



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes            CNC, FF

### 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 September 4, 2015 ("1 Month Notice"), pursuant to section 47;
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord and her agent, GA (collectively "landlord") and the tenant attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord confirmed that her agent had authority to speak on her behalf at this hearing.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package ("Application") and advised that she 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 88, 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 confirmed receipt of the landlord's 1 Month Notice on September 8, 2015, which was sent by way of registered mail by the landlord on September 4, 2015. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was duly served with the landlord's 1 Month Notice.

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 recover the filing fee for this Application from the landlord?

### Background and Evidence

Both parties agreed that this month-to-month tenancy began on October 2, 2003. Both parties agreed that monthly rent in the current amount of \$2,193.00 is payable on the first day of each month. Both parties agreed that a security deposit of \$825.00 was paid by the tenant and the landlord continues to retain this deposit. A copy of the written tenancy agreement was provided for this hearing. 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 October 9, 2015. The landlord testified and provided a written account indicating that the tenant has paid rent late most recently in January, June, July and September 2015, which the tenant disputes.

The landlord stated that the tenant has paid rent in full, to date. The landlord confirmed that rent was paid on time for October and November 2015 and that only one receipt was issued for one of these payments. The landlord did not provide a copy of the rent receipt. The landlord noted that the tenant was verbally advised a number of times in October 2015, that he needed to pay rent until the date of this hearing when a decision would be made regarding his tenancy. The tenant disputes this statement by the landlord.

### Analysis

According to subsection 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant receives the notice. The tenant received the 1 Month Notice on September 8, 2015, and filed his Application on the same date. Therefore, the tenant is within the ten day time limit under the *Act*. The onus, therefore, shifts to the landlord to justify the basis of the 1 Month Notice.

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, as per the tenancy agreement.

Residential Tenancy Policy Guideline 38 states that "three late payments are the minimum number sufficient to justify a notice..." The tenant acknowledged that his cheque was returned for insufficient funds in June 2015 and the landlord provided documentary evidence showing the return of a partial amount of rent that the tenant attempted to pay.

The tenant stated that he accidentally provided the landlord with a rent cheque for a bank account that was closed in July 2015, and the landlord provided documentary evidence showing

the return of a partial amount of rent that the tenant attempted to pay for a bank account that was closed.

The tenant stated that he paid rent on September 3, 2015 because the landlord did not make herself available when he attempted to pay rent on time on September 1, 2015. I find that the tenant failed to provide sufficient evidence that he attempted to contact the landlord on September 1, 2015 to pay rent. The tenant stated that he attempted to meet the landlord in person, while the landlord denied this fact. I find that both parties provided documentary evidence that