



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC, FFT  
                              CNR, LRE, FFT

### Introduction

This hearing convened as a result of two applications filed by the Tenant. In the Tenant's Application for Dispute Resolution, filed on March 10, 2021, the Tenant requested an Order canceling a 1 Month Notice to End Tenancy for Cause issued on March 1, 2021 (the "1 Month Notice") and to recover the filing fee. In the Tenant's Application for Dispute Resolution, filed on April 13, 2021, the Tenant requested an Order canceling a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice"), an Order restricting the Landlord's right to enter the rental unit and recovery of the filing fee.

The hearing was conducted by teleconference at 9:30 a.m. on June 21, 2021. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties were cautioned that recordings of the hearing were not permitted pursuant to *Rule 6.11* of the *Residential Tenancy Branch Rules*. Both parties confirmed their understanding of this requirement and further confirmed they were not making recordings of the hearing.

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.

### Issues to be Decided

1. Should the 1 Month Notice be cancelled?
2. Should the 10 Day Notice be cancelled?
3. Should the Landlord's right to enter the rental unit be restricted?
4. Is the Tenant entitled to recovery of the filing fees paid for both her Applications for Dispute Resolution?

### 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. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlord presented their evidence first.

The Landlord, A.M., testified that the tenancy began in the fall of 2015. He confirmed that the Tenant rents a three-bedroom upstairs unit and a large rec room above the garage. Monthly rent was \$900.00 when the tenancy began and is currently \$975.00. The Tenant paid a \$450.00 security deposit. He stated that the original written tenancy agreement was lost.

The reasons set forth on the 1 Month Notice were noted as follows:

- Tenant has rented part of the house without landlord consent.
- Extra people are living in the house.
- Dog is living in the house (tenant was not allowed any pet except one cat)
- House is truned into storage as inception Feb 23/2021.

[reproduced as written]

The Landlord stated that when the tenancy first began there were only two people. He claimed that currently the Tenant has another full-time subtenant and two other people staying in the house, all of which are living in the rental home without his consent.

The Landlord claimed that the original written tenancy agreement prohibited pets.

The Landlord also claimed that the rental unit has been “turned into storage”. The Landlord submitted photos of the rental unit showing a number of items in the rental unit as well as outside. He further stated that they warned the Tenant on February 23, 2021 that the rental unit needed to be cleaned up.

The Tenant also submitted photos of the rental unit which she claimed were taken recently. In response the Landlord argued that the photos she provided were in fact taken over the years, mostly when she first moved in as he says the floors are now significantly damaged.

The Landlord also provided testimony regarding flooding at the rental unit in February of 2021 as well as their efforts to remediate the damage. This testimony was not relevant to the 1 Month Notice; I therefore decline to record the Landlord’s testimony in this regard. Should the Landlord wish to end the tenancy for reasons relating to the flood, the Landlord may issue a further 1 Month Notice to End Tenancy for Cause.

The Landlord also claimed the Tenant failed to pay rent when due. He issued the 10 Day Notice on April 8, 2021 claiming the Tenant only paid \$900.00 for rent for March 2021, such that she was owing \$50.00 for the previous month. The Landlord testified that the rent was raised as of January 2020 from \$950.00 to \$1,000.00.

The Landlord stated that the Tenant has continued to pay \$950.00 despite the fact the rent was raised to \$1,000.00. He confirmed she has not paid \$50.00 from March, \$950.00 from April, \$950.00 from May and \$950.00 for June such that she is in arrears of \$2,900.00.

The Tenant responded to the Landlord’s testimony as follows.

In terms of the 1 Month Notice the Tenant stated that only she and her daughter live in the rental unit. She confirmed that her boyfriend comes over quite often, and babysits her daughter, but stated he has his own place. The Tenant also stated that her brother lived with her for a couple of months before he moved into the basement suite of the rental home.

In terms of the items in the living room and the outside, she testified that the items were in her brother’s place when the house flooded as he was living in the basement suite.

In terms of the Landlord’s claim that she was not permitted to have pets, the Tenant stated that she has always had a dog and a cat. She also said that she made sure it

was included in the rental agreement (she confirmed she also did not have a copy of the agreement.) In support of her testimony the Tenant submitted in evidence letters from witnesses confirming that she has always had a pet, as well as photos of her dog over the years.

