



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC

### Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution wherein he sought to cancel a Notice to End Tenancy for Cause issued on February 23, 2015 (the "Notice"). The reasons listed on the Notice were that the Tenant was repeatedly late paying rent.

The Tenant appeared as did counsel for the Landlord. The Landlord was not available to provide evidence. The Tenant provided affirmed testimony. The hearing process was explained and the participants were asked if they had any questions. Both participants were provided the opportunity to present their evidence orally and in written and documentary form, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

During the hearing, the Landlord's counsel requested an Order of Possession.

*Residential Tenancy Branch Rules of Procedure* provide that where a Tenant applies to set aside a Notice to End Tenancy, the the Landlord will present his or her case first as the Landlord bears the burden of proving the Notice is valid and, in this case, that they had cause.

### Issue to be Decided

1. Should the Notice be cancelled?
2. Is the Landlord entitled to an Order of Possession?

### Background and Evidence

Introduced in evidence was a copy of the residential tenancy agreement signed January 5, 2006. The tenancy began February 1, 2006 and monthly rent was payable on the 1<sup>st</sup> of the month in the amount of \$1,250.00 per month. Counsel for the Landlord submitted that rent was increased in 2011 from \$1,250.00 to \$1,300.00 which she conceded was more than the allowable amount as it was offset by a reduction in utilities.

Introduced in evidence by the Landlord were documents drafted in Madrin. Counsel for the Landlord advised that the legal assistants at her law firm were bilingual and that an assistant at the firm by the name, Y.Z., had translated those documents. While Y.Z. did not sign the translations, nor was she available for cross examination, I accept counsel for the Landlord's submissions that the translations were accurate.

One such document, introduced as Tab B of the Landlord's documents, and described by counsel for the Landlord as a "collateral or addendum agreement", indicates as follows:

...  
"Tenants will pay 60% of the water, electricity, gas fees...The Tenants must deposit the rent (\$1250.00) plus the water, electricity, and gas fees into the Owner's bank account by the 1<sup>st</sup> day of every month."...

Another such translated document, dated June 27, 2011, introduced as Tab C of the Landlord's documents, further provides as follows:

..."The Owner has not increased the rent for many years, but due to inflation, the Owner decides to increase their rent by 4% effective July 1, 2011. Starting from July 1<sup>st</sup>, the monthly rent will be \$1300.00. The Tenants will pay 50% of the water, electricity and gas fees. The Tenants will pay their own cable and telephone fees. Please notify the Owner by July 1<sup>st</sup> 2011 if the Tenants wish to continue to rent the property."

The Landlord introduced copies of some of her bank statements and which her counsel submitted indicated the following rental payments were made late:

|                  |            |
|------------------|------------|
| October 22, 2012 | \$1,520.80 |
| March 18, 2013   | \$1,432.04 |
| August 23, 2013  | \$1,501.00 |
| January 21, 2014 | \$1,465.76 |

|                   |            |
|-------------------|------------|
| April 22, 2014    | \$1,678.49 |
| November 20, 2014 | \$1,402.76 |

Counsel for the Landlord stated that the Tenant's late payment of rent has been a longstanding problem, and that the Landlord served the Notice on the Tenant by Fax and regular mail on February 23, 2015.

The Tenant applied to dispute the Notice on February 24, 2015.

I raised the issue of estoppel with the Landlord, and in response to my question as to whether the Landlord informed the Tenant that she expected strict compliance with the tenancy agreement with respect to the date of the payment of rent, counsel for the Landlord stated that she believed the Landlord spoke to the Tenant. She could not provide any more specific information as to when this conversation occurred. In further response, she submitted that there was no evidence the Landlord waived reliance on the strict interpretation of the contract.

Counsel for the Landlord submitted that the Tenant was late three times in the past year, which is all that is required by the *Residential Tenancy Policy Guidelines*. She further submitted that the Tenant did not provide particulars of his dispute as required by Section 59(2)(b) of the *Act*, and Rule 3.1(f) of the *Residential Tenancy Branch Rules of Procedure*, did not submit any evidence in support of his application, and that accordingly his application should be dismissed in its entirety.

The Tenant testified that he always pays rent after the 1st of the month and that at no time prior to receiving the Notice did the Landlord tell him that she was upset with him not paying on the 1<sup>st</sup> of the month. He further stated that he pays his rent and his contribution towards the utilities in one single payment and that he does so *after* the Landlord provides him with a fax notification of the amounts. He stated that whenever she sends him the fax he goes to the bank and pays right away but that at times she does not send this information to him until the middle of the month, sometimes later. In response to my question as to when he paid his March 2015 rent, he stated that he received the fax from the Landlord on the evening of March 4, 2015 and that he paid his rent and contribution to utilities the next morning on March 5, 2015.

The Tenant submitted that he believes that the reason the Landlord is trying to evict him is that she wants to move her son into the rental unit as her son will be attending a local university.

The Landlord was not available to respond to the Tenant's testimony. Her counsel also confirmed she did not have instructions regarding the Tenant's submissions and that her client was prejudiced in terms of her ability to respond as the Tenant did not provide particulars of his dispute as required by the *Rules*.

During the hearing I considered whether an adjournment should be granted, pursuant to Rules 1.1, 6.3 and 6.4 of the *Residential Tenancy Branch Rules of Procedure*, to permit the Landlord, or the Tenant to provide copies of the faxes which the Tenant says he receives from the Landlord indicating his share of the utilities, as well as to provide the Landlord an opportunity to respond further. Counsel for the Landlord opposed an adjournment and provided the following submissions in opposition to my suggestion of an adjournment:

- The Tenant failed to provide this evidence in a timely fashion. He has had one month since filing, and 10 days since receiving the Landlord's evidence to submit this evidence and he did not.
- The Landlord is in Saskatchewan.
- The Tenant's application is defective and should be dismissed pursuant to section 59(2)(b) of the Act.
- Previous decisions and case law support a finding that service of evidence is mandatory. The Tenant is essentially raising issues of dispute at trial.

