Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, DRI, MNDCT, 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 determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord 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.

Preliminary Matters – Service of Documents

The landlord and their son, their advocate at this hearing (the advocate) testified that they "slipped" the 2 Month Notice under the tenants' door on December 31, 2020. This Notice sought an end to this tenancy to enable the advocate to move into this basement suite.

While Tenant KS (the tenant) provided sworn testimony and written evidence that they did receive the first two pages of the 2 Month Notice, they maintained that this was not served in the manner required by the *Act* and, furthermore, did not contain the final two pages of what they learned was supposed to have been the four page Notice.

The advocate did not dispute the tenant's allegations in this regard, confirming that neither they nor the landlord had been aware of the provisions of the *Act* with respect to the service of Notices to End Tenancy to tenants.

The advocate confirmed that the landlord received copies of the tenants' dispute resolution hearing package and written evidence sent to them by registered mail in advance of this hearing. The landlord did not enter any written evidence for this hearing.

Analysis – Service of Documents

Section 88 of the *Act* outlines the ways that documents such as the 10 Day Notice can be served to a tenant: Section 88 reads in part as follows:

88 *All documents, other than those referred to in section 89* [special rules for certain documents]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:*

> *(a) by leaving a copy with the person;…*
> *(c) by sending a copy by ordinary mail or registered mail to the address at which the person resides…;*
> *(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;*
> *(e) by leaving a copy at the person's residence with an adult who apparently resides with the person;*
> *(f) by leaving a copy in a mailbox or mail slot for the address at which the person resides…;*
> *(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides…;*
> *(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;*
> *(i) as ordered by the director under section 71 (1)* [director's orders: delivery and service of documents]*;*
> *(j) by any other means of service prescribed in the regulations.*

In this case, there is undisputed evidence that the landlord did not serve the tenants with the 10 Day Notice in any of the ways outlined in section 88 of the *Act.*

Section 71 of the *Act* reads in part as follows:

> ***71*** *(1)The director may order that a notice, order, process or other document may be served by substituted service in accordance with the order.*
>
> *(2)In addition to the authority under subsection (1), the director may make any of the following orders:*
>
> *(a) that a document must be served in a manner the director considers necessary, despite sections 88* [how to give or serve documents generally] *and 89* [special rules for certain documents]*;*
>
> *(b) that a document has been sufficiently served for the purposes of this Act on a date the director specifies;*
>
> *(c) that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.*

While no application was made by the landlord to allow for substituted service of the 2 Month Notice by placing it under the tenants' door, there is evidence that the tenants did receive this Notice. They applied to cancel the 2 Month Notice on January 15, 2021, within the time frames established pursuant to the *Act* for so doing.

If the method of service were the only deficiency in the landlord's service of the 2 Month Notice to the tenants, there may very well have been an opportunity for me to exercise the discretion provided to me pursuant to paragraph 71(2)(c) of the *Act* to make a determination that the 2 Month Notice, although not served in accordance with section 88, had been sufficiently served for the purposes of the *Act.* However, that is not the case. By the advocate's admission, the tenants were correct in their assertion that the landlord only provided them with half of the pages of the 2 Month Notice. The missing pages are essential in understanding how a tenant receiving such a notice can go about disputing it through the provisions of the *Act*.

In considering this portion of the matter before me, I have also taken into account the following wording of sections 49, 55 and 52 of the *Act*:

Pursuant to section 49(8) of the *Act*, a tenant may dispute a 2 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 January 15, 2021, and the circumstances surround the service of the Notice were suspect, I find that they were within the time limit for doing so, and the landlord must demonstrate that they meet the requirements of section 49(3) of the *Act* to end this tenancy:

Section 49(7) of the *Act* requires that "a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*. Although the landlord's 2 Month Notice was on the proper RTB form, the landlord only provided one half of that Notice to the tenants, and no copy of the missing portions of the 2 Month Notice has been entered into written evidence for this hearing.

