



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding MAXTRUM HOLDINGS INC  
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes      CNC OLC PSF RR

### Introduction

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

- cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "Notice") pursuant to section 47;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

All parties attended the hearing. The landlord was represented by two agents (SL and KJL). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The parties confirmed that each had been served with the other's documentary evidence. I find that all parties have been served with the required documents in accordance with the Act.

### Preliminary Matter – Corroboration of Basis for Prior Adjournment

This matter had previously come to a hearing on November 8, 2019. At that hearing, which started at 11:00 am, the tenants were granted an adjournment as tenant EG testified that she had a surgery scheduled for 12:30 pm that afternoon and needed to leave at 11:30 am. She testified that she only learned of the surgery on November 5, 2019. She did not provide any corroboration that the surgery was occurring.

Despite the lack of corroboration, I granted the adjournment and issued an interim decision on November 8, 2019 setting out my reasons for doing so (the "Interim Decision"). I also required that the tenants provide documentary evidence corroborating the EG's testimony. I ordered that,

not less than seven days before the reconvened hearing, the tenants submit to the Residential Tenancy Branch and serve on the landlord a letter from EG's doctor confirming:

- 1) that EG underwent surgery;
- 2) the date and time the surgery; and
- 3) the date EG was made aware that this surgery had been scheduled.

On November 15, 2019, the tenants submitted a form from a medical clinic dated November 13, 2019 signed by a doctor which stated:

To whom it may concern:

This is to certify that [EG] has been under my care and was unfit for work/school from/on: Nov 8 to/and Nov 8.

Pt was notified on Nov 4

(the "Note")

The Note does not provide the information I ordered the tenants to provide. I have no confirmation that surgery occurred or, if it did, of the date and time it occurred. Additionally, the Note states a date different from the date EG testified to as to when she was made aware the surgery had been scheduled.

As such, I do not have the corroboration of EG's testimony that I require. Accordingly, I dismiss with leave to reapply the tenants' applications for:

- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

I decline to dismiss the tenants' application to cancel the Notice, as to do so may have the effect of ending the tenancy, pursuant to section 55 of the Act. I find that such a result would not be equitable in the circumstances.

### **Issue(s) to be Decided**

Are the tenants entitled to an order cancelling the Notice?

### **Background and Evidence**

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting August 1, 2019. Monthly rent is \$2,000 and is payable on the first of each month. The tenants paid the landlord a security deposit of \$1,000. The landlord still retains this deposit.

The rental unit is a single-detached house. There is a back patio on the upper floor of the rental unit which overlooks the backyard, which contains a swimming pool (the "**Pool**"), a jacuzzi (the "**Jacuzzi**"), and a pump shed (the "**Shed**"). The entire backyard of the house is surrounded by a chain-link fence with two access gates. Additionally, the area under the patio is enclosed by a chain link fence, upon which, facing the interior of the backyard, is an electrical control box controlling the heating for the Jacuzzi (the "**Control Box**"). The gates to the backyard are padlocked, as are the door to the Shed and the door of the Control Box.

The landlord does not permit the tenants access to the backyard. There is a dispute between the parties as to whether the use of the backyard is included under the tenancy agreement. However, for reasons I will set out later in the decision, it is not necessary for me to determine this question.

On October 4, 2019, an agent of the landlord served the tenants with the Notice in person. The Notice indicates an effective move-out date of November 2, 2019.

The grounds to end the tenancy cited in that Notice were:

- the tenant or a person permitted on the property by the tenant has
  - significantly interfered with or unreasonably disturbed another occupant or the landlord;
  - seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
  - has put the landlord's property at significant risk;
- breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

The Notice provided the following details of the causes leading to its issuance:

- failure to return contract with [tenant DI's] signature;
- cutting and bypassing of locks;
- false statements;
- action: safety concerns regarding health;
- improper storage of garbage in RV parking area;
- action: safety concerns regarding property;

- exposure to Risk & Cost for Landlord due to safety issues;
- unauthorized access to restricted areas;
- [RCMP file number], digital media, witness statements & physical evidence; and
- Breach of Material Terms.

Most of these allegations relate to the tenants' alleged use of the Pool and Jacuzzi. While not concisely articulated by the landlord's agents, their general position is that this usage amounts to a material breach of the tenancy agreement, and that the tenants have damaged the landlord's property (padlocks on various doors) to gain access to the Pool and Jacuzzi.

