



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **FFT, CNC**

### Introduction

This hearing dealt with an application by the tenants under the *Residential Tenancy Act* (the *Act*) for the following:

- Cancellation of One Month Notice to End Tenancy for Cause (“One Month Notice”) pursuant to section 47;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The landlord PM attended with her son and agent DM (“the landlords”). The tenants attended. No issues of service were raised. I find each party served the other in accordance with the *Act*.

The hearing process was explained, and all participants had an opportunity to ask questions.

The hearing lasted 93 minutes. Only the evidence and testimony relevant to my decision is referenced.

### Issue(s) to be Decided

Are the tenants entitled to the following:

- Cancellation of One Month Notice to End Tenancy for Cause (“One Month Notice”) pursuant to section 47;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

### Background and Evidence

The parties agreed the tenancy began on November 1, 2010. The rent is \$1,263.00 payable on the first of the month. At the beginning of the tenancy, the tenants provided a security deposit of \$550.00 which the landlord holds. A copy of the tenancy agreement was submitted which stated that occupancy under the agreement is limited to the two tenants and two children. The tenants have since added two children to their family and now have four children.

The unit is the main floor of a building located on two acres of land; the landlords do not live there. The basement suite is occupied by a couple and a child. The landlords stated that the building has an old septic system which was in existence when the landlord purchased the property many years ago. The septic system also services one other residence, for a total number of users being 11.

The landlords submitted a copy of the One Month Notice dated January 30, 2020. The tenants acknowledged service by posting on January 30, 2020; service was therefore affected on February 2, 2020. The tenants filed an Application for Dispute Resolution within the time period.

The Notice sets out six grounds for the termination of the tenancy:

1. Tenant has allowed an unreasonable number of occupants in the unit/site.
2. Tenant or a person permitted on the property by the tenant has:
  - a. significantly interfered with or unreasonably disturbed another occupant or the landlord.
  - b. seriously jeopardized the health or safety or lawful right of another occupant or the landlord.
  - c. put the landlord's property at significant risk.
3. Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.
4. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The parties agreed that the landlords issued a previous One Month Notice in September

2018. The tenants brought an Application to cancel the Notice; the hearing was held on November 13, 2018 and a Decision entered dated November 14, 2018, a copy of the Decision being submitted as evidence. Reference to the hearing number appears on the first page. The Arbitrator cancelled the previous Notice and ordered that the tenancy continue.

The tenants asserted that all grounds in the current Notice are substantially the same as the grounds in the previous 2018 Notice. They requested that the current Notice be cancelled because all the grounds were rejected by the Arbitrator in the previous Decision.

The landlords disagreed with the tenants' position and stated that there have been changes in the two years between the two Notices., Two key additional pieces of evidence were relied upon by the landlord and submitted for this hearing.

The first is a letter from a septic company dated February 28, 2020 stating that the septic system has a capacity of serving "5.5 to 8.5 people". The second is a recent letter of complaint from the downstairs occupants regarding noise from the tenants' unit and complaints about the tenants control of the heating system, often leaving the downstairs occupants cold.

The landlords said that in the previous hearing, the landlords did not have evidence that the septic system was overused, and the landlord did not submit a letter of complaint from the people downstairs or call them as witnesses.

In the previous Notice, the landlords relied on the following grounds: (numbering is consistent with the list referenced above, with the inapplicable standard sections in the form struck out)

1. Tenant has allowed an unreasonable number of occupants in the unit/site.
2. Tenant or a person permitted on the property by the tenant has:
  - a. significantly interfered with or unreasonably disturbed another occupant or the landlord.
  - ~~b. seriously jeopardized the health or safety or lawful right of another occupant or the landlord.~~
  - ~~c. put the landlord's property at significant risk.~~
- ~~3. Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.~~

4. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The parties provided the following evidence with respect to each of the grounds:

1. *Tenant has allowed an unreasonable number of occupants in the unit/site.*

The landlords stated that there is a single septic system for the unit, the basement apartment in the building, and another unit, for a total of 11 residents who use the system.

The landlords stated that the septic system is old and cannot withstand the demands the 11 people currently using it; sometimes there is a smell of sewage and occasionally the ground is wet with sewage excess. They assert the current situation (overuse, smell and discharge) causes a health and safety risk, although the landlords did not submit any documentary evidence to support their claims in this regard.

The landlords said there is no easy and inexpensive solution because of the location of the septic system on a steep incline and the high costs associated with joining the municipal system. They said they have explored solutions and the only viable resolution is to have the tenants vacate, with their 6 occupants, and replace them with a new tenancy limited to 3 occupants.

The tenants deny that the landlords have grounds to end their tenancy because their family has grown to 6 people. They deny the landlords' claims that the system is not working adequately, that there is excess sewage discharged, or that odour is a problem. They asserted that they should not be penalized with eviction by the landlord.

In the previous hearing, the landlords similarly relied on the fact that the tenancy agreement permitted two adults and two children. They argued, as they do now, that there are too many people using the septic system. At the previous hearing, the tenants had four children, as they do today.

