



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **MNETC, FFT**

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- 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 an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by an advocate.

In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given an opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings. The landlord inquired about the authority of the Branch to prevent unauthorized recordings and was directed to the specific Rule. Thereafter the parties each testified that they were not making any recordings of the hearing.

The landlord confirmed receipt of the tenant's application and materials.

The landlord gave evidence that they served the tenant with their evidentiary materials by registered mail sent on September 2, 2022 and again on September 8, 2022. The landlord submitted valid tracking receipts for each package. The tenant submits they did not receive the landlord's materials.

Based on the evidence I find the tenant is deemed served with the landlord's evidentiary materials on September 7, 2022, five days after mailing, in accordance with sections 88 and 90 of the *Act*. Pursuant to Residential Tenancy Policy Guideline 12 I note that the refusal or deliberate failure of a party to pick up materials sent by registered mail does not override the deeming provisions of the *Act*.

At the outset of the hearing a typographic error in identifying the dispute address was noted by the parties and has been corrected in this decision and accompanying order.

#### Issue(s) to be Decided

Is the tenant entitled to the relief sought?

#### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties do not dispute the background facts. This periodic tenancy began in 2017. The monthly rent was \$2,500.00 payable on the first of each month. The rental unit is a suite in a detached home with the landlord occupying the other portion of the building. The landlord is the parent of the tenant's spouse.

The landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated September 28, 2021 with an effective date of December 1, 2021. The reason provided on the notice for the tenancy to end is that the rental unit will be occupied by the landlord or the landlord's spouse. The tenant says that the 2 Month Notice was received on October 2, 2021 and filed an application to dispute the notice with the Branch on October 5, 2021.

The landlord subsequently attempted to withdraw the 2 Month Notice of September 28, 2021 on October 22, 2021. A copy of the correspondence issued by landlord's counsel was submitted into evidence.

The tenant did not consent to the withdrawal of the 2 Month Notice and informed the landlord by correspondence dated October 26, 2021.

The tenant subsequently issued correspondence to the landlord dated October 27, 2021 stating they would vacate the rental unit in accordance with the 2 Month Notice by December 31, 2021.

The tenant withdrew their application for dispute resolution with the Branch disputing the 2 Month Notice on November 4, 2021.

The parties agree that the tenant did not pay rent as required under the tenancy agreement on December 1, 2021. The tenant says they withheld the rent in accordance with section 51(1.1). The landlord submits that the tenant unilaterally withheld the amount and they consider it to be a rental arrear. The landlord says they did not issue a Notice to End Tenancy for Unpaid Rent or pursue the matter as they felt the relationship had deteriorated and they expected the tenant to vacate soon.

The tenant vacated the rental unit on December 31, 2021. The landlord testified that they occupied the full property including the rental unit from that point.

The landlord entered a contract to sell the rental property to an unrelated purchaser. The property was sold on February 15, 2022 and the landlord vacated the rental property.

The tenant submits that the 2 Month Notice of September 28, 2021 could not be unilaterally withdrawn by the landlord and was in full force and effect. The tenant says they vacated the rental unit in accordance with the corrected effective date of the 2 Month Notice on December 31, 2021 and the landlord did not occupy the rental unit as stated in the notice for at least 6 months. The tenant now seeks a monetary award in the amount of \$30,000.00 the equivalent of 12 months' rent payable under the tenancy agreement in accordance with section 51 of the *Act*.

The landlord submits that the 2 Month Notice was withdrawn on October 22, 2021 and there is no statutory basis for a monetary award.

### Analysis

I accept the undisputed evidence that the 2 Month Notice dated September 28, 2021 was served on the tenant on October 2, 2021.

In accordance with section 49(2) of the *Act* a notice under this section is effective on a date that is no earlier than 2 months after the date the tenant receives the notice and is the day before the day in the month when rent is payable under the tenancy agreement.

As set out in section 53(1) an incorrect effective date is automatically changed to the earliest date permitted under the *Act*.

