



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding LARCO INVESTMENTS LTD.  
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes      **CNC, MNDCT, RR, RP, PSF, OLC, FFT**

### Introduction

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "Act") for:

- An order to cancel a 1 Month Notice to End Tenancy for Cause, pursuant to sections 47 and 55;
- A monetary order for damages or compensation pursuant section 67;
- An order for a reduction of rent for repairs, services or facilities agreed upon but not provided pursuant to section 65;
- An order for repairs to be made to the unit, site or property pursuant to section 32;
- An order that the landlord provide services or facilities required by the tenancy agreement pursuant to section 27;
- An order for the landlord to comply with the Act, regulations or tenancy agreement pursuant to section 62;
- Authorization to recover the filing fee from the other party pursuant to section 72.

The tenant attended the hearing and the landlord was represented by its counsel, DP. As both parties were present, service of documents was confirmed. The landlord acknowledged service of the Notice of Dispute Resolution Proceedings package and the tenant acknowledged service of the landlord's evidence. Neither party raised issues with timely service of documents.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act.

Each party was administered an oath to tell the truth and they both confirmed that they were not recording the hearing.

#### Preliminary Issue

A person twice called into the hearing, although he was experiencing problems with the phone he was using and could not be heard. The tenant advised it was likely his witness and I advised the parties that the tenant's witness may testify if he called in. The tenant's witness did not call back and participate in the hearing.

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply. Rule of Procedure 6.2 allows an arbitrator to decline to hear or dismiss unrelated issues. At the commencement of the hearing, I determined that the issue of whether to uphold or cancel the landlord's notice to end tenancy was the primary issue before me and that the other issues listed on the tenant's application were not related and would be dismissed with leave to reapply.

#### Issue(s) to be Decided

Should the landlord's 1 Month Notice to End Tenancy for Cause upheld or cancelled?  
Can the tenant recover the filing fee?

#### Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The landlord presented his case first in accordance with Rule 7.18 which states:

*The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof. One instance when the respondent bears the onus of proof is where a tenant applies to cancel a Notice to End Tenancy. In such a*

*case, the hearing will begin with the landlord presenting first unless the arbitrator decides otherwise.*

The landlord called witness, TD, the building manager to testify first. He testified that he served the tenants with the 1 Month Notice to End Tenancy for Cause by posting it to the tenants' door on July 24, 2022. He also sent a copy via registered mail to the tenants' address on July 25<sup>th</sup> and provided a tracking number, printed on the cover page of this decision.

A copy of the notice to end tenancy was provided as evidence. The reason for ending the tenancy states the tenant has assigned or sublet the rental unit/site without landlord's written consent.

The witness testified that there are 3 consecutive tenancies with the tenants, the last one is dated May 7, 2013. The building manager suspected the tenants were subletting the unit by noticing unknown people using a fob to access the front door of the unit and going to the 17<sup>th</sup> floor. The building manager pulled the fob activity report and saw that the fob used was associated to this tenant's fob. Cross referencing the fob activity report with screenshots taken from the camera at the building entrance, the landlord suspects the landlord has sublet the rental unit. The landlord provided the fob activity report and photos taken from the building security as evidence.

The building manager alleges that the tenants used facebook marketplace to seek a subtenant and VRBO to advertise the rental unit as a short term rental. The landlord provided a copy of both advertisements into evidence. When a co-worker contacted the phone number associated with the rental, a response came back from a phone number associated to the tenant in the landlord's info sheet. The landlord also points out the advertisements indicate the same general vicinity of the rental to be where the tenant's unit is; the view in the ad is the same as the tenants'; and the person posting the ad has the same name as the tenant, HT.

The landlord also points to photos taken of food delivery and packages coming into the building associated to the tenants' address, but not in the name of either of the tenants. The landlord testified that he rarely sees the tenant in the building, just when he comes in to use the gym. According to the fob activity report, the tenant rarely comes in but the subtenant does.

In cross examination, the building manager testified that there is another access point to the building that is not controlled by fob and photos of the tenant AA in the building were not provided for this hearing.

The tenant gave the following testimony. He is the occupant of the rental unit and always has been. HT, the second person named on the tenancy agreement has temporarily moved out of the unit and intends on moving back in when repairs have been made to the unit.

The tenant testified that he has been getting roommates to live with him and help pay the rent. The first one was from late November until April, 2022. He had another roommate from September to October 2022. The so-called subletters are just roommates which he is entitled to have. The tenant directed my attention to a video provided as evidence by the landlord whereby the building manager asks his roommate to fill out a tenant information sheet on April 7<sup>th</sup> as proof that she is a roommate, not a subtenant.

Regarding the facebook posts, the tenant states the co-tenant on the lease HT does not have a facebook account and that there are 2,000 people with that handle on the platform. Regarding the fob activity report generated, it shows a completely different site address from his residence. The tenant argues that he was provided with 3 keyfobs and although his roommates use the front door, the tenant accesses the building using the side entrance that is not fob controlled. The landlord has not provided any photos of the tenant in the building, causing an inaccurate and misleading record of him being in the building.

The tenant also referenced a multitude of documents that show his address is the rental unit in dispute. These include a drivers license, prescriptions, internet accounts, utility bills and doctors notes.

### Analysis

I find the landlord served the tenants with the 1 Month Notice to End Tenancy for Cause on July 27, 2022, three days after July 24, the day it was posted to their door in accordance with sections 88 and 90 of the Act. The tenant filed his application to dispute the notice on July 29, 2022.