I informed the Landlord's counsel that the risk to the Landlord was that if we continued without the Landlord's response, that I could accept the Tenant's undisputed affirmed testimony with respect to the receipt of the faxes from the Landlord. I also reminded counsel for the Landlord that a residential tenancy hearing is a viva voce hearing and that the parties are expected to attend, provide affirmed testimony, and be subject to cross examination. I also informed the Landlord's counsel that should the matter be adjourned, that it would be adjourned to a date which would ensure the Landlord could attend. Notwithstanding the concerns I raised regarding the insufficiency of evidence supporting the notice and lack of response by the Landlord to the Tenant's affirmed testimony, counsel for the Landlord continued to strenuously oppose my suggestion for an adjournment.

The Landlord, having the burden of proving the Notice should be upheld, might have benefited from an adjournment as she would be able to answer to the Tenant's affirmed

testimony. However, as the Landlord's counsel strenuously opposed the adjournment, I continued with the hearing.

The Tenant continued with his testimony and stated that that if the Landlord gave him the fax at the end of the previous month he would pay his rent on the 1st of the month, but that sometimes she does not give him her fax until the 15<sup>th</sup>. He confirmed that as the utility amounts vary, the amount he pays for rent and utilities also varies month to month. The Tenant stated that he did not want to move out, but if he had to, he asked to do so in the summer when he believed he would be recovered from an injury.

### Analysis

The Landlord bears the burden of proving the Notice should be upheld. In this case, the Tenant provided undisputed testimony that he paid his rent upon receipt of a fax from the Landlord setting out the amounts he was to pay for his share of the utilities. The Landlord did not attend to dispute this testimony and my suggestion for an adjournment was opposed by the Landlord's counsel.

The evidence filed by the Landlord clearly shows the Tenant paid rent after the first of the month on at least six occasions since October 2012; once in 2012, twice in 2013, and three times in 2014. I accept the Tenant's testimony that he paid rent and his share of the utilities after the 1<sup>st</sup> of the month, and upon receipt of communication from the Landlord as to the amount he was to pay. I note that the banking statements from the Landlord span a period of three years and clearly show the payments as being more than the amount payable for rent and paid after the 1<sup>st</sup> of the month.

*Policy Guideline 38* provide as follows:

...

"It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late

I note that even the most recent late payments (those made in 2014) were made three and seven months apart respectively. Accordingly, and with reference to the above *Policy Guideline*, I find that the Tenant cannot be said to be "repeatedly" late.

The *Policy Guidelines* further provide that "[a] landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to

have waived reliance on this provision.” Counsel for the Landlord submitted that the Landlord did not immediately act on the November 2014 late payment due to the Christmas holidays and Chinese New Year. I note she did not issue the Notice until three months after the most recent late payment in November 2014.

The Landlord’s counsel could not confirm when the Landlord verbally communicated to the Tenant that she expected strict reliance on the contract in terms of the date of payment of rent. Although paragraph 14 of the Landlord’s written submissions note that fax was a “usual method of communication between the Parties” it appears that this essential information was not communicated by fax to the Tenant. I accept the Tenant’s undisputed testimony that the first time he was aware the Landlord took issue with his rental payments being made after the 1<sup>st</sup> of the month was when he received the Notice.

I accept the Tenant’s undisputed testimony that he made a single payment for rent and utilities after receiving a fax from the Landlord setting out his share of the utilities. The six payments in evidence were clearly for such a combined sum and span a three year time period such that I find the parties had an established pattern of payment of rent after the 1<sup>st</sup> of the month. Accordingly, I find that the Landlords waived her right to enforce the strict terms of the tenancy agreement when she accepted payments for both rent and utilities after the 1<sup>st</sup> of the month.

The Landlord, in changing the rent payable in 2011, also made adjustments in utilities and it is clear from this and the pattern of payments that the payment of rent and utilities were substantially linked.

During the course of the hearing, and considering the evidence filed by the Landlord, it became apparent that the Landlord failed to follow Part 3 of *Act* when increasing the Tenant’s rent in 2011 as she did not give the Tenant three month’s notice of the increase, did not use the approved form, and increased rent in excess of that permitted by the *Regulations*. Section 41 provides that a landlord must not increase rent except in accordance with this part. Accordingly, I find that the monthly rent shall continue to be \$1,250.00 per month and the Tenant is at liberty to apply for a Monetary Order for any previous payments made in excess of this amount.

Clearly from the Notice and submissions by the Landlord, the Landlord has put the Tenant on notice that she expects rent payments on the 1<sup>st</sup> of the month. The Tenant is cautioned to pay his rent on the 1<sup>st</sup> of the month as required by the tenancy agreement. Payment of the utilities must be paid within 30 days of receiving a written demand from the Landlord otherwise the Landlord may issue a Notice pursuant to section 46(6) of the Act.

While service of the Notice was not at issue, and although the Landlord submitted that fax was “a convenient and usual method of communication between the parties”, service of the Notice by such means is insufficient under the Act.

### Conclusion

The Landlord failed to prove that the Notice should be upheld. The Tenant’s application is granted and the Notice is set aside. The tenancy will continue until ended in accordance with the *Act*. The Tenant’s rent shall continue at \$1,250.00 per month until increased in accordance with the *Act* and *Regulations*. The Tenant is at liberty to apply for a Monetary Order for any overpayment of rent.

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: March 27, 2015

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Residential Tenancy Branch