Section 52 of the *Act* reads in part as follows:

> *In order to be effective, a notice to end tenancy must be in writing and must...*
>
> *(a) be signed and dated by the landlord or tenant giving the notice,*
> *(b) give the address of the rental unit,*
> *(c) state the effective date of the notice,*
> *(d) except for a notice under section 45(1) or (2) [tenant's notice], state the grounds for ending the tenancy, and*
> *(e) when given by a landlord, be in the approved form.*

In a case such as this one, where there is undisputed evidence that the tenants were not provided with the full 2 Month Notice, their rights to dispute the Notice were not properly conveyed to them in the approved form. As such, I am unwilling to make a determination pursuant to 71(2)(c) of the *Act* that the 2 Month Notice was properly served to the tenants in accordance with the provisions of section 88 of the *Act.*

Based on the undisputed sworn testimony and written evidence, I do find that the landlord was duly served with the tenants' dispute resolution hearing package and written evidence in accordance with sections 88 and 89 and 90 of the *Act.*

Preliminary Matter- Tenants' Application for a Monetary Award

At the commencement of the hearing, I asked the tenants to confirm the information contained in their application for dispute resolution with respect to the amount of the monetary award they were seeking from the landlord. The tenant confirmed that the amount identified in their application was $109.75. They testified that this amount was arrived at by adding their $9.75 in mailing costs that they had incurred to the $100.00 filing fee they were seeking to recover from the landlord. This testimony confirmed the

information they outlined as follows in their application for dispute resolution, a copy of which was conveyed to the landlord in the Notice of Hearing:

Filing fee of $100 plus registration mail of $9.75 to be paid back to the tenant as the landlord incorrectly tried serving the tenant and provided an incomplete two month notice to end tenancy.

For their part, the advocate also confirmed that the only monetary amount that they understood the tenants were seeking in this hearing was for the $109.75 specifically cited as the amount claimed in the tenants' application.

In another section of the issues identified in the tenants' application, as was identified in the Notice of Hearing provided to the landlord, the tenants outlined the following reasons for disputing "a rent increase that is above the amount allowed by law." This was another of the outcomes they were hoping to achieve through their application:

March 1, 2016 I rented the basement suite for $700/month which was then increased to $750/month, then on March 2019 the landlord demanded $800/month payable April 1, 2019, which we paid, then May 1, 2019 she demanded $825/month which we also paid and on May 12, 2019 we were served with a Notice of Rent increase from $750/month to $825/month which we have been paying since May 1, 2019 inclusive to today. Which is a total of $1362.50 in overpayments. As the correct increase should be $18.75/month

Although they included in their written evidence a two page chronology entitled "Table of Rent", which amounted to $3,552.50 described as "Total Extra Rent Paid to the Landlord", they did not amend their application for dispute resolution to seek this significantly higher monetary claim. Instead, they entered this as written evidence, apparently in support of their assertion that the landlord had implemented an additional rent increase in contravention of the *Act* and the regulations.

The tenants may truly have intended that their current application sought a determination on the correct monthly rent for this tenancy **as well as** a monetary award for any overpayment of rent that they made over the course of this tenancy. However, that is not what they applied to obtain. More importantly, it is not what they advised the landlord or the Residential Tenancy Branch they were seeking in their application. They did not amend their original application for a monetary award of $109.75. In fact, to the contrary, they were very specific in their original application that this amount was the extent of their monetary claim at that time.

A fundamental tenet of the principle of natural justice is that parties identified as Respondents in a claim must know the case against them so that they are afforded an adequate opportunity to respond to the Applicant's claim. In this instance, the landlord knew that the tenants were seeking a ruling with respect to what the tenants considered to be an additional rent increase that was implemented without legal authority. However, I find that the landlord was not properly notified that the tenants were seeking a retroactive rent reduction and a monetary claim far in excess of the $109.75 specifically cited and outlined in the tenants' application for dispute resolution. To proceed to consider a monetary claim in the order of the $3,552.50 figure cited in the tenants' written evidence would lead to a denial of the landlord's right to a fair hearing of the case against them, in contravention of the legal principle of natural justice. Parties are not allowed to increase the amount of their requested monetary award solely through submissions of written evidence or during the course of a hearing unless it is clear to all that an additional required payment had become owing since the original application was submitted (e.g., an additional monthly rent payment had become due).

Under these circumstances, I find that the only monetary claim properly before me is the tenants' original claim for $109.75, most of which is a request to recover the filing fee for the tenants' application.

I would be remiss if I did not add that even if the tenants had amended their application well in advance of this hearing and notified the landlord of their intention to seek a monetary claim far in excess of the original amount cited their application, I would very likely have exercised the discretion provided to me by RTB Rule of Procedure 2.3, which reads as follows:

> ***2.3 Related issues***
>
> *Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.*

In this case, the principal issue identified on the tenants' application was to cancel the landlord's 2 Month Notice. Whether or not the tenancy should continue, or end on the February 28, 2021 date identified on the 2 Month Notice was the paramount issue before me.

