



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding GARDEN CONSTRUCTION LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC,FFT  
                             OPC, FFL

### Introduction

This hearing convened as a result of Cross Applications. In the Tenant's Application filed on November 24, 2020, he sought to cancel a 1 Month Notice to End Tenancy for Cause issued on November 17, 2020 (the "Notice") as well as recovery of the filing fee. In the Landlord's Application, filed on January 16, 2021, the Landlord sought an Order of Possession based on the Notice as well as recovery of the filing fee.

The hearing of the parties' cross applications was scheduled for 9:30 a.m. on February 18, 2021. Both parties called into the hearing. The Landlord was represented by the Building Manager, M.A. The Tenant and his three roommates, D.M., N.A. and S.M. called into the hearing as well as the Tenant's former spouse, L.G. The Tenant and M.A. were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

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 parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

### Preliminary Matter

On the Tenant's Application, they named eight tenants. A copy of the residential

tenancy agreement was provided in evidence and which confirmed only two tenants were named on the agreement, E.B. and L.G.

During the hearing before me, the Tenant E.B. confirmed that L.G. is his former spouse. He further confirmed that he and his spouse, separated in May of 2016. At that time, the Tenant, L.G. and their children, E.B., R.B. and J.B. (who were listed as occupants on the tenancy agreement) moved from the rental unit. The Landlord's representative confirmed that L.G. and the children moved from the rental unit in May of 2016 and the only Tenant on the tenancy agreement, is the Tenant, E.B.

E.B. confirmed that he continues to reside in the rental unit with his roommates, D.M., N.A. and S.M. The Landlord's representative confirmed that the Tenant's roommates are not tenants, but occupants.

Hearings before the Residential Tenancy Branch are conducted in accordance with the *Residential Tenancy Branch Rules of Procedure*. Rule 4.2 of the *Rules* allows me to amend an Application for Dispute Resolution in circumstances where the amendment might reasonably have been anticipated. The authority to amend is also provided for in section 64(3)(c) of the *Residential Tenancy Act* (the "*Act*") which allows an Arbitrator to amend an Application for Dispute Resolution.

The Landlord named only E.B. as Tenant on the Landlord's cross application; as such, I find the Landlord would have reasonably anticipated that the names of the tenants on the Tenant's Application would need to be amended. I therefore amend the Tenant's Application to remove L.G., his three children and his roommates as named tenants.

#### Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Landlord entitled to an Order of Possession?
3. Should either party 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.

A copy of the tenancy agreement was provided in evidence before me and which confirmed the following. This tenancy began December 1, 2013. Originally rent was \$1,150.00.

The Landlord's Building Manager, M.A. testified that at the time of the hearing the rent was \$1,338.00. M.A. also confirmed that when the tenancy first began, the Tenant, E.B., his spouse, L.G. and their three children, E.B., R.B. and J.B. resided in the rental unit. M.A. stated that there are three bedrooms and two bathrooms in the rental unit.

M.A. stated that in May of 2016, L.G. confirmed she was moving out of the rental unit. She initially moved out of the rental building, and then moved back into the rental building (although in a different unit) in September of 2017.

M.A. confirmed there are now three other occupants in the rental unit: D.M. who moved into the rental unit some time in December 2016; S.M. who moved into the rental unit some time in January 2017; and, N.A. who moved into the rental unit some time in February 2020.

M.A. stated that he believes there are now four adults living in the rental unit on a full-time basis including the Tenant E.B., and the occupants D.M. N.A. and S.M. M.A. stated that he believes that two of the adults are sharing a room, N.A. and D.M. M.A. also claimed that there are two other adults who live at the rental unit approximately 2 months a year, as they visit once or twice a week.

In terms of the Landlord's claim that there is an unreasonable number of occupants, M.A. stated that the unit was originally rented to one family, but now there are four different families. M.A. stated that there is more wear and tear with more families.

In written submissions filed by the Landlord, the Landlord indicated that the occupant N.A. was not accepted as an occupant in 2020 such that the Tenant has breached a material term of the tenancy. In this respect, the Landlord relied on clause 13 of the tenancy agreement which provides as follows:

**13. ADDITIONAL OCCUPANTS.** Only those persons listed in clauses 1 or 2 above may occupy the rental unit or residential property. A person not listed in 1 or 2 above, who without the landlord's prior written consent, resides in the rental unit or on the residential property in excess of fourteen cumulative days in a calendar year will be

considered to be occupying the rental unit or residential property contrary to this Agreement. If the tenant anticipates an additional occupant, the tenant must apply in writing for approval from the landlord for such person to become an authorized occupant. Failure to obtain the landlord's written approval is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy on proper notice.

In response to the Building Manager's testimony and submissions, the Tenant E.B. testified as follows. He confirmed that he moved into the rental property with his wife and three children in 2013. He stated that his wife and children moved out in May of 2016. He confirmed that he did not have a roommate right away. In December 2016, his roommate D.M. moved into the rental unit. He confirmed that the Landlord interviewed D.M. and gave them a key to the building. The Tenant stated that his roommate, S.M. was interviewed by the Landlord in January of 2017 and was also provided a key. The Tenant stated that N.A. arrived on February 28, 2020. He then traveled to Alaska for a short period of time and returned to the rental unit before the COVID-19 lock down.