Additionally, the landlord takes the position that the presence of pool maintenance chemicals in the Shed, and the tenants' ability to access them, poses a danger generally, in the event they are misused, the landlord may bear some liability for any damage they cause.

Finally, and unrelated to the pool, the landlord argued that the tenants improperly stored garbage in the RV parking area.

#### 1. Tenants' Alleged Use of Pool

The landlord's agents testified that they believed the tenants have on at least one occasion, gained access to the backyard, used the Pool and Jacuzzi, broke into the Shed, and opened the Control Box. They testified that, on September 27, 2019, the tenants forced their way through the locked gate into the yard using a "football tackle". They testified that the tenants then cut the lock to the Shed. The landlord submitted a photo of a padlock in which it appears to have been cut.

The landlord's agents allege that the tenants turned on the Jacuzzi via the Control Box on September 27, 2019. They testified that on September 28, 2019, police officers attended the rental unit (at the landlord's agents' request, upon seeing that the Shed had been broken into), and that the police officer observed that the Jacuzzi water was warm. The tenants do not deny that the police attended the rental unit, or that the Jacuzzi water was warm.

The tenants testified that the landlord arranged for a pool maintenance worker to come to the residential property to do maintenance or repair the Pool and Jacuzzi on September 27, 2019. The landlord's agents did not deny this. They testified that the Pool required maintenance because the water had turned green. They testified this was due to the tenants using it, and because they were "dirty people". The landlord entered a photo of the green pool into evidence. The tenants denied that they used the Pool, or that they caused it to turn green. The landlord submitted no documentary evidence setting out what might have caused the water to turn green (for example, a letter from the pool maintenance company).

The landlord entered a copy of an invoice from the pool maintenance company dated September 26, 2019 for, according to the landlord's agents, maintenance in connection with dealing with the issue of green water in the Pool. Neither party addressed the issue of discrepancy between the date on the invoice and the dates provided by the parties relating to the maintenance worker's attendance at the residential property. In light of this, I find the most likely reason for this discrepancy is that the pool maintenance company misdated their invoice.

The tenants testified that the maintenance worker was scheduled to arrive in the afternoon of September 27, 2019 and was going to be met by the landlord's agent. However, they testified that the maintenance worker arrived in the later morning, and no agent of the landlord was present.

The tenants testified that maintenance worker did not have keys to access the backyard, but that he was able to force his way through the backyard gate. They testified that he asked them for bolt cutters so he could gain access to the Control Box. Tenant DI testified that the tenants did not have bolt cutters, but that he called his cousin asking if he could borrow a pair. The tenants were not able to obtain a pair of bolt cutters, but the maintenance worker was able to use his own tools to saw through the lock on the Control Box.

DI entered a text message into evidence which he says corroborates this version of events. It appears to have been sent by DI to his cousin after the initial call to his cousin. It reads:

September 27, 2019

10:39 AM

Cousin: Hey D, sorry but I'm not feeling good with my stomach, and my heads not on right.

[time obscured]

Tenant DI: no worries was just gonna see if u had bolt cutters but the pool guys used a sawzaw any ways

Tenant DI: hope you feel better soon [cousin]

10:41 AM

Cousin: In that case we do, but I'm not sure where they are haha

The tenants testified that the maintenance worker gained access to the Control Box and turned on the Jacuzzi as part of his maintenance. They stated that this is the reason why the Jacuzzi was warm the following day when the police officer felt it. They denied having used the Pool or Jacuzzi at any point during the tenancy. They argued that the weather on September 27, 2019 was not good, so it wouldn't have made sense for them to use the Pool or Jacuzzi. The

landlords' agent did not deny that the weather was poor on September 27, 2019, but I note that no evidence was provided as the weather conditions that day.

The maintenance worker was not called by either side to testify during the proceeding. Such testimony would have been of great assistance in determining the events of September 27, 2019.

The landlord's agents also testified that they know the tenants have been using the Pool as they have seen pool inflatables stored in the backyard which belong to the tenants. The landlord entered photographs corroborating this testimony into evidence. The tenants do not deny that they store inflatables in the backyard but deny that this indicates this means they use the Pool. Rather, they testified that they use the inflatables when they go to the beach. They testified that they store the inflatables in the backyard, just over the fence, where they can reach them easily without having to enter the backyard.

