



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC, FFT

### Introduction

The Tenant applies to cancel a One-Month Notice to End Tenancy signed January 28, 2022 (the “One-Month Notice”) pursuant to s. 47 of the *Residential Tenancy Act* (the “Act”). The Tenant also seeks the return of her filing fee pursuant to s. 72 of the Act.

This matter had originally come on for hearing on May 3, 2022 but was adjourned to July 7, 2022 to provide the Landlord an opportunity to serve its evidence on the Tenant’s agent.

D.B. appeared as agent for the Tenant. D.B. is the Tenant’s son. K.N. appeared as counsel for the Landlord. M.V. appeared as agent for the Landlord and is the property manager.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord advised that the One-Month Notice was served on the Tenant and the Tenant’s agent confirmed it was received on January 28, 2022. I find that the One-Month Notice was served in accordance with s. 88 of the *Act* and was received by the Tenant on January 28, 2022.

As mentioned in the interim reasons, the Tenant’s agent advised that the Notice of Dispute Resolution and Tenant’s evidence was served on the Landlord, which was acknowledged by the Landlord’s counsel. I find that pursuant to s. 71(2) of the *Act* that the Landlord was sufficiently served with the Tenant’s application materials.

At the reconvened hearing, Landlord's counsel advised that the Landlord's response evidence was served on the Tenant's agent by way of registered mail. The Tenant's agent acknowledges receipt of the Landlord's evidence. I find that the Landlord's evidence was served in accordance with s. 89 of the *Act*.

### Issues to be Decided

- 1) Should the One-Month Notice be cancelled?
- 2) If not, is the Landlord entitled to an order of possession?
- 3) Is the Tenant entitled to the return of her filing fee?

### Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on September 1, 2005.
- Rent of \$1,149.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$400.00 in trust for the Tenant.

A copy of the written tenancy agreement was put into evidence by the Landlord.

The One-Month Notice put into evidence by the parties lists the reasons for ending the tenancy were due to the Tenant permitting an unreasonable number of occupants in the rental unit and breach of a material term of the tenancy agreement. The Landlord's agent indicates that the Tenant's son has moved into the rental unit.

The Landlord's agent advised that the Tenant's son had moved into the rental unit sometime in February 2020. The Tenant's agent confirms this and indicates that his brother had a medical event such that moving into the Tenant's rental unit was necessary. It was argued that no steps were taken in the spring of 2020 to address the son's occupancy of the rental unit due to the state of emergency brought about by the COVID-19 Pandemic.

The Landlord provided a series of letters from the fall of 2020 with respect to the son's occupancy of the rental unit. I was directed to a letter dated January 5, 2021 sent by Landlord's counsel, which set a deadline for the son to vacate the rental unit or risk the Landlord issuing a One-Month Notice. I am advised by the Landlord's agent that the son moved out of the rental unit sometime in January 2021. The Landlord did not issue a One-Month Notice in early 2021 as the issue had been addressed to the Landlord's satisfaction at that time.

The Landlord's agent alleges that the Tenant's son began to occupy the rental unit once more in December 2021. A letter dated December 20, 2021 outlines the allegation that the son has begun to reside within the rental and that the Landlord would issue a notice to end tenancy if this was not corrected by January 15, 2022.

The Landlord provides a series of videos from a surveillance camera in the lobby of the building. At the hearing, I was advised by the Landlord's agent and counsel that the Tenant's son has a pattern of attending the property beginning at approximately 8:00 AM and leaving at midnight. I have reviewed some of the videos provided by the Landlord, which show the same individual coming and going from the property throughout the day. The videos cover a time range from October 3, 2021 to April 10, 2022. Some of the files could not be accessed by me as they were not viewable, so there may be a greater time range of the videos.

The Landlord's agent further indicates that she attended the rental unit at the Tenant's request to address a fire alarm issue, though did not specify the date. On that occasion, the Landlord's agent observed the Tenant's son on the couch on his phone wearing pyjamas. The Landlord's agent argued that the son is living in the rental unit and speculated that the son may be going to work an evening shift when he leaves at midnight and returns at 8:00 am.

I was advised that the rental unit has one bedroom and is approximately 500 square feet. Landlord's counsel directed me to the National Occupancy Standards issued by the Canada Mortgage and Housing Corporation (the "NOS"). I was advised that the NOS only permits two adults to occupy a single bedroom if they are spouses. As that was not the case here, it was argued that the Tenant was in breach of the NOS. The Tenant's agent argued that the NOS is a federal regulation and has no prescriptive force in this matter as it is an issue within provincial jurisdiction.

