



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC, CNR, OLC

### Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel two notices to end tenancy and for an order to have the landlord comply with the *Residential Tenancy Act (Act)*, regulation or tenancy agreement.

The hearing was conducted via teleconference and was attended by the tenant, the landlord and two of his agents.

At the outset of the hearing, the landlord verbally requested an order of possession should the tenant be unsuccessful in his Application.

During the hearing the tenant identified that he did not appear to have all of the evidence that the landlord had been referring to. The tenant confirmed what documents he had received including photographs. The landlord's agent testified that she had served the tenant with the same evidence she provided to the Residential Tenancy Branch (RTB) which included several documents and several photographs.

I noted to the participants that I had not received any photographs in the evidence that was before me. As I received a package that was different than what the landlord's agent testified she provided to the RTB, I find it likely that the tenant also receive an incomplete evidence package.

However, I find the tenant was able to provide relevant testimony to all matters brought forward by the landlord and his agents and further find the tenant has not been prejudiced by this failure on the agent's part.

### Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause; to cancel a 10 Day Notice to End Tenancy for Unpaid Rent; and to an order to have the landlord comply with the *Act*, regulation or tenancy agreement, pursuant to Sections 46, 47, and 55 of the *Act*.

If the tenant is unsuccessful in his Application seeking to cancel either the 1 Month Notice to End Tenancy for Cause or the 10 Day Notice to End Tenancy for Unpaid Rent it must be decided if the landlord is entitled to an order of possession, pursuant to Section 55 of the *Act*.

### Background and Evidence

The landlord submitted into evidence the following documents:

- A copy of a tenancy agreement signed by the parties on March 24, 2009 for a current monthly rent of \$1,709.67 due on the first day of the rental period which falls on the last day of each month. The agreement includes an addendum that states the rental unit is no smoking;
- A copy of a 1 Month Notice to End Tenancy for Cause issued April 16, 2012 with an effective vacancy date of May 31, 2012 citing the tenant is repeatedly late paying rent; the tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord or has put the landlord's property at significant risk; and a breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued May 2, 2012 with an effective vacancy date of May 12, 2012 due to unpaid rent in the amount of \$2,924.67;
- A typewritten document entitled Incorrect Rent Payments listing over and underpayments of rent from September 2008 to October 2010 indicated a total underpayment of \$1,215.00; and
- A typewritten document entitled Rent Payments – Date Received recording that from January 2010 to March 2012 the tenant paid rent late at least 23 months out of the 26 month period.

The landlord testified that he had been given permission by one of the tenant's roommates to enter the unit so that he could gain access to a balcony for painting. When he entered the unit he found ashtrays in the living room from which he determined the tenant had been smoking in the rental unit despite the term in the tenancy agreement prohibiting smoking inside the unit.

The landlord testified that he informed the tenant to vacate the property as a result of this information. The landlord testified that he noted in the 1 Month Notice to End Tenancy for Cause that the tenant had breached a material term of the tenancy agreement and that as a result of smoking in the rental unit the tenant was seriously jeopardizing the health or safety or lawful right of another occupant or the landlord and was putting the landlord's property at significant risk.

The tenant submitted the landlord had not been given permission from him or any other occupant to enter the rental unit. The tenant acknowledged having ashtrays in the unit but only for use when they smoked outside as they had been asked not to leave cigarette butts around the property.

The landlord asserts the tenant is repeatedly late paying rent and the tenant acknowledges that he is often late because the day that rent is due often falls before his payday. The landlord testified that he had spoken with the tenant that this practice was not acceptable and that he must stop paying rent late. The tenant testified that the first time he heard from the landlord that this was a problem was when he received the Notice. The parties agree that even after receiving the Notice on April 16, 2012, the tenant paid his May 2012 rent in two instalments and not on the due date.

The landlord testified that the 10 Day Notice that was issued included arrears from previous under payments that span the duration of this tenancy and that each time the landlord receives a payment from the tenant it goes to cover the arrears and while the tenant did pay rent for the month of May 2012 there remains \$1,210.67 in arrears.

The tenant testified that while he was aware of a shortage in his payment for rent for February 2010, he had corrected this situation and was unaware of any outstanding balances owed to the landlord. The landlord contends that the tenant has on many occasions been short in his rental payment by a small amount but there have been a couple of occasions where the underpayment has been substantial.

### Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- a) The tenant is repeatedly late paying rent;
- b) The tenant or a person permitted on the residential property by the tenant has
  - i. Seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
  - ii. Put the landlord's property at significant risk;
- c) The tenant
  - i. Has failed to comply with a material term, and
  - ii. Has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

In relation to the landlord's assertion that the tenant breached a material term of the tenancy agreement, I make no finding on whether or not a material term was breached, because, by the landlord's testimony, he did not provide a written notice to the tenant of the breach nor did he give the tenant any time to correct the situation, which is required in order to use this cause to end a tenancy.

As to the landlord's claim that as a result of finding evidence of the tenant smoking in the rental unit that the tenant's action has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant and put the landlord's property at significant risk. Other than pointing out the building is a wooden structure, which does not in itself provide any evidence of putting the property at significant risk or

having any impact on other occupants, the landlord has provided no evidence to establish these causes.

In the case of verbal testimony, I find that when testimony is clear and both the landlord and tenant agree on the events, there is no reason why such testimony cannot be relied upon. However when the parties disagree with what was occurred, the verbal testimony, by its nature, is virtually impossible for a third party to interpret when trying to resolve disputes. As a result, the burden is on the party making the claim to provide sufficient evidence to establish their version of events.

On the issue of repeated late payment of rent, despite the due date of the last day of each month in the tenancy agreement I find that by his practice the landlord had allowed rent to be paid, for the most part, at anytime during the first week of each month throughout the entire tenancy.

As the tenant disputes that the landlord ever raised this matter as an issue that needed to be corrected and the landlord has failed to provide any documentary or corroborating evidence that the tenant was informed of the landlord's change in practice to have rent paid by the due date, I find the landlord cannot now rely on this provision to end the tenancy.

Residential Tenancy Policy Guideline 38 states 3 late payments are the minimum number sufficient to justify a notice under these provisions. Despite my finding above, I note that the tenant should now consider himself sufficiently warned the landlord will no longer accept any late payments of rent.

As the tenant has already paid rent late for the month of May 2012, the landlord may consider this late payment as the first one to contribute the late payment count and may consider ending the tenancy if the tenant makes 2 more late payments.

Section 46 of the *Act* allows a landlord to end a tenancy if rent is unpaid on any day after the day it is due by giving the tenant notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

In relation to the landlord's claim that the tenant has rental arrears owed to the landlord, I accept the tenant's position that the landlord has provided no documentary evidence that corroborate any amounts owed. While the landlord has provided a list, he has not supported that list with evidence of the payments of rent the tenant had paid or of any rent increase notifications to support how much was due at those times.

Further in relation to the 10 Day Notice since I have found the landlord has not established that there are any arrears to rely upon to end the tenancy for unpaid rent I do accept the tenant failed to pay rent when it was due on April 30, 2012 for the month of May 2012, however from the testimony of both parties I accept the tenant paid the rent in full within the 5 days required under the *Act* after the 10 Day Notice was received by the tenant.

Conclusion

For the reasons noted above, I grant the tenant's Application and cancel the 1 Month Notice to End Tenancy for Cause issued by the landlord on April 16, 2012 and the 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on May 2, 2012. I, therefore, find the tenancy remains in full force and effect.

As I have found the tenant was successful in his Application to cancel both Notices, I dismiss the landlord's verbal request for an order of possession.

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: May 11, 2012.

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Residential Tenancy Branch