# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

**Dispute Codes** CNC, OLC, MNDCT, FFT

**Introduction**

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act.*

PL ("landlord") represented the landlord in this hearing, while the tenant attended with their advocate PW. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's dispute resolution application ('Application') and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenant's Application and evidence package. The landlord did not submit any written evidence for this hearing.

The tenant confirmed service of the 1 Month Notice dated May 26, 2021, which was posted on the tenant's door. Accordingly, I find that the 1 Month Notice deemed served on the tenant In accordance with sections 88 and 90 of the *Act,* 3 days after service.

**Issues**

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Is the tenant entitled to recover the filing fee?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applications and my findings around it are set out below.

This month-to-month tenancy originally began on February 1, 2015, with monthly rent currently set at $1,200.00, payable on the first of the month. The landlord collected a security deposit in the amount of $600.00, and a pet damage deposit in the amount of $300.00, which the landlord still holds.

The landlord served the tenant with the notice to end tenancy dated May 26, 2021 providing the following grounds:

1. *Breach of a material term of the tenancy agreement that was not corrected within a reasonable amount of time after written notice to do so.*
2. *Tenant has assigned or sublet the rental unit/site without landlord's written consent.*

The landlord provided the following reasons for why they are seeking an Order of Possession on the grounds provided on the 1 Month Notice. It is undisputed by the tenant that the tenant resides in the three bedroom suite with another occupant, DC, who has resided there since 2018. The landlord testified in the hearing that they took over the management of the rental in January of 2021, and was instructed by the owner to investigate the situation as the owner had never given the tenant permission to allow DC to reside there, or sublet or assign the rental unit to any other occupants or tenants. The landlord testified that upon confirming that DC was in fact residing at the rental

address, the landlord provided the tenant with the opportunity to sign a new tenancy agreement in order for DC to stay. The landlord requested that the tenant sign a new rental agreement, with rent set at $1,400.00 to account for the additional occupant. The landlord testified that they felt that this was fair, and below market rate. The tenant submitted a copy of the new tenancy agreement for the increased amount, with an attached five page addendum, which the tenant refused to sign.

The landlord provided the tenant with a written warning dated April 30, 2021, which was provided in the tenant's evidence. The warning letter is titled "Notice to Remove Unauthorised Occupant", and advises the tenant that they must obtain written consent of the landlord for the additional occupant, DC, or remove DC from the property by May 15, 2021. If the tenant failed to do either, the landlord would pursue a termination of the tenancy for what the landlord stated was a material breach of the tenancy agreement. The landlord testified that the tenant failed to comply, and the 1 Month Notice was served on May 26, 2021.

The tenant disputes that they have sublet or assigned the rental unit, and testified that DC had been residing in the rental unit since 2018, with the landlord's knowledge and permission. The tenant testified that the original tenancy agreement named two tenants. The other tenant moved to a care facility, and the tenant resided in the home with another tenant DG, who had passed away on June 26, 2020. The tenant testified that there was no material breach of the tenancy agreement, and that the landlord was simply attempting to harass the tenant for refusing to sign the new tenancy agreement for $200.00 more in monthly rent.

The tenant also applied for an order that the landlord to comply with the Act as the landlord has harassed the tenant with repeated inspections, and requests for the tenant to sign the new agreement with new terms. The tenant also made a monetary claim of $2,000.00 as compensation for the lack of quiet enjoyment due to the landlord's actions.

**Analysis**

Section 46 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. As the tenant had filed their application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving that that they have cause to end the tenancy on the grounds provided on the 1 Month Notice.

Although the term "sublet" is used by the landlord in this dispute, I must note that RTB Policy Guideline #19 states the following:

***"C. SUBLETTING***
***Sublets as contemplated by the Residential Tenancy Act***

*When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement."*

RTB Policy Guideline #19 states the following about assignment of tenancy agreements:

***B. ASSIGNMENT***
*Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord. When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement.*

*For example:*

- *the assignment to the new tenant was made without the landlord's consent;*
- *or the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.*

Although the term "sublet" is used by the landlord in this dispute, I must note that RTB Policy Guideline #19 clearly provides the definition of a "sublet" versus a "roommate" situation, which states:

> *"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…"*

By the above definition the additional occupant cannot be considered a "sublet", but a roommate, as the tenant still resides there. As such I find that the tenant has not sublet or assigned the rental unit, and therefore the landlord does not have the right to end the tenancy for this reason.