In terms of the 10 Day Notice, the Tenant stated that she stopped paying rent as of March 2021 as the Landlord has collected rent over and above the \$900.00 set forth in the residential tenancy agreement. She further stated that he has raised her rent illegally twice. She claimed she had overpaid rent as of 2017 when the Landlord first illegally raised her rent by \$50.00. He then raised her rent another \$50.00 in January of 2020. Each time the Landlord did not issue the proper notice of rent increase and raised her rent over the legislated amount. She confirmed that as a result she has overpaid rent as follows:

Year	Monthly overpayment	Total
2017	\$50.00 per month for 12 months	\$600
2018	\$50.00 per month for 12 months	\$600
2019	\$50.00 per month for 12 months	\$600
2020	\$100.00 per month for 12 months	\$1,200.00
2021	\$100.00 per month for January, February, and March	\$300.00
	<b>TOTAL OVERPAYMENT</b>	<b>\$3,300.00</b>

The Tenant claimed that she is not in arrears of \$2,900.00, as in fact she has overpaid rent and is permitted by the *Act* to reduce her rent payments accordingly.

The Tenant also submitted copies of her bank statements showing her rent at \$900.00 and when it changed to \$950.00. The Tenant claimed that at some point the Landlord refused e-transfers and insisted on cash and he refused to issue cash receipts.

In reply the Landlord testified as follows. The Landlord confirmed the Tenant's rent was \$900.00 at the start of the tenancy. He claimed that he issued a proper Notice of Rent Increase in January of 2017 to \$50.00; but when he realized it was incorrect, he raised it to \$925.00. He then stated that her rent was raised to \$930.00 in addition to \$20.00 for water for a total of \$950.00 of January 2017. The Landlord also stated that he tried to raise it again in January 2020 to \$1,000.00 but claimed that sum was never collected as it was in error such that she only paid \$950.00 as of January 2020.

The Landlord agreed that the items in the rental home depicted in the photos were in fact her brothers because of the basement flooding but claimed the items outside were hers and not her brothers.

### Analysis

Ending a tenancy is a significant request and must be done in accordance with the *Act*. In this case the Landlord seeks to end the tenancy for cause, pursuant to section 47 of the *Act*, and for nonpayment of rent pursuant to section 46.

In terms of the 1 Month Notice the Landlord relies on the following subsections of section 47:

#### **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:

...

(c)there are an unreasonable number of occupants in a rental unit;

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

...

(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;

(i)the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;

...

In this case the Landlord alleged the Tenant has allowed an unreasonable number of occupants. The onus of proof is on the Landlord to prove the Tenant has allowed an *unreasonable* number of occupants; the Landlord cannot simply restrict the Tenant from having guests. This is set forth in section 9 of the Schedule to the *Residential Tenancy Regulation* which prohibits a Landlord from including such restrictions in a tenancy agreement.

### **Occupants and guests**

**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*.

A landlord who wishes to end a tenancy for cause for this reason must prove that the Tenant has allowed an *unreasonable* number of occupants. In this case, I find the Landlord has failed to meet this burden. Aside from his testimony, the Landlord failed to submit any evidence to support a finding that the Tenant has allowed an unreasonable number of people to reside in the rental unit. I accept the Tenant's evidence that she lives there with her daughter. I further accept her testimony that her boyfriend only stays over occasionally and has his own accommodation. And finally, I accept her testimony that her brother lived with her for a short period of time after the basement suite in the rental home flooded (which he happened to be renting at the time). Even if all four individuals were residing in the rental unit, I would not have found this to be unreasonable in relation to the size of the rental unit. In all the circumstances, I am not satisfied she has allowed an unreasonable number of occupants and I decline the Landlord's request to end the tenancy for this reason.

The Landlord also alleged the Tenant has pets contrary to the tenancy agreement and in doing so has breached a material term of the agreement.

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. A party who alleges a term of an agreement is material bears the burden of proving it is a material term.

Neither party submitted a copy of the residential tenancy agreement. The Landlord claimed it was lost. Section 13(1) of the *Act* requires a landlord to prepare a written tenancy agreement. As the Landlord is responsible for the preparation of such a

document, I find it reasonable to expect the Landlord to also retain a copy. Without a copy I am unable to prefer the Landlord's testimony as to the contents of the agreement as it relates to the Tenant's ability to have pets. Further, as I have not been provided a copy of the agreement, I am not satisfied a material term existed with respect to pets, such that I decline the Landlord's request that I end the tenancy for this reason.

The Tenant testified that she has always had pets and provided photos of her pets over a number of years. She also provided letters from friends who confirm she has always had a pet. On balance I find the Tenant was permitted, pursuant to the tenancy agreement, to have pets at the rental property. Consequently, I decline the Landlord's request to end the tenancy for this reason.