I was further directed to clause 13 of the tenancy agreement, which prohibits additional occupants without the Landlord's consent. Landlord's counsel argued it was a material term and emphasized the wording of clause 13 indicates that it is a material term.

The Tenant's agent did not dispute the relevant timeframe provided by the Landlord, nor did he dispute that his brother lived in the rental unit in 2020. The Tenant's agent advises that his brother lives in a nearby rooming house, that he attends the rental unit in the morning, and returns to the rooming house to sleep in the evening. The Tenant's agent further advised that the rooming house does not have a kitchen and says that his brother's rental may not be legal but that this is where he sleeps in the evening. The Tenant's agent denies his brother has a job.

It was argued by the Tenant's agent that the arrangement was beneficial for both the Tenant and his brother, both of whom have medical issues. The Landlord's agent argued that the Tenant's son did not provide care for his mother, though it is uncertain how she came to that conclusion.

### Analysis

The Tenant seeks to cancel the One-Month Notice.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause and serve a one-month notice to end tenancy on the tenant. In this instance, the Landlord issued the One-Month Notice was issued under ss. 47(1)(c) and 47(1)(h) of the *Act*.

A tenant may dispute a one-month notice by filing an application with the Residential Tenancy Branch within 10 days after receiving the notice. If a tenant disputes the notice, the burden for showing that the one-month notice was issued in compliance with the *Act* rests with the landlord.

The primary issue here is whether the son is characterized as an occupant. There is little dispute with respect to the relevant facts here: the Tenant's son currently spends his days at the rental unit but leaves in the evening and returns in the morning. The Tenant's son did occupy the rental unit in 2020 but moved out in or about January 2021.

Section 1 of *Act* provides no definition of "occupant". I note that s. 45.1(1) of the *Act*, which relates to notices to end tenancy issued for reasons of family violence or relating to long-term care homes does define an occupant as "an individual, other than a tenant,

who occupies a rental unit". However, this definition is not particularly helpful. Merriam-Webster's definition of occupant states it is one who occupies a particular place, especially a resident. This definition is more helpful as it emphasizes residency being a key component of occupation, a point that ought to be clear from the fact that the *Act* applies to residential tenancies.

In other words, the issue may be more accurately characterized as whether the Tenant's son is an occupant resident of the rental unit. There are many incidents of residential occupation, including exclusive occupation, storage of personal belongings, and use of the rental unit address as one's primary mailing address or residence. One of the primary incidents of residential occupation would be, in my view, whether an individual in fact sleeps at the rental unit in the evening. It is difficult to imagine an individual being considered a residential occupant without also sleeping at the location.

I have difficulty following the Landlord's position as it is admitted that he leaves every evening and returns every morning. The Landlord's agent argued that the son may be working in the evening and stated her belief that he was living in the rental unit. It is not clear to me how she came to that conclusion and I find the argument to be speculative. I accept that the videos show the Tenant's son coming and going. However, that is not really disputed by the Tenant's agent, who simply argues that his brother is visiting his mother during the day and returns to his place in the evening to sleep.

The Landlord's agent attended the rental unit and had an opportunity to make observations of its state. One would expect that if the son lived in the rental unit it would be evident upon inspection. Perhaps there was a separate bed, the couch was made out into a bed, his personal belongings were present, an additional dresser for clothing, or some other similar observation. None of this was described. Instead, the Landlord's agent says that the Tenant's son was in pyjamas. With respect, that is hardly conclusive proof that the son lives in the rental unit by mere fact that he was wearing pyjamas.

Based on the evidence and submissions of the parties, I find that it is far more likely that the Tenant's son resides in a nearby rooming house as described by the Tenant's agent and visits his mother during the day. The Landlord has failed to provide evidence that the son is, in fact, a resident occupant of the rental unit. No observations of occupancy for residential purposes were provided, such as the storage of personal belongings at the rental unit or spending the evenings at the rental unit. I find that the Tenant's son is not an occupant.

As the Tenant's son is not an occupant, I find that the One-Month Notice was not properly issued. I grant the Tenant's application and hereby cancel the One-Month Notice, which is of no force or effect.

### Conclusion

The Landlord has failed to show that the Tenant's son is an occupant. Accordingly, the One-Month Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

As the Tenant was successful in her application, I find that she is entitled to the return of her filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant's \$100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold \$100.00 from rent owed to the Landlord on one occasion in full satisfaction of her filing fee.

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 08, 2022

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Residential Tenancy Branch