The primary difference between the situation relevant to the previous Decision and the situation now, is that the landlord received a letter from a septic company which says that "5.5 - 8.5 people" should be using the system. A copy of the letter of February 28, 2020 was submitted as evidence. The letter makes no reference to any problems with the system although the landlord reports issues as described above.

The landlords assert that in the intervening two years, the system has declined in efficiency and it has become urgent that less people use it. They claimed the system is “over saturated”, sewage is coming to the surface, the system is “overflowing”, and there are “smells, odors and gasses” related to the sewage. The tenants deny all these assertions.

In short, the landlords argued that the tenants have allowed an unreasonable number of occupants in the unit.

2. *Tenant or a person permitted on the property by the tenant has:*
  - a. *significantly interfered with or unreasonably disturbed another occupant or the landlord.*

This is the second ground for the issuance of the current Notice upon which the landlord relied. The landlord relied on two arguments in support.

The first argument concerns the overuse of the system by the unauthorized number of occupants in the unit. An account of the landlords’ argument appears above and is not repeated here. It is the same argument referenced in the previous Decision with the addition of the letter from the septic company of February 28, 2020.

The second ground related to noise coming from the tenants’ unit.

In the previous hearing, the landlords stated that the occupants of the basement suite find the tenants noisy. The occupants of the basement suite were not called as witnesses and no documentary evidence was submitted to support the landlords’ testimony.

The landlords stated that the tenants have been noisy in the intervening two years and that the disturbance to the people in the basement suite is extreme and warrants the eviction of the tenants. The landlords claimed to have verbally warned the tenants many times. A copy of a recent written letter of complaint from the downstairs occupants was submitted; the landlord acknowledged this was the only letter of complaint and no warning letters had been given to the tenants.

The tenants acknowledged that with four children, normal living in their home can create noise. However, they stated they do everything within their power to reduce noise. At

the hearing they expressed surprise that the downstairs tenants have noise criticisms as they have not had “one word of complaint” in the previous two years. They deny receiving any verbal warnings from the landlords. The residents of the basement suite were not called to give evidence in either hearing.

2. *Tenant or a person permitted on the property by the tenant has:*
  - a. ...
  - b. *seriously jeopardized the health or safety or lawful right of another occupant or the landlord.*

This ground was not alleged in the previous hearing.

The landlords relied on the facts referenced above with respect to the septic system for this cause. The landlords provided testimony of discharge of sewage to ground level, odour and so on which is not repeated here. The landlords provided no documentary evidence in support of their claims that the tenants “jeopardized the health or safety” such as a letter from a government health or safety authority.

2. *Tenant or a person permitted on the property by the tenant has:*
  - a. ...
  - b. ...
  - c. *put the landlord’s property at significant risk.*

This ground was not alleged in the previous Decision.

The landlords relied on the facts referenced above with respect to the septic system for this cause. The landlords’ assertions and the tenants replies are not repeated here.

3. *Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.*

This ground was not alleged in the previous Decision.

The landlords relied on the facts referenced above with respect to the septic system for this cause. They repeat the arguments already outlined above. That is, the tenants have too many people living in the unit; their overuse of the septic system has caused damage to the system. The parties’ arguments and evidence is not repeated here.

The landlords also claimed that the tenants discharged unacceptable items that clog the septic system and cause it to perform poorly. However, the tenants denied this, and no evidence was submitted as to which of the users of the septic system were responsible.

*4. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.*

This ground was alleged by the landlords in the Notice which was the subject of the previous Decision. The parties' arguments and evidence are not repeated here.

I now address the determination in the previous Decision of the landlords' claims.  
*Previous Decision – first ground (unreasonable number of occupants)*

In the previous Decision, the Arbitrator found that the landlords had not met the burden of proof with respect to any of the causes in the 2018 Notice.

The Arbitrator wrote with respect to the first cause (over occupancy), in part:

*"I am not satisfied that the Tenants have an unreasonable number of occupants in the rental unit. There is no issue that the Tenants had two children when they moved into the rental unit and now have four children. I do not find the two additional children to amount to an unreasonable number of occupants in and of themselves. ...*

*I do not accept that the two additional children pose a risk to the septic tank without some evidence to support the landlord's position in relation to the septic tank. The landlord acknowledged that there have been no issues with the septic tank. The landlord submitted no evidence to support the position that the two additional children pose a risk to the septic tank failing.*

*.... I am not satisfied that the two additional children amount to an unreasonable number of occupants in the rental unit. I am not satisfied that the Landlords have proven the first ground on the Notice."*

*Previous Decision – second ground (significant interference)*

The Arbitrator then considered the second ground, that the tenants caused significant

interference. Having rejected the argument that the tenants were interfering with the septic system by having two more children, the Arbitrator considered the allegation of noise.