The Tenant stated that D.M. and N.A. are married and they share one of the three bedrooms. In support the Tenant provided a copy of their marriage certificate. The Tenant confirmed that his former spouse, L.G., now lives in the rental building with his three children. The Tenant stated that no one else lives in the rental unit. He confirmed that S.M. and the Tenant have girlfriends who sometimes come to visit and spend the night, but they have their own residence.

The Tenant further confirmed that each of his roommates pays him their share of the rent and he pays the full amount of rent to the Landlord directly.

In reply, M.A. confirmed that he deals with the Tenant only in terms of this tenancy.

### Analysis

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 seeks to end this tenancy pursuant to section 47(1)(c) and (h) of the *Act* on the basis that the Tenant has an unreasonable number of occupants in the rental unit and has breached a material term of the tenancy.

The evidence confirms that when this tenancy first began, the Tenant, his spouse L.G. and their three children, E.B., R.B. and J.B. resided in the rental unit. At the time of the hearing, the Tenant and his three roommates resided in the rental unit.

The evidence further confirms the rental unit has three bedrooms and two bathrooms. The Tenant's first roommate, D.M., moved into the rental unit in 2016, the second roommate, S.M., moved into the rental unit in January of 2017 and the third roommate, N.A., in February of 2020. I accept the Tenant's testimony that while the Tenant and S.M. have girlfriends, their girlfriends only stay over occasionally and have their own residences elsewhere. As well, although they are now separated, the Tenant's spouse and their children reside in the same rental building, which allows the Tenant to see his children frequently.

The Landlord's representative argued that there is more wear and tear on the rental unit now that the Tenant and his roommates reside there, than when the Tenant his spouse and their three children resided in the rental nit. The Landlord failed to provide any corroborating or documentary evidence to support this claim and I am not persuaded this is in fact the case.

In all the circumstances, I find the Landlord has failed to prove there are an unreasonable number of occupants residing in the rental unit. At the time the tenancy began there were five people living in the rental unit, currently there are four. I find that four adults living in a three bedroom and two bathroom 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 clause 13 of the tenancy agreement which requires the Tenant to obtain the Landlord's approval for any occupants.

While the evidence indicates the Landlord did not approve of N.A. as an occupant in September of 2020, at that time N.A. had lived in the rental unit since February of 2020.

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

### **Material Terms**

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.

As noted in the *Guidelines*, having a clause designated as a material term in a tenancy agreement is not conclusive. In this case, I find the Landlord's approval of occupants is not a material term. The evidence indicates the landlord was aware N.A. lived in the rental unit as early as February 2020 yet the Landlord did not issue the Notice until November 17, 2020, some 9 months later. Had clause 13 been a material term, one would have expected the Landlord's agents to ensure strict compliance. While there was a period of time in 2020 when a Landlord was restricted in terms of issuing notices to end tenancy due to the COVID-19 pandemic, that restriction was lifted on June 24, 2020. Another five months passed before the Landlord issued the Notice. As the *Guideline* provides, a material term is one that is so important that even a trial breach allows the parties to end the tenancy. I find clause 13 does not meet this definition.

I note that even if I had found clause 13 to be a material term, I would not have ended the tenancy on this basis as I find this clause to be unconscionable and of no force and effect. Clause 13 purports to give the Landlord the ability to screen the Tenant's roommates and end his tenancy should the Landlord disapprove. The clause gives the

Landlord broad authority to refuse occupancy based on undisclosed grounds. While the Landlord in this case claims the reason N.A. was not approved was due to financial considerations, there was no evidence to support a finding that the Tenant and his roommates were unable to pay the rent at any time during the tenancy. By operation of clause 13's broad authority, the Landlord could end the tenancy for any reason, simply because they do not approve of the Tenant's roommate. I find this to be unconscionable and unenforceable. Further, this clause also characterizes overnight guests as occupants should they stay overnight more than 14 days in a calendar year. I find this to be onerous and unsupportable, particularly when those overnight guests maintain a primary residence elsewhere.

I remind the parties that pursuant to section 5 of the *Act*, the parties may not avoid or contract out of the *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.

(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.

(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 and roommates 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.

The *Act* allows a Landlord to charge additional rent for additional occupants, provided this is specifically included in the written tenancy agreement (section 13(2)(f)(iv)). The *Act* also allows a Landlord to end a tenancy if there are an *unreasonable* number of occupants. The *Act* does not permit a landlord to screen or otherwise choose a tenant's roommates.

**I therefore strike down clause 13 of the tenancy agreement pursuant to section 5 of the Act; this clause is of no force and effect.** While the Landlord may end this tenancy should there be an *unreasonable* number of occupants in the rental unit, the Landlord cannot end this tenancy simply because they do not approve of the Tenant's roommates.

The Tenants' application to cancel the Notice is granted. The tenancy shall continue until ended in accordance with the *Act*.

The Tenant, having been successful in his Application, is entitled to recover the filing fee. Pursuant to section 72 of the *Act*, he may reduce his next month's rent by \$100.00 to recover this fee.

The Landlord's Application for an Order of Possession and recovery of the filing fee is dismissed without leave.

#### Conclusion

The Tenant's request to cancel the Notice is granted. He may reduce his next month's rent by \$100.00 to recover the filing fee.

The Landlord's request for an Order of Possession and recovery of the filing fee is dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: February 18, 2021

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Residential Tenancy Branch