



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding NEST PROPERTY MANAGEMENT & REAL ESTATE SERVICES LTD. and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNL, FFT

### Introduction

This hearing dealt with the tenant's application to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property ("2 Month Notice").

The tenant appeared at the hearing. The landlord was represented by an agent for the property management company. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

I confirmed the landlord's agent was in receipt of the tenant's Application for Dispute Resolution. The landlord did not submit any materials prior to the hearing.

The hearing process was explained to the parties and the parties were given the opportunity to ask questions.

### Issue(s) to be Decided

1. Did the landlord serve the tenant with a valid and enforceable notice to end tenancy?
2. Did the tenant dispute the notice to end tenancy within the time limit for doing so?
3. Should the notice to end tenancy be upheld or cancelled?
4. Award of the filing fee.

### Background and Evidence

The landlord's agent testified that he started managing the property for the property owner in August 2020. The landlord's agent testified that he believes there is a written tenancy agreement and that he has requested it from the owner but the owner has not yet provided him with a copy. The tenant testified that there is no written tenancy agreement.

The landlord's agent was uncertain when the tenancy started. The tenant stated the tenancy started in 1999 or 2000, approximately.

Both parties provided consistent statements that the tenant is required to pay rent of \$635.00 on the first day of every month.

The landlord's agent testified that the owner is holding a security deposit. The tenant testified that there was no security deposit.

With respect to service of the 2 Month Notice, the landlord's agent testified that it would most likely have been shoved in the door jamb of the rental unit on the date he signed the 2 Month Notice, which is July 28, 2020, as this is the way he normally serves notices to tenants.

The tenant testified that he found the 2 Month Notice in his mailbox on August 11, 2020. The tenant described that he is certain it was served that date, or August 10, 2020 because he had checked his mail on August 9, 2020 and found his BC Hydro bill. Then, he checked his mail again on August 11, 2020 and found his Fortis bill and the 2 Month Notice in the mailbox at the same time. The tenant described the 2 Month Notice as being in an envelope with a notation "hand delivered" on it.

The landlord's agent confirmed that the 2 Month Notice was in an envelope and that he likely wrote "hand delivered" on the envelope because he delivered the notice by his hand. The landlord's agent acknowledged that "hand delivered" does not refer to how the tenant received the envelope.

As for the content of the 2 Month Notice, the tenant pointed out that his last name is incorrect. The tenant has no idea where that name came from as he has never used that name. The tenant stated that when he pays rent at the bank his name is on the receipt, and he has identification showing his actual last name.

The landlord's agent testified that he obtained the last name appearing on the 2 Month Notice by way of an oral statement made by the owner of the property but the agent acknowledged he has not been provided any documentation by the owner showing the tenant's name.

As for the reason for ending the tenancy, the 2 Month Notice indicates that the landlord seeks to end the tenancy so that the owner's child may occupy the rental unit. The landlord's agent testified that is what the owner told him.

The tenant questioned whether the owner intends to have his child occupy the rental unit in good faith. The tenant pointed out that the owner served him with a previous 2 Month Notice to End Tenancy for Landlord's Use, in 2016, indicating the landlord intended to do renovations, and the tenant disputed that notice and was successful in having the notice cancelled. The tenant was of the view the landlord likely intends to renovate the rental unit. The landlord's agent acknowledged that he was aware of a previous eviction attempt and that it was unsuccessful but he did not know any other details as it preceded his management contract.

The landlord's agent further stated that the tenant has not paid "a stitch of rent" since the COVID-19 pandemic started; however, the agent also confirmed that the tenant did pay rent for September 2020. The landlord's agent stated that in deciding which property to place the owner's son, the property with the tenant who did not pay rent was chosen as it made the most financial sense. The tenant disagreed that he has not paid rent.

I also heard that the landlord's agent may have been unlawfully charging a late fee based on the agent's "introductory letter" and not the tenancy agreement.

### Analysis

Pursuant to section 49 of the Act, a tenant in receipt of a 2 Month Notice has 15 days to file an Application for Dispute Resolution to dispute it. A notice to end tenancy is to be served upon the tenant in a manner that complies with section 88 of the Act.