The evidence regarding the service of the 2 Month Notice was not in dispute as the advocate confirmed that they and the landlord had erred in how they provided the Notice and in not serving the entire Notice to the tenants. On that basis, it was apparent

that this tenancy would continue until ended in accordance with the *Act*. It thus became important to establish clarity on the correct monthly rental amount for this ongoing tenancy. This clarification required my consideration of the tenants' application to dispute an alleged additional rent increase. While willing to establish this certainty so that the parties could continue this tenancy on the basis of an arbitrator's ruling as to the amount of rent to be paid, this clarification would not extend to consider the tenant's greatly increased monetary claim as related to the original matter identified in their application for dispute resolution.

Issues(s) to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession? What is the correct monthly rent for this tenancy? Are the tenants entitled to recover the filing fee or their mailing costs for this application from the landlord?

Background and Evidence

Tenant HS first moved into this basement suite on March 1, 2016. Although neither party submitted a copy of the Residential Tenancy Agreement (the Agreement), they both maintained that there was a written Agreement. According to the terms of that Agreement as described to me by the parties, monthly rent was set at $700.00, payable in advance on the first of each month. This amount was to include all utilities, including internet. The landlord continues to hold the $350.00 security deposit paid when the tenancy began.

The tenant gave undisputed sworn testimony that the Agreement identified two occupants. They said that the original intention was Tenant HS and his mother would live in the rental unit. Well after this tenancy began, the two tenants married, and after a honeymoon period abroad commenced living in the rental unit as a couple. Except for short periods of a few days, Tenant HS testified that no one else has stayed at the rental unit, and that no one else has lived there. This is at odds with the advocate's sworn testimony that as many as five people have lived in this rental unit at certain points during this tenancy.

The tenants maintained that they have never signed a new Agreement and that the increases in rent charged by the landlord have been done without legal authority to do so. The tenant said that they did not know this until very recently. They maintained that the landlord issued the 2 Month Notice in response to the questions they raised when

they discovered that the landlord had illegally raised their rent. The tenants entered written evidence in the Table of Rent document referenced earlier in this decision in which they asserted that the landlord has raised their rent a total of $3,552.50 more than would have been permitted under the *Act*. These calculations are summarized as follows:

Item	**Amount Charged**	**Amount the Tenants believed they were overcharged**
December 1, 2016 to June 1, 2018	$725.00	$25.00 per month x 19 months
July 1, 2018 to September 1, 2018	850.00	$150.00 x 2 months
September 1, 2018 to March 1, 2019	750.00	$50.00 x 7 months
April 1, 2019	800.00	$100.00 x 1 month
May 1, 2019 to August 1, 2019	825.00	$125.00 x 4 months
September 1, 2019 to January 1, 2021	825.00	$125.00 x 17 months
Total Amount Tenants Maintain they have been Overcharged		**$3,552.50**

At the hearing, the parties confirmed that the tenants have provided the landlord with a cheque for rent for February 2021 in the amount that they consider correct based on their understanding of the legislation. The advocate said that they have withheld cashing that cheque as they believed that the tenants were entitled to remain in the rental unit for the month of February 2021, without having to pay rent, after having received the 2 Month Notice requiring them to vacate the premises by February 28, 2021.

The tenants entered into written evidence a copy of a Residential Tenancy Brach Notice of Rent Increase form signed by the landlord on May 12, 2019. This form identified the date of the last rent increase as July 1, 2018 for a monthly rent of $750.00. The rent increase shown on this Notice of Rent Increase form was for $75.00, raising the monthly rent to $825.00, as of May 1, 2019, with a provision that monthly rent for April 2019 would be $800.00 for that month only.

On this point, the advocate gave undisputed sworn testimony that the tenants prepared this Notice of Rent Increase form and gave it to the landlord to sign, which she did. The

advocate noted that the landlord did not really know what she was signing at that time, as it was done at the tenants' request. The advocate also confirmed that this was the only written Notice of Rent Increase given to the tenants during the course of this tenancy. They also confirmed that no new Agreement has ever been created for this tenancy.

The tenant also said that they have purchased a new house that is currently being built. They said that this would enable them to vacate the premises, perhaps as early as June 15, 2021, but possibly as late as the end of July 2021.