The landlord also alleges that there is a material breach of the tenancy agreement, which was not corrected within a reasonable amount of time after written notice to do so. A party may end a tenancy for the breach of a material term of the tenancy, but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. As noted in RTB Policy Guideline #8, a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the Agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…must inform the other party in writing:*
> - *that there is a problem;*
> - *that they believe the problem is a breach of a material term of the tenancy agreement;*
> - *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*

- *that if the problem is not fixed by the deadline, the party will end the tenancy…*

Although it was undisputed that the landlord did provide written warning to the tenant on April 30, 2021 that the allowance of an additional occupant without written permission of the landlord constituted a breach of a material term of the tenancy agreement, in review of the tenancy agreement, documents, and testimony provided for this hearing, I am not satisfied that the DC is an unauthorized occupant, nor am I satisfied that there has been a breach of a material term of the tenancy agreement.

I find that the DC had been residing at the rental address since 2018. The testimony of the tenant is that the owner had full knowledge of this arrangement, and provided detailed evidence of this history of the occupants and tenants in the three bedroom rental suite. I find that the legal principle of estoppel applies in this case. Estoppel is a legal doctrine that holds that one party must be strictly prevented from enforcing a legal right to the detriment of the other party if the first party has established a pattern of failing to enforce this right, and the second party has relied on that conduct and has acted accordingly. To return to strict enforcement of their right, the first party must give the second party notice (in writing) that they are changing their conduct, and are now going to strictly enforce the right previously waived or not enforced.

I find that the landlord had never denied the tenant the right to allow additional occupants or roommates in the past, and then after several years since DC had moved in the landlord is now attempting to end the tenancy for this conduct. Even in the absence of an amended or new tenancy agreement, I find that over time the landlord had implied that the tenant had permission to allow DC to reside there without paying additional rent.

Although the landlord may consider this arrangement to be a material breach, I am not satisfied that the landlord has sufficiently supported this position. Accordingly, I allow the tenant's application to cancel the 1 Month Notice dated May 26, 2021, and the tenancy is to continue until ended in accordance with the *Act.*

The tenant also filed an application for an order that the landlord comply with the *Act,* and for a monetary order equivalent to one month's rent related to her loss of quiet enjoyment, and for an order for the landlord to comply with the *Act.*

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenant must satisfy each component of the following test for loss established by **Section 7** of the Act, which states;

***Liability for not complying with this Act or a tenancy agreement***

> ***7*** *(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*
>
> *(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the tenant bears the burden of establishing their claim on the balance of probabilities. The tenant must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the tenant must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenant must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

In light of the evidence before me, I am not convinced that the landlord had intentions to harass the tenant. I, however, do remind the landlord that the tenant's right to quiet enjoyment is protected under the *Act.*

**Protection of tenant's right to quiet enjoyment**

> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following…
>
> (b) freedom from unreasonable disturbance;…

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

I am not satisfied that the tenant had sufficiently supported the loss claimed in this application in relation to the landlord's contravention of the *Act*, specifically the tenant's right to quiet enjoyment of the rental unit. On this basis, I dismiss the tenant's application for a monetary order without leave to reapply. As I am not satisfied that the landlord had contravened the *Act*, I dismiss the tenant's application for any further orders.

I allow the tenant to recover the fling fee for this application.

**Conclusion**

The tenant's application to cancel the landlord's 1 Month Notice is allowed. The landlord's 1 Month Notice, dated March 26, 2021 is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I allow the tenant to recover the $100.00 filing fee. I allow the tenant to implement a monetary award of $100.00 by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of $100.00, and 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.

I dismiss the remainder of the tenant's application without leave to reapply.

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 5, 2021

Residential Tenancy Branch