order that monthly rent is payable in advance on the 5th day of each month.

I issue a monetary award in the amount of \$1,500.00, which allows the tenants to recover overcharged monthly rent of \$100.00 for a period of 14 months and to recover their \$100.00 filing fee for this application. To implement this award and as this tenancy is continuing, I order that the tenants withhold \$1,500.00 from their monthly rent for August 2019, which became due on August 5, 2019. Monthly rent in the amount of \$500.00 is now due. Monthly rent in the amount of \$2,000.00 for September 2019 becomes due on September 5, 2019. This amount continues in effect until modified in accordance with the *Act*.

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: August 08, 2019

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Residential Tenancy Branch