The advocate did not dispute the amounts that the tenants claimed were paid during the months outlined above. The advocate provided the following explanations for the increases cited by the tenants.

The advocate testified that the initial increase of $25.00 from $700.00 to $725.00 resulted from Tenant HS's purchase of a new television in late 2016. When Tenant HS reported that the landlord's existing internet service was insufficient to enable them to access their television properly, the advocate informed Tenant HS that the landlord would have to upgrade the service at an additional cost to the landlord. The advocate said that they offered to do so, but at an increased cost to Tenant HS of $25.00. The advocate said that Tenant HS agreed to this increase in their monthly rent.

In response to this evidence, Tenant HS said that they understood that their rent was to include all utilities including internet and television, and that they only paid the extra $25.00 because they were relatively new in the country and did not want to lose their rental unit. Tenant HS said that the landlord was expected to provide these utilities as part of the Agreement.

The advocate testified that during the summer of 2018, they discovered that there were five people living in the rental unit, including Tenant HS's mother and father, his sister and brother-in-law. When the advocate and/or the landlord confronted those living in the rental unit at that time without the landlord's permission, those living there agreed to pay the landlord an extra $150.00 for the months of July and August 2018. When they left by the end of August, monthly rent charged by the landlord reverted to $750.00, an amount that the advocate claimed was agreed to by Tenant HS. However, the advocate conceded that no official Notice of Rent Increase form was provided to the tenants for the rent increase that increased the monthly rent to $750.00.

The advocate gave undisputed sworn testimony that the tenants advised them orally that they were planning to vacate the rental unit in 2019. However, the parties agreed that the tenants did not provide anything in writing with respect to that intent to vacate the rental unit. The advocate said that in expectation of the tenants' move, the advocate and/or landlord advertised for new tenants and discovered that they could obtain a much higher monthly rent from prospective renters who contacted them. When the tenants did not follow through with their move, the advocate and landlord discussed the landlord's proposed rent increase with the tenants. Although the tenants were unwilling to pay what new renters were willing to pay for this rental unit, the advocate said that they did come to an agreement that monthly rent would be $825.00, the amount paid by the tenants since May 1, 2019, until this past month when the tenants provided a cheque slightly in excess of $700.00.

Analysis – Application to Cancel the 2 Month Notice

Pursuant to section 49(8) of the *Act*, a tenant may dispute a 2 Month Notice by making an application for dispute resolution within fifteen days after the date the tenant received the notice.

As was outlined earlier, as I am not satisfied that the landlord complied with the provisions of section 49 and 52 of the *Act* in providing the tenants with a complete 2 Month Notice, I allow the tenants' application to cancel the 2 Month Notice.

This tenancy continues in effect.

Analysis- Disputed Additional Rent Increase

Part 3 of the *Act* establishes how rent increases may be implemented. In this regard, section 42 reads in part as follows;

> ***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;*
>
> *(b)if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.*

(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…

Section 43 of the *Act* reads in part as follows:

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.

Although *Regulations* established pursuant to the *Act* have been instituted to give legal effect to the annual rent increases permitted without seeking approval from an arbitrator appointed pursuant to the *Act,* the actual annual rent increases prescribed by the Branch are not at issue in this dispute.

What is at issue in this dispute is the contradictory accounts entered into sworn testimony by the parties as to the reasons for the various increases in monthly rent that have been paid by Tenant HS initially, and later by the tenants after they married and lived in the rental unit as a couple.

When disputes like this arise, it is very helpful to have available the wording of the Agreement that the parties entered into when this tenancy began. As neither party apparently believed it important enough to include a copy of the Agreement for consideration, I am left to decide this matter without the benefit of the wording of that Agreement. Since the parties did not dispute one another's account of the terms of the Agreement, I am confident that the parties have had an adequate opportunity to dispute any disagreements they might have with respect to what the landlord agreed to convey as part of the tenancy they entered into with Tenant HS when this tenancy began.

Of more concern is the advocate's frank admission that, with the exception of the sole time when the landlord signed the Notice of Rent Increase form on May 12, 2019, the landlord and quite likely the advocate have relied almost exclusively on oral agreements that they claim to have entered into with at first Tenant HS, and later with the tenants. While such arrangements can certainly work for some tenancies, when disagreements

occur, it is difficult to ascertain which party was left with the correct interpretation of what had been committed by whom and when. Memories fade and without an accurate written agreement between parties, misunderstandings may arise. Although one party may believe that there was an agreement between the parties, the other party may feel that they were forced to comply with requests that were interpreted as ultimatums.