The Arbitrator wrote, in part:

*“In relation to the noise, the Tenants disputed that the downstairs tenants have issues with noise levels at the rental unit. Again, the landlords provided no evidence in support of their position on this issue such as witness statements from the downstairs tenants or written complaints received from the downstairs tenants. Not did the Landlord call the downstairs tenants as witnesses at the hearing. I do not accept that there is a noise issue in the absence of any evidence to support the Landlord’s position on this.*

*I do not accept that the Tenants have significantly interfered with or unreasonably disturbed the downstairs tenants.*

The Arbitrator rejected the landlords’ claim that the tenants have significant interfered with or unreasonably disturbed the downstairs tenants.

*Previous Decision – third ground (breach of material term)*

The Arbitrator rejected the assertion that the tenants had breached a material term of the tenancy, stating in part:

*There is no evidence before me that the Landlords took any steps to end the tenancy when the Tenants had their third child which, based on the position of the Landlords, would have been a breach of the note on the front page of the tenancy agreement. I do not accept that the note is a material term when the Landlords did nothing to end the tenancy based on an apparent breach of the term for four years.*

With respect to the current Notice, the landlords argued that the recent letters from the septic company and the downstairs occupants are sufficient evidence of grounds under the Notice under one of the six headings claimed.

The tenants reply that all these matters were argued in the previous hearing.



## Analysis

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims and my findings are set out below.

Section 47 of the *Act* provides that upon receipt of a Notice to End Tenancy for Cause, the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the One Month Notice.

It is acknowledged by the parties that the Notice was served, and the tenants applied within the timeline.

The landlord must now show on a balance of probabilities, which is to say, it is more likely than not, the tenancy should be ended for the reasons identified in the One Month Notice:

### *Res judicata*

The legal principle of *res judicata* prevents a party from pursuing a claim that already has been decided. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that issue was contested and decided in the first action.

### *Causes in Notice*

I will now address each of the six causes listed in the Notice.

#### *1. Tenant has allowed an unreasonable number of occupants in the unit/site.*

I find that the previous Decision dealt with this cause. The tenants' number of children has not changed. I find the evidence from the landlords is not markedly different from the evidence submitted to the Arbitrator in the previous decision. I find this issue has already been decided and the principal of *res judicata* applies. .

#### *2. Tenant or a person permitted on the property by the tenant has:*

- a. *significantly interfered with or unreasonably disturbed another occupant or the landlord.*

While the landlords submitted a letter from the downstairs occupants complaining about noise, documentary evidence that was not present in the previous hearing, I find the landlords' assertions are essentially the same at this hearing as they were at the previous hearing, albeit with more details. I find that the landlords are attempting to reargue a cause for ending the tenancy which has already been decided.

The issue of the alleged overburdening of the septic system was dealt with in the previous hearing. I find the landlords are attempting to reargue an issue that has already been decided.

I find the principal of *res judicata* applies with respect to this cause.

- b. *seriously jeopardized the health or safety or lawful right of another occupant or the landlord.*

While this cause was not listed in the previous notice, I find the landlords are attempting to refashion the same argument that was decided in the previous Decision. I also find this cause was previously decided and has been alleged by the landlords to reargue their case under a new heading.

I find the principal of *res judicata* applies. I therefore dismiss this cause without leave to reapply.

- c. *put the landlord's property at significant risk.*

The landlords allege too many people in the tenants' unit overburden the septic system and caused, or may cause, significant damage to the system. I find this argument is essentially the same as the argument made by the landlords in the previous hearing. I find the Arbitrator in the previous hearing dealt with this matter.

For these reasons and for the reasons stated with respect to the other alleged causes, I find this issue has already been decided.

I find the principal of *res judicata* applies.

3. *Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.*

Again, and for the reasons stated above, I find that this alleged cause is an attempt by the landlords to reargue an issue that has already been decided.

I find the principal of *res judicata* applies.

4. *Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.*

For the reasons stated above, I find that this alleged cause is an attempt by the landlords to reargue an issue that has already been decided.

I find the principal of *res judicata* applies.

### *Conclusion*

I find that the previous Decision dealt with substantially the same causes contained in the One Month Notice that is the subject of this hearing although the landlords expanded the causes from three to six.

I find the evidence from the landlords is not markedly different from the evidence submitted to the Arbitrator in the previous decision. I find this Notice is an effort by the landlords to reopen a case that has already been decided and to get a “second kick at the can”. While the current Notice contains more selected causes, the underlying circumstances are essentially the same.

I therefore find that this matter is *res judicata*, meaning the issues have already been conclusively decided and cannot be decided again. I do not have the jurisdiction to consider a matter that has already been the subject of a final and binding decision by another arbitrator appointed under the *Act*.

In the previous Decision, the arbitrator cancelled the Notice.

The tenants’ application is granted in this case also. The landlords’ Notice to End Tenancy for Cause is dismissed. The tenancy shall continue until ended in accordance with the tenancy agreement and the *Act*.

I award the tenants reimbursement of the filing fee of \$100.00 which they may deduct from rent on a one-time basis.

Conclusion

The tenants' application is granted. The landlords' Notice to End Tenancy for Cause is dismissed. The tenancy shall continue until ended in accordance with the tenancy agreement and 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: April 08, 2020

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Residential Tenancy Branch