As for service of the 2 Month Notice and whether the tenant filed to dispute the Notice within the time limit for doing so, I find the landlord's agent's oral testimony to be inconsistent and failed to satisfy me that the tenant was properly served when the landlord's agent claims he served the tenant. To illustrate:

- The landlord's agent testified that he started managing the property in August 2020 yet he claims to have served the tenant on July 28, 2020 since that is the date of signature appearing on the 2 Month Notice. There was no explanation why the agent would be issuing and serving a notice to end tenancy before his property management contract commenced. As such, I found these statements inconsistent and unreliable.
- The landlord's agent testified that he most likely served the 2 Month Notice by putting it in the door jamb of the rental unit door because that is his normal practice. I find this statement lacks certainty as to what happened in this case. Further, placing a document in a door jamb is not a permissible method of service under section 88 of the Act. If a document is "posted" to a door, section 88 requires that it be "affixed" to the door. This would require secure attachment, such as by strong tape or the like.

In contrast, I found the tenant's description of when and how he received the 2 Month Notice to be detailed and consistent. Therefore, I accepted that the tenant received the 2 Month Notice on August 11, 2020 as he testified.

In finding the tenant received the 2 Month Notice on August 11, 2020 I am satisfied the tenant filed to dispute the Notice within the 15 day time limit since he filed his Application for Dispute Resolution on August 25, 2020.

As I suggested to the landlord's agent, using the term "hand delivery" may be confusing and any notations should reflect how the document was actually placed at the property or given to the recipient.

The tenant pointed out that the landlord erred in reflecting his last name. Unfortunately, the landlord's agent is relying upon hearsay to determine the tenant's name rather than a written tenancy agreement or other records the owner has in his possession. The tenant did not provide a copy of his identification in making this Application for Dispute Resolution but he did point out this issue in making his Application for Dispute Resolution and the landlord did not produce any documentation to demonstrate the tenant was correctly identified. Accordingly, I am unsatisfied the landlord correctly identified the tenant on the Application for Dispute Resolution and that is a basis for finding the 2 Month Notice unenforceable.

Finally, the tenant called into question the landlord's true intentions with respect to the property and where a tenant does so, the landlord bears the burden to prove they intend

to use the property for the stated purpose and they have a good faith intention in ending the tenancy, free from an ulterior motive. In this case, the owner and/or the owner's child did not appear for the hearing or otherwise provide any submissions concerning their intentions to occupy the property in good faith. Therefore, I find there to be a lack of evidence on part of the landlord to meet the landlord's burden of proof.

Considering all of the above, I cancel the 2 Month Notice with the effect that the tenancy continues at this time.

I further make the following orders, pursuant to the authority afforded me under section 62 of the Act:

1. The landlord or landlord's agent is to provide the tenant with a copy of the written tenancy agreement immediately upon locating it, if one exists.
2. The tenant shall show the landlord or landlord's agent a copy of his identification, upon request by the landlord or landlord's agent, to ensure the landlord has the tenant's correct name.
3. Any late fees charged or paid by the tenant must be in accordance with section 7 of the Residential Tenancy Regulations. The Regulations require that a late fee must be provided for in the in the tenancy agreement, among other things. An "introductory letter" or operating practice of the property management company, is not in itself a lawful means to charge or collect a late fee. Rather, the landlord must be able to point to the tenancy agreement as being a basis for charging the late fee. If the tenant has paid an unlawful late fee the landlord must refund it to the tenant or deduct it from rent otherwise payable. The parties are to try to resolve this matter between themselves but if this matter is not resolved satisfactorily, the tenant may make another Application for Dispute Resolution to seek further remedy.

Although not an order, having heard the landlord's agent is of the belief there is unpaid rent and the tenant stated he pays rent to the owner by way of a bank deposit, I suggest the tenant show the landlord's agent his bank deposit receipts so that the landlord's agent can get an accurate accounting of any unpaid rent.

Since the tenant was successful in this Application for Dispute Resolution, I award the tenant recovery of the \$100.00 filing fee he paid for this Application for Dispute Resolution. The tenant is authorized to deduct \$100.00 from rent otherwise payable to recover this award.

Conclusion

The 2 Month Notice is cancelled and the tenancy continues at this time.

I have issued other orders to the parties in this decision pursuant to section 62 of the Act.

Pursuant to section 72 of the Act, the tenant is awarded recovery of the filing fee. I have authorized the tenant to deduct \$100.00 from rent otherwise payable to recover the filing fee paid for this Application for Dispute Resolution.

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: October 08, 2020

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Residential Tenancy Branch