Viewed in the context of the ongoing dispute, the advocate asserted that Tenant HS agreed to increase his monthly rent by $25.00 as of December 1, 2016. By contrast, the tenants claimed that the $25.00 additional charge imposed by the landlord in December 2016 was for a service that the tenant expected to receive as a result of the provisions of the Agreement in which the landlord committed to provide internet and television along with all other utilities. As was noted above paragraph 43(1)(c) of the *Act* requires the tenant's written authorization to obtain a rent increase. Whether or not the landlord had to upgrade the service provided, without a written agreement by Tenant HS to make an additional payment for such services, I find that the landlord has provided insufficient evidence to demonstrate that they had an actual agreement with Tenant HS to make this additional payment for the upgrade in the internet service, which the tenant(s) have been paying to receive since December 2016. In the absence of any such written agreement and after considering the conflicting oral testimony of the parties, I find that the landlord imposed an additional rent increase without authorization in December 2016, in which the monthly rent was increased from $700.00 to $725.00.

I have also given careful consideration to the conflicting oral testimony of the parties as to the arrangements made in July and August 2018, whereby the landlord obtained $850.00 in monthly rent for each of those months. With no reference by the parties at the hearing to additional occupant charges referenced in the Agreement and no evidence other than the advocate's sworn testimony at the hearing to rely upon, I again must refer to the terms of the Agreement as conveyed to me during the hearing. Without anything in writing to rely upon, I find that the landlord imposed an additional rent increase during the months of July and August 2018.

In September 2018, the parties agreed that the monthly rent charged by the landlord changed from $850.00 to $750.00. The advocate fully admitted that no written agreement was obtained from the tenant(s) to pay this amount and that they did not issue the required Notice of Rent Increase form to increase the rent at that time.

I also find that on the sole occasion that the landlord did sign a Notice of Rent Increase form, the document did not provide the required three month notice, was signed after the rent increases had already taken effect, and the contents of that form were

questionable given the advocate's assertion that it was prepared by the tenants and signed by the landlord without her knowing what they were signing. The Notice also references a monthly rent of $750.00, an amount that was also invalid, given the failure of the landlord to provide any Notice of Rent Increase form to the tenant to arrive at that figure or obtain the tenant's written consent to obtain this increase. For these reasons, I find that the Notice of Rent Increase form is invalid and no effect.

Based on a balance of probabilities, I find that the correct monthly rent for this tenancy remains at $700.00, the amount originally cited in the Agreement between the landlord and Tenant HS.

As the tenants have been successful in their application and as this tenancy is continuing, I allow their application to recover their $100.00 filing fee from the landlord. I dismiss their application to recover their registered mailing costs as recovery of the filing fee is the only hearing related cost they are entitled to recover from the landlord.

There is undisputed sworn testimony that the landlords have received a cheque in excess of the $700.00 that I find is the correct monthly rent for this tenancy and have not cashed that cheque. I order the parties to make arrangements whereby the tenants are credited with the difference between the amount of that cheque and the correct $700.00 monthly rent that is payable for this tenancy.

For the reasons outlined earlier in this decision, I cannot make any decision as to amounts that the tenants have been overcharged during this tenancy as I find that the landlord has not been properly notified of any claim in that regard. The tenants remain at liberty to apply for amounts that they believe they are entitled to receive based on my final and binding decision that the correct monthly rent for this tenancy since it began is and remains $700.00.

Conclusion

I allow the tenants' application to cancel the 2 Month Notice. The 2 Month Notice of December 31, 2020 is of no force or continuing effect. This tenancy continues until ended in accordance with the *Act.*

I order that the monthly rent for this tenancy remains $700.00, until varied in accordance with the provisions of the *Act*.

I allow the tenants' application for a monetary award of $100.00 to recover their filing fee. Since this tenancy is continuing, I order the tenants to withhold $100.00 from a future rent payment to implement this decision.

Depending on how the parties choose to address the difference between the cheque that the landlords hold and the $700.00 monthly rent that is owing for February 2021, the tenants may also be entitled to withhold this difference from a future monthly rental payment.

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 18, 2021

Residential Tenancy Branch