In the present case I find that the earliest effective date of the 2 Month Notice received by the tenant on October 2, 2021 was December 31, 2021 and the effective date of the notice is automatically changed accordingly.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Section 51(2) of the *Act* states that a landlord must pay the tenant an amount that is equivalent to 12 times the monthly rent payable under the tenancy agreement if a tenant receives a notice to end tenancy for landlord's use of property and:

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
- (b) the rental unit is not used for that stated purpose for at least 6 months duration, beginning within a reasonable period after the effective date of the notice,

In the present case the parties agree that the landlord issued a 2 Month Notice dated September 28, 2021 which was received by the tenant on October 2, 2021. The parties

disagree as to whether the notice had any force or effect after the correspondence of October 22, 2021 by landlord's counsel stating the notice was withdrawn.

Residential Tenancy Policy Guideline #11 states:

A landlord or tenant cannot unilaterally withdraw a notice to end tenancy.

I find the tenant expressly states they do not consent to the withdrawal of the notice in their correspondence of October 26, 2021. While the tenant did not expressly identify the Policy Guideline in their correspondence, I find that does not allow the landlord to withdraw the notice.

I further find that the conduct of the parties, in the tenant's cancellation of their dispute of the 2 Month Notice, withholding of last month's rent payable under the tenancy agreement on December 1, 2021, and the landlord's failure to issue a Notice to End Tenancy for Unpaid Rent or correspondence stating that rent remained payable to be consistent with a valid an enforceable 2 Month Notice.

I find the correspondence by landlord's counsel on October 22, 2021 did not serve to withdraw the 2 Month Notice as the tenant did not consent and pursuant to Policy Guideline 11 a party cannot unilaterally withdraw a notice without the express or implied consent of the other party. I find insufficient evidence that any consent was provided by the tenant, in fact I find the tenant expressly denied the withdrawal. Accordingly, I find the 2 Month Notice of September 28, 2021 remained in full force and effect.

The reason provided on the 2 Month Notice for the tenancy to end is that the rental unit will be occupied by the landlord or their spouse. The parties agree that the tenancy ended on December 31, 2021. The undisputed evidence is that the rental property was sold on February 15, 2022 with the landlord vacating the property.

Based on the undisputed evidence of the parties I find that the landlord or their spouse, did not occupy the rental unit as stated on the 2 Month Notice for a period of at least 6 months duration. I find the landlord occupied the rental unit after the tenancy ended for a maximum duration of 6 weeks, far shorter than required under the *Act*.

Section 51(3) of the *Act* provides that:

The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under

subsection (2) if, in the director's opinion, **extenuating circumstances** prevented the landlord or the purchaser, as the case may be, from

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
- (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice

Residential Tenancy Policy Guideline 50 provides some examples of extenuating circumstances including death and wildfires. The Guideline specifically cites changing one's mind as an example of circumstances that would not be considered extenuating.

While the landlord made some reference to illness of family members in their written submissions, little cogent details were provided. The undisputed evidence of the parties is that the landlord initially intended to sell the property in September 2021, entered a listing agreement with a realtor in October 2021 and entered a contract for purchase and sale on November 3, 2021 ultimately transferring the property on February 15, 2022. I find insufficient evidence that there were any extenuating circumstances that would excuse the landlord from their obligation to pay the tenant pursuant to section 51(3).

I find, based on the totality of the evidence before me, that the landlord issued a valid 2 Month Notice to End Tenancy for Landlord's Use dated September 28, 2021. I find that the notice could not be unilaterally withdrawn by the landlord and remained in full force and effect. I accept the evidence that the tenant vacated the rental unit on the corrected effective date of the notice on December 31, 2021. I find that the landlord did not use the rental unit for the purpose stated on the notice for at least 6 months. I find that no extenuating circumstances exist that would excuse the landlord from paying an amount equivalent to 12 months' rent in accordance with section 51(2) of the Act.

Consequently, I find that the tenant is entitled to a monetary award of \$30,000.00, the equivalent of 12 times the monthly rent for this tenancy.

As the tenant was successful in their application, they are also entitled to recover the \$100.00 filing fee.

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$30,100.00. The landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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 29, 2022

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Residential Tenancy Branch