



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding ZEALOTS CONSULTING INC. and  
[tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCL-S

### Introduction

The landlord applies to retain a security deposit and pet damage deposit for loss suffered after the tenants vacated the property less than one month into a one-year fixed term tenancy.

The listed parties attended the hearing, the landlord represented by CT, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

### Issue(s) to be Decided

There is no dispute that after the tenants vacated, the landlord lost one month's rent, the equivalent of the total deposit money it holds. The issue is whether the conditions in the rental unit permitted the tenants to immediately end the agreement.

### Background and Evidence

The rental unit is a three bedroom "plus den" suite in a house. The landlord's principal, CT reserved to himself a small suite elsewhere in the home. At all times relevant to this matter, he was staying at that suite.

The tenancy started May 1, 2020 for a one-year term ending April 30, 2021. There is a written tenancy agreement. The monthly rent was \$1795.00. The landlord holds a \$897.50 security deposit and a \$897.50 pet damage deposit. The agreement contains a clause directing that if the tenants want to end the tenancy they must give one month's notice: "a clear written formal notice from the last day of the month."

The tenants moved in May 1, paying a professional mover over \$1200.00. MM did not take part as he was out of town until May 11. A move-in condition report was completed and the May rent and deposit money were paid.

The tenant CM testifies that on move in she noticed "things flying around." On May 2 she contacted CT who said he'd noticed them too. She identified them as "pantry moths" after looking for them online.

On May 3 and 4 CT attended and sprayed Raid at locations in the kitchen.

On May 5 an exterminator hired by the landlord attended. CM says he confirmed flying insects were pantry moths and that he could not find the source.

On May 11 MM came home and, with the consent of the landlord, removed some cabinets and found a source. The tenants cleaned the area and MM sprayed with Raid.

CM testifies that even after that there were still months "flying all over" and "everywhere." She called the exterminator who, she says, informed her that a re-spray could only be conducted a month after the first spray on May 5.

CM left the rental unit on May 3, 4, 5 and 11 out of concern about what effect all the spraying might have on her health.

On May 15 the tenants moved out to CM's parents' house in the same locale.

CM raises complaints about the washing machine and shower drain. She indicates that the home was just "not the right fit" with all these problems. She had thrown away a lot of food because of the moths and was keeping no food in the kitchen.

MM testifies that after he pulled out the cabinets on May 11 he showed CT the nest he'd found.

The landlord's representative CT testifies that he attended promptly to the drain and dishwasher, replacing the dishwasher on May 7.

CT says his previous tenant showed the suite to CM by electronic means. conducted a move-out inspection with him on April 30 and no moths were noted. The previous tenant had never mentioned any moths in the home. Later on the night of April 30 he was back in the home and noticed what he thought were flies near the smoke alarm.

He was at the property on the morning of the May 1, prior to the tenants' arrival. He was attending to some things and noticed flies in the cupboard. He vacuumed them up.

When the tenant CM contacted him on May 2 to report pantry moths, he obtained and supplied pantry moth traps. And arranged for the exterminator to come on May 5.

CM called him again on May 3 to "do something" and so he cleaned the cupboards and sprayed raid.

It is his understanding from the exterminator that after a spray by the exterminator the tenants were required to be out of the house for six hours and that one must wait 30 days before another spray treatment.

CT says that during his attendances he saw three or four moths inside the island pantry, one or two in a "lazy-susan" cupboard and one or two stationary on a wall.

On May 11 CT called the exterminator again who informed him to clean the cupboards and put up moth traps (which CT had already done). CT contacted another exterminator for a second opinion and received the same advice.

CT says he offered the tenants \$200.00 in food certificates as compensation for their troubles with the moths, the dishwasher and the shower drain and the tenants accepted.

CM texted him on May 12 that they were looking at moving. On May 14 he saw them in the process of moving out and on the evening of May 15 the tenants informed him they had left "because of the pantry moths." The parties attended a move-out inspection together on May 16.

After the tenants vacated CM cleaned out the cupboards and over the next month found four or five moths. He found new tenants for July 1, 2020. They were given a "heads up" about moths and told to report to him if they saw any. He testifies they haven't reported any moths.

In response MM testifies that the tenants did not accept CT's \$200.00 offer and returned the food certificates.

CM replies saying the exterminator told them the pantry moth problem could last months. She acknowledges they posed no “health risk” but their presence prevented her from keeping food in the kitchen.

### Analysis

Residential Tenancy Policy Guideline 30, “Fixed Term Tenancies” states that a tenant may end a fixed term tenancy early if the landlord has breached a material term of the agreement.

Policy Guideline 8, “Unconscionable and Material Terms” indicates:

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 the term would be clause 26 of the tenancy agreement, which enshrines s. 32 of the *Residential Tenancy Act* (the “RTA”) that a landlord must provide and maintain residential property in a state of decoration and repair that; (a) complies with the health, safety and housing standards required by law, and (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

There is no indication the landlord had pre-knowledge of the moth problem. When he first noticed the moths on April 30, he did not consider it a problem. When notified by the tenants it is apparent the landlord took immediate steps to attend to the problem, though his efforts and that of the exterminator did not have immediate effect.

The nature of the problem remains obscure. Neither side presented evidence about the moths themselves; their cause, their life cycle, how they nest, any danger to be associated with their presence or how they are eradicated.

The severity of the problem remains obscure. Though CM states the moths were “everywhere” and “flying all over” the photos submitted by the tenants show the odd moth on a wall or in the corner of a drawer or cupboard. The larvae claimed to be in the photos cannot clearly be seen. It was not stated whether the photos were taken before or after cleanup. The landlord, who was frequently at the premises in the first half of May and after, indicates he saw relatively few moths.

It is conceivable that a landlord might breach its obligation to maintain and repair a rental unit in such a fundamental way as to entitle a tenant to declare a breach of a material term and move. I find that in this case it has not been proved that the landlord has fundamentally breached the tenancy agreement. The tenants were not entitled to end the fixed term tenancy without the proper notice on that basis.

In any event, the tenants did not go through the process mandated by Guideline 8, above. They did not declare to the landlord that they considered he had breached a material term of the agreement and they did not give him a deadline to rectify the breach.

It might also be argued that tenancy agreement was “frustrated” because of the moth problem. Policy Guideline 30, “Frustration” states:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The evidence does not support a finding of frustration. The tenants were met with a moth problem that posed a nuisance, perhaps a significant nuisance, to their enjoyment of the rental unit but it did not render the rental unit unuseable, but for a brief period after the exterminator sprayed.

### Conclusion

The tenants have failed to show that they were entitled to end this tenancy before the end of its fixed term on April 30, 2021, other than by giving the one month’s notice provided for in the agreement. As a result, the landlord has lost the June rent of \$1795.00. I award it that amount and authorize it to retain the \$1795.00 deposit money it holds, in full satisfaction of the award.

This decision is not a decision that the tenants are not entitled to relief in the nature of damages for the nuisance, inconvenience or expenditures resulting from the moth problem, or even the drain or dishwasher problems. It is a decision that they were not entitled to immediately end the tenancy. They are free to make their own application (within the time limits imposed by the *RTA*) for damages in that regard.

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: September 21, 2020

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Residential Tenancy Branch