I note that in a photograph entered into evidence by the tenants, an inflatable boat is visible roughly two paces past the entry gate to the backyard. It does not appear to be easily accessible without entry to the backyard.

Additionally, the landlord's agents testified that the tenants *might* damage their property (the Pool, the Pool's filtration system, the contents of the Shed etc.) if they have access to the Pool and the Jacuzzi. In its written submission, the landlord wrote:

The [shed] has extended upgraded electrical service. No responsible landlord would leave something like this unattended and unlocked. The [shed] also contains an expensive filtration system as well as the salt water generation unit and electronics. We have this area locked up for it's [sic] protection".

However, other than the damage described above (discoloration of pool water and cut padlocks) the landlord has not alleged any damage to their property.

## 2. Pool Chemicals

The landlord's agents testified that the landlord store chemicals for the Pool in the Shed. They testified that these chemicals are brightly colored and resemble sports drinks. They testified that these chemicals would be deadly if swallowed by a child, and that this is part of the reason that the landlord restricts the tenants' access to the backyard.

The landlord's agents provide no evidence that anyone has consumed the pool chemicals.

## 3. Garbage in RV Parking

The landlord's agents alleged that the tenants are storing bags of garbage containing food in the RV parking area for a prolonged period of time. They testified that a neighbour told them that this was attracting animals who would break into the bags and spread the garbage about. The landlord provided no documentary evidence supporting this assertion.

The tenants admit that they stored garbage bags in the RV parking area. However, they testified only stored the bags there for a brief time, and they denied that animals broke into the bags.

### **Analysis**

Section 47(1) of the Act sets out the reasons that a landlord may end a tenancy for cause. These include:

#### **Landlord's notice: cause**

**47(1)** A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(d) the tenant or a person permitted on the residential property by the tenant has

- (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
- (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
- (iii) put the landlord's property at significant risk;

[...]

(h) the tenant

- (i) has failed to comply with a material term, and
- (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

Rule of Procedure 6.6 states:

#### **6.6 The standard of proof and onus of proof**

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

So, in this instance, the landlord bears the onus to prove that it is more probable than not that the tenants acted in such a way to satisfy the conditions to end a tenancy for cause set out at section 47(1).

During the hearing, the landlord did not explicitly state which of the tenants' alleged conduct represent breaches of which sections of the Act.

The Notice listed the grounds for ending the tenancy as:

- 1) the tenant or a person permitted on the property by the tenant has
  - a. significantly interfered with or unreasonably disturbed another occupant or the landlord;
  - b. seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
  - c. has put the landlord's property at significant risk;
- 2) breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

Of the points listed on the Notice as reasons for ending the tenancy, I understand them to fit into the above-mentioned categories as follows:

- 1) tenants have seriously jeopardized the health or safety or lawful right
  - a. action: safety concerns regarding health;
  - b. improper storage of garbage in RV parking area;
  - c. action: safety concerns regarding property;
- 2) tenants have put landlord's property at significant risk
  - a. cutting and bypassing of locks;
- 3) tenants have breached a material term of the tenancy agreement
  - a. cutting and bypassing of locks;
  - b. improper storage of garbage in RV parking area;
  - c. unauthorized access to restricted areas;

The landlord's agents did not provide any evidence which to support the ending of the tenancy on the basis that the tenants unreasonably disturbed the landlord or other occupants of the residential property (I note that neighbours are not occupants of the residential property).

The following points listed on the Notice do not fit into any of the categories:

- failure to return contract with [tenant DI's] signature;
- false statements;
- exposure to Risk & Cost for Landlord due to safety issues;
- [RCMP file number], digital media, witness statements & physical evidence; and
- Breach of Material Terms.



I note that these points (with the exception of the failure to return a signed contract) do not appear to be grounds in and of themselves for issuing the Notice, but rather evidence, assertions, or elaboration on the other points which the landlord alleges constitute proper ground for ending the tenancy.

I was not directed to any section of the Act which permits a landlord to end a tenancy on the basis that a tenant has failed to return a signed tenancy agreement.

