



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC, RP, O

### Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause, dated July 27, 2015 ("1 Month Notice"), pursuant to section 47;
- an order requiring the landlord to make repairs to the rental unit, pursuant to section 33;
- other remedies, identified as an order permitting the tenant to make repairs to the rental unit, pursuant to section 33.

Both parties attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. This hearing lasted approximately 54 minutes in order to allow both parties to full present their submissions.

The landlord testified that he served the tenant with the 1 Month Notice on July 27, 2015, by way of leaving a copy under the tenant's rental unit door. The tenant confirmed receipt of the 1 Month Notice on July 27, 2015. Although the tenant was not served with the notice in accordance with section 88 of the *Act*, the tenant confirmed that he received the notice, he was aware of the contents and purpose of the notice, and he made an application to cancel the notice at this hearing. In accordance with section 71(2)(c) of the *Act*, I find that the tenant was sufficiently served for the purposes of the *Act*, with the landlord's 1 Month Notice.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package ("Application") and advised that he reviewed the Application and was prepared to proceed with this hearing. The tenant confirmed receipt of the landlord's written evidence package and advised that he reviewed the written evidence and was prepared to proceed with this hearing. In accordance with sections 89 and 90 of the *Act*, I find the

landlord was duly served with the tenant's Application and the tenant was duly served with the landlord's written evidence package.

The tenant requested amendments to his Application to correct the spelling of the landlord's surname and to correct the landlord's mailing address. The landlord consented to these amendments. In accordance with section 64(3)(c) of the *Act*, the tenant's Application is hereby amended to reflect the above changes.

During the hearing, the landlord made an oral request for an order of possession.

### Issues to be Decided

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

Is the tenant entitled to an order permitting the tenant to make repairs to the rental unit or alternatively, an order requiring the landlord to make repairs to the rental unit?

### Background and Evidence

Both parties agreed that this month-to-month tenancy began on August 1, 2013. Both parties agreed that monthly rent under the tenancy agreement was initially \$700.00 and that rent is currently \$746.00 payable on the first day of each month, pursuant to legal notices of rent increase issued to the tenant during this tenancy. Both parties agreed that a security deposit of \$350.00 was paid by the tenant and the landlord continues to retain this deposit. The tenant provided a copy of the tenancy agreement with his Application. The tenant continues to reside in the rental unit.

The tenant seeks to cancel the landlord's 1 Month Notice. The landlord issued the 1 Month Notice, indicating that "the tenant is repeatedly late paying rent." The notice indicates an effective move-out date of September 1, 2015. The landlord testified and provided a written account indicating that the tenant has paid rent late numerous times during this tenancy between 2010 and 2015. The tenant stated that he had established a flexible practice with the landlord to pay rent of \$400.00 on the first day of each month and the remainder of rent a few days later. Both parties agreed that rent was due on the first day of each month as per the tenancy agreement.

Both parties agreed that in the year 2015, the tenant paid rent late in February, March, April, June and July. Both parties agreed that the tenant paid rent on time by the first day of each month for September and October 2015. The tenant confirmed that the

landlord issued receipts to him for the September and October 2015 rent payments but they only indicated the date, the landlord's and tenant's names, the amount of rent paid, and the landlord's signature.

The tenant seeks an order permitting him to perform repairs in the rental unit or alternatively, an order requiring the landlord to make these repairs. The tenant confirmed that the phone jack in his rental unit is not working as it is "shorted/grounded with interference on the line." The landlord stated that he has not been inside the tenant's rental unit to confirm the above information. The tenant stated that his telecommunications provider, "T" confirmed the above information on July 26, 2015, when the tenant attempted to have internet service connected in his rental unit through this phone jack. The tenant indicated that T advised him that the landlord had to repair the phone jack before T could provide internet service to the tenant. The landlord stated that no tenants use landlines anymore and that the tenant should switch to the landlord's telecommunications provider who would fix the problem. The tenant stated that he is a handyman and has done electrical work for the landlord before, so he can perform this electrical repair himself at no cost, once the landlord provides permission and selects a method of repair. Alternatively, the tenant stated that the landlord can perform these repairs at the landlord's cost.

### Analysis

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement. Both parties agreed that rent is due on the first day of each month. Although the tenant paid rent late a number of times during the tenancy and the landlord accepted his rent, this does not waive the landlord's right to issue a 1 Month Notice for repeated late payment of rent. The landlord established that the tenant paid rent late most recently in April, June and July 2015. The landlord issued the 1 Month Notice on July 27, 2015, after the last late rent payment. Therefore, the landlord has provided recent evidence of the tenant's late rent payments and communicated to the tenant that this late rent is not acceptable. The tenant stated that he paid rent on time in September and October 2015 because he was aware that the landlord expected rent on time after issuing the 1 Month Notice.

Residential Tenancy Policy Guideline 38 states that "three late payments are the minimum number sufficient to justify a notice..." Both parties agreed that the tenant paid rent late more than three times in the year 2015. Accordingly, I find that the landlords' 1 Month Notice was issued for a valid reason.

The next issue is whether the landlord waived his right to pursue the 1 Month Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 1 Month Notice:

*A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.*

*If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:*

- whether the receipt shows the money was received for use and occupation only.*
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- the conduct of the parties.*

*There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.*

Although the landlord accepted rent payments from the tenant after the effective date on the 1 Month Notice of September 1, 2015, I do not find this to be a waiver of the 1 Month Notice. This is despite the fact that the landlord did not issue rent receipts indicating "use and occupancy only" and the fact that the landlord wanted to avoid

confrontation with the tenant so did not discuss eviction proceedings with the tenant when he received rent in September and October 2015. The tenant did not withdraw his Application to cancel the 1 Month Notice, at any time prior to this hearing. The landlord submitted written evidence for this hearing that supports the 1 Month Notice and the landlord's intention to evict the tenant. This evidence was received by the Residential Tenancy Branch on September 29, 2015, just 8 days prior to this hearing, despite the fact that the tenant's application was filed much earlier on July 30, 2015. This is recent evidence of the landlord's intention to pursue the 1 Month Notice and obtain an order of possession against the tenant.

Although the tenant paid the full rent owing for September and October 2015, the tenant testified that he was aware that the landlord wanted to evict him. The tenant stated that other tenants in the rental building even advised him about this intention. The tenant stated that he was aware that this hearing was scheduled to decide whether his tenancy would continue. The tenant testified that there was no indication from the landlord that he was not pursuing the 1 Month Notice to evict the tenant.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive his rights to pursue the 1 Month Notice and he did not waive the 1 Month Notice, whether expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting rent payments after the effective date stated on the 1 Month Notice. Accordingly, the tenant's application to cancel the landlord's 1 Month Notice is dismissed without leave to reapply. As I have dismissed the tenant's application, the landlord is entitled to an order of possession pursuant to section 55 of the *Act*, as he made an oral request at this hearing.

The tenant paid rent for the entire month of October 2015 and is entitled to possession of the rental unit until the end of October 2015. Accordingly, I issue an **Order of Possession to the landlord effective at 1:00 p.m. on October 31, 2015.**

As this tenancy is ending, the tenant's application for an order requiring the landlord to make repairs to the rental unit and an order permitting the tenant to make repairs to the rental unit, is moot. Therefore, these portions of the tenant's Application are dismissed without leave to reapply.

### Conclusion

The tenant's entire application is dismissed without leave to reapply.

I grant an Order of Possession to the landlord effective at 1:00 p.m. on October 31, 2015. Should the tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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, 2015

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Residential Tenancy Branch