Section 47 of the Act provides that upon receipt of a Notice to End Tenancy for Cause, the tenant may, within ten days, dispute it by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files the application, the landlord bears the burden to prove he or she has valid grounds to terminate the tenancy for

cause. The landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the Notice. In the matter at hand, the landlord must demonstrate the tenant has assigned or sublet the rental unit/site without landlord's written consent.

Assignment and Sublets are examined in Residential Tenancy Branch Policy Guideline PG-19. Under part A – Legislative Framework, the guideline states:

If a tenant is allowing their rental unit or space within their rental unit to be used for a commercial venture, such as a vacation or travel accommodation, **a landlord may issue a One Month Notice to End Tenancy (form RTB-33) for a breach of a material term.** Variables such as the terms of the tenancy agreement and whether a tenant remains in occupation of the rental unit will be considered on a case-by-case basis by an arbitrator. See section C for more information.

(bold emphasis added)

Under part C. – Subletting, the guideline states:

### **Occupants/roommates**

Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the Residential Tenancy Act.

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### **Use of rental property for travel/vacation accommodation**

Section 4 of the RTA states that the Act does not apply to living accommodations occupied as vacation or travel accommodation and there is no recourse under the RTA for disputes arising from vacation or travel accommodation. However, there have been dispute resolution proceedings arising from tenants who have rented out all or part of their rental unit via AirBnB or other vacation/rental listing services and their landlord has issued a One Month Notice to End Tenancy (form RTB-33) for the tenant's failure to obtain the landlord's written consent to sublet. As stated above within section C, **unless**

**the tenant is acting as an agent for the landlord or has moved out of the unit, this is not a true sublet under the RTA.** It is unlikely that a One Month Notice to End Tenancy (form RTB-33) for cause for the tenant's failure to obtain the landlord's written consent to sublet would be successful in these circumstances, although this type of action by a tenant may constitute other breaches of the Act or tenancy agreement for which the landlord might issue a One Month Notice to End Tenancy (form RTB-33).

In the matter before me, the landlord bears the onus to prove on a balance of probabilities that the tenant had sublet the rental unit/site without landlord's written consent. The landlord did not choose alternate reasons for ending the tenancy, such as breach of a material term of the tenancy that was not corrected within a reasonable time after written notice to do so. As stated in the Policy Guideline, If a tenant is allowing their rental unit or space within their rental unit to be used for a commercial venture, such as a vacation or travel accommodation, a landlord may issue a One Month Notice to End Tenancy (form RTB-33) **for a breach of a material term.**

Therefore, in order for me to uphold the landlord's notice to end tenancy, I must find the tenant has sublet the rental unit. As stated above, the tenant must move out of the rental unit in order for this to be a true sublet.

In evidence, the landlord provided fob entry reports together with photos of people entering the building. First, the tenant raised the issue that the key fob record is for an entirely different building. Second, there is no direct cross referencing for me to associate each entry into the building against each photo provided, so I must rely on the landlord's testimony that there is a correlation. I also rely on the landlord to assure me that the people in the photos are not the tenants AA or HT, named on the tenancy agreement, as I do not know what either of them look like. Moreover, the tenant raised the argument that the landlord failed to include any photos of himself or the co-tenant named on the tenancy agreement entering or being inside the building. I agree with the tenant that this provides an incomplete record of whether the tenant resides in the building.

The tenant raises another argument that just because there is no record of him entering via fob that it necessarily means he does not live there. I can accept that he enters and leaves the building through the side door which the tenant testified is more convenient for him to use. I have also reviewed the various pieces of evidence supplied by the tenant that indicate the rental unit is his residence. I have insufficient evidence from the landlord to corroborate their claim that the tenant does not actually reside in the rental unit.

Lastly, the landlord provided the facebook and VRBO advertisements as proof the tenant has “sublet” the rental unit. The landlord suggests that the vicinity of the “bubble” where the VRBO accommodation is located suggests that this is the tenant’s unit. The landlord also states that the view depicted in the ads are very similar to the tenant’s view from the 17<sup>th</sup> floor. The person who posted the ad has the same name as the tenant HT and the phone number matches the tenant AA. While I accept that each of these factors point to a potential use of the unit for a commercial purpose, I am not satisfied the tenant has actually **sublet** the rental unit or assigned the tenancy agreement. It is altogether possible that the tenant got a roommate.

The evidence that there are food delivery packages addressed to a person not named on the tenancy agreement is not necessarily evidence of a sublet or an assignment of the tenancy agreement. It may be that the order was made by a roommate of the tenant’s, as the tenant submits. In order for me to be satisfied the tenant has sublet or assigned the tenancy, I have to be satisfied the tenant is no longer occupying the rental unit. I find the landlord has provided insufficient evidence to satisfy me this is the case. Consequently, I find the landlords notice to end tenancy for cause, that the tenant assigned or sublet the tenancy is of no force or effect and I cancel it. This tenancy shall continue until it is ended in accordance with the Act.

The tenant’s application was successful and the tenant may recover the \$100.00 filing fee. The tenant may reduce a single payment of rent owing to the landlord by \$100.00 pursuant to section 72 of the Act.

### Conclusion

The notice to end tenancy for cause is cancelled. This tenancy shall continue until it is ended in accordance with the Act.

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: December 23, 2022

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Residential Tenancy Branch