The following points listed by the landlord on the Notice as reasons for ending the tenancy are predicated on the fact that the tenants have accessed the backyard, and used the Pool, Jacuzzi, and/or Shed:

- a. action: safety concerns regarding health;
- b. action: safety concerns regarding property
- c. cutting and bypassing of locks; and
- d. unauthorized access to restricted areas.

I understand the landlord's safety concerns regarding health to be related to the fact that the Pool chemicals resemble sports drinks and may be consumed by children who gain access to the shed, and that the area around the Pool is generally dangerous for children to play on.

I understand the landlord's safety concerns regarding property to be that the tenants do not have the knowledge necessary to use the mechanical systems in the Shed and the electrical systems in the Control Box.

1. Did the Tenants Access the Backyard and Use the Pool and Jacuzzi?

The parties' evidence as to whether the tenants used the Pool and Jacuzzi are diametrically opposed. As stated above, the landlord bears the onus to prove it is more likely than not that tenants accessed the backyard and used the Pool or the Jacuzzi. The landlord has not presented direct evidence that the tenants have done so. Its agents have not seen the tenants accessing the backyard. No witnesses were called to testify that they had observed the tenants using the Pool or the Jacuzzi.

The landlord bases its assertion that the tenants have access the backyard on the following circumstantial evidence:

- 1) that the Pool water turned green;
- 2) that the Jacuzzi was warm;
- 3) that the padlock had been cut;
- 4) that the lock of the gate showed signs of forced entry; and
- 5) that the tenants store inflatables in the backyard.

The tenants testified that the warm Jacuzzi, padlock, and gate issues were attributable to the landlord's pool maintenance worker accessing the backyard. As I noted above, the maintenance worker was not called to give evidence. Had this been the case, I could readily determine the truth of the tenants' claims. As the landlord's bear the onus to prove their claim, it is incumbent upon them to rebut, if necessary, the testimony of the tenants. I find that they failed to do so. As such, I prefer the direct evidence of the tenants over the circumstantial evidence of the landlord.

The landlord presented no evidence at the hearing as to the cause of the Pool water turning green. I do not know if usage of the Pool causes the water to turn green or if something else may have the same effect (improper maintenance, for example). As such, I find that the landlord has failed to discharge its onus to prove that the Pool water was turned green by the tenants' usage of it.

I find that the presence of the inflatables in the backyard does not necessarily mean that the tenants used the Pool. However, based on the photograph which shows an inflatable boat roughly two paces past the entry gate to the backyard, I find that it is more likely than not that the tenants accessed the backyard on at least one occasion.

However, I do not find that by so doing or by storing the inflatables in the backyard, the tenants breached a material term of the tenancy agreement. I find that a term restricting access to the backyard for the purposes of storage, if it is a term of the tenancy agreement (which I make no finding on), would not rise to the level of materiality. The landlord's concerns relating to access to the backyard have been focused on the restriction of use of the Pool and Jacuzzi and access to the Shed and Control Box. These are terms which would seem (if they exist, on which I make no finding) to go to the heart of the tenancy agreement.

Similarly, I find that accessing the backyard for the purpose of storage does not seriously jeopardize the health, safety, or lawful right of the landlord, nor does it put their property at significant risk.

As such, the tenant's accessing the backyard for the purpose of storing their inflatables is not a basis on which the tenancy may be ended.

I find that the landlord has failed to prove the tenants have accessed the backyard for the purpose of using the Pool or Jacuzzi, or for gaining access to the Control Box or the Shed.

## 2. Garbage in the RV area

The landlord bears the onus to show that the tenants acted in the manner that it alleges. The landlord has provided no evidence corroborating its allegation that animals looked for food in the garbage, or that the bags of garbage were there for a prolonged period. Additionally, the

landlords' agent did not direct me to any term of the tenancy agreement relating to proper storage of garbage or give any evidence as to whether such a term would be material.

I find that the landlord has failed to prove that the manner in which the tenants stored garbage seriously jeopardized the health or safety or lawful right of the landlord or constituted a breach of a material term of the tenancy agreement.

As such, I find that the Notice was issued for invalid reasons and should be cancelled. The tenancy shall continue.

### **Conclusion**

I grant the tenants' application to cancel the Notice.

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: January 22, 2020

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Residential Tenancy Branch