The Landlord also alleged the Tenant has used the rental unit for storage and is storing an unreasonable amount of items. There was no dispute that there was flooding at the rental unit, at the time the Tenant's brother was renting the basement suite from the Landlord. I accept the Tenant's testimony that the items shown in the photos are her brothers and were at the rental unit temporarily. I am not satisfied that by storing her brothers items the Tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant or put the landlord's property at significant risk. As such, I decline the Landlord's request that I end the tenancy for this reason.

I find the Landlord has failed to prove he has cause to end this tenancy. I therefore grant the Tenant's request and cancel the 1 Month Notice.

I similarly cancel the 10 Day Notice for the following reasons.

The parties agreed that rent was \$900.00 pursuant to the tenancy agreement. The evidence before me indicates the Landlord attempted to raise the rent on two separate occasions in 2017 and 2020 such that at the time of the hearing the Landlord expected the Tenant to pay rent in the amount of \$2,000.00.

A Landlord may not increase rent unless the rent increase is done in accordance with the *Residential Tenancy Act*, and the *Residential Tenancy Regulation*.

Part 3 of the *Act* provides as follows:

### **Part 3 — What Rent Increases Are Allowed**

#### **Meaning of "rent increase"**

**40** In this Part, "**rent increase**" does not include an increase in rent that is



(a) for one or more additional occupants, and

(b) is authorized under the tenancy agreement by a term referred to in section 13 (2) (f) (iv) [*requirements for tenancy agreements: additional occupants*].

### **Rent increases**

**41** A landlord must not increase rent except in accordance with this Part.

### **Timing and notice of rent increases**

**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.

(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.

### **Amount of rent increase**

**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.

(2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.

(3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(4) [Repealed 2006-35-66.]

(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.

The relevant portions of the *Regulations* read in part as follows:

#### **Part 4 — Rent Increases**

##### **Annual rent increase**

**22** (1) In this section, "**inflation rate**" means the 12 month average percent change in the all-items Consumer Price Index for British Columbia ending in the July that is most recently available for the calendar year for which a rent increase takes effect.

(2) For the purposes of section 43 (1) (a) of the Act [*amount of rent increase*], a landlord may impose a rent increase that is no greater than the percentage amount calculated as follows:

$$\text{percentage amount} = \text{inflation rate} + 2\%$$

(3) and (4) Repealed. [B.C. Reg. 234/2006, s. 17.]

[am. B.C. Reg. 234/2006, s. 17.]

The Tenant claimed the Landlord did not issue a Notice of Rent Increase in the approved form as required by section 42(3) of the *Act*. Although this was disputed by the Landlord, he failed to provide documentary evidence to support his testimony in this regard. On balance I find the Landlord did not raise the rent in accordance with the *Act*.

Consequently, I find the Landlord collected a rent increase that did not comply with Part 3 of the Act and pursuant to section 42(5), the Tenant may deduct the increase from rent or otherwise recover the increase.

The Landlord alleged the Tenant was in arrears in the amount of \$2,900.00 as of March 2021. I found his testimony with respect to the rent increases to be inconsistent and not credible.

Conversely, the Tenant provided clear testimony and documentary evidence regarding the rent increases. I find her testimony and evidence supports a finding that she paid \$3,300.00 over and above the \$900.00 per month rent pursuant to the agreement for the material time. On balance I accept her testimony and find that she was not in arrears of her rent payments at the time the 10 Day Notice was issued. I therefore grant her request to cancel the 10 Day Notice.

The parties agreed that the original written tenancy agreement had been lost. However, they both testified that rent was originally \$900.00. As I have found the rent increases to be invalid, I therefore find that the Tenant's rent is payable in the amount of \$900.00. I further find the Tenant is to be credited the sum of \$400.00 as an overpayment as of March 2021. In the event the Tenant has paid more than \$900.00 for April, May, June or July 2021, she is to be credited those amounts towards future rent payments.

The Tenant as also been successful in her two Applications, as such, the Tenant is also entitled to recover the \$200.00 filing fees paid. She may apply this to any rent owing, or reduce their next month's rent accordingly.

The priority claims before me were the validity of the 1 Month Notice and 10 Day Notice. I did not hear testimony regarding the Tenant's request for an Order that the Landlord's right to enter the rental unit be restricted. I therefore dismiss this portion of her Application with leave to reapply.

### Conclusion

The Tenant's request for an Order canceling the 1 Month Notice and the 10 Day Notice is granted. The tenancy shall continue until ended in accordance with the *Act*.

The Tenant is to be credited the sum of \$400.00 as an overpayment of rent as of March 2021 as well as \$200.00 as recovery of the two filing fees paid for her application. This \$600.00 may be offset against any rent owing from April 2021 onwards, or reduced from the Tenant's future rent as the case may be.

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: July 14, 2021

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Residential Tenancy Branch