

A. G. KEMP & ASSOCIATES INC.

Serving, Educating, and Assisting Rental Housing Providers since 1997

AI's Almanac

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AI's Almanac is intended to provide you with current information about the residential rental industry and tips to help you increase your success in this sometimes challenging business. Each issue will include:

Did You Know . . .

- . . . whether a Tenant Can Withdraw a Notice to End Tenancy?**
- . . . the Four Part Test for a Monetary Claim?**
- . . . what "Two Opportunities" Really Means?**

Can a Tenant Withdraw a Notice to End Tenancy?

The Hatfields and the McCoys had been feuding for years. Finally, Joe Hatfield said he and his wife couldn't take it anymore; they're leaving. They wrote a letter to Mary Spencer, the building manager, stating they would be leaving the end of this month. Mary breathed a sigh of relief when she received the letter; an end was in sight to the continuous complaints about each other from these two tenants.

Her relief was short lived. Two days later Rebecca and Joe Hatfield came to her office and sheepishly told her they acted too hastily and had changed their mind. They gave her a note signed by both, retracting the letter ending their tenancy.

Everyone thought that was the end of it. However, Mary phoned me and I confirmed that, not only could the Hatfields not withdraw their first letter, but also, she could ultimately use that letter to get an Order of Possession.

Residential Tenancy Branch Policy Guideline #11 states in part,

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

A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given.

A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant. It is recommended that withdrawal of a notice to end tenancy be documented in writing and signed by both the landlord and the tenant.

What is the Four Part Test?

If you plan to file to obtain a monetary order against a tenant or ex-tenant, the arbitrator will require you to satisfy the Four Part Test. Arbitrators use this to determine if compensation is payable, and if so, what amount. This not a requirement in the Act or Regulation; it is documented in an RTB Policy Guideline.

Even if it wasn't a requirement, it is a good test for you to determine if your claim is likely to succeed.

RTB Policy Guideline 16 reads:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due.

In order to determine whether compensation is due, the arbitrator may determine whether:

- 1. a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;*
- 2. loss or damage has resulted from this non-compliance;*
- 3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and*
- 4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.*

#3 is particularly important, as "aggrieved" tenants (aka free money tenants) will often cite stress, anxiety, harassment, emotional upset, etc. caused by the landlord is worth XX thousand dollars. I've never seen this claim where the tenant had legitimate and convincing medical evidence.

If you can't satisfy all four tests to yourself, you need more evidenced or probably should not apply for a monetary order.

What Does "Two Opportunities" Mean?

Section 35(2) of the Residential Tenancy Act requiring a move-out condition inspection and report to be completed at the end of a tenancy reads, *"The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection."*

This is one of very few poorly worded sections in the Act because of the words, "as prescribed." This would seem to state the landlord must offer two times for the inspection and the tenant can pick one. Not! A person unfamiliar with reading legislation won't know that "as prescribed" means, "Look someplace else," usually a regulation.

Section 17 of the Residential Tenancy Regulation is a bit wordy. It potentially requires a few steps when attempting to schedule a move-out inspection (same rules for a move-in inspection, but they always seem to go well).

1. The landlord must offer the tenant a date and time to do the inspection (between 8 am and 9 pm). If the tenant agrees, the scheduling is complete* and both parties must do the inspection at that time, (the first opportunity).
2. If the tenant disagrees – usually because something is planned for that time – the landlord must allow the tenant to offer a different time. If the landlord agrees, the scheduling is complete.*

3. If the landlord doesn't agree to the tenant's suggested time, it is not necessary to go back and forth until both parties agree on a time. In most cases, agreement will be reached, but what about the tenant who suggests 2 am?! What about the tenant who refuses to have any contact with the landlord?

4. If agreement cannot be reached, the landlord must serve the tenant RTB form 22, Notice of Final Opportunity to Schedule a Condition Inspection. (the second opportunity).

* If agreement is reached on a time for the inspection, confirm by email (communication, not service) in case the tenant doesn't show up.

If the tenant doesn't participate at the agreed time or after the Notice has been served, complete and record the inspection. The tenant's security/pet damage deposits will automatically be forfeited to you or your client; no need to apply for a direct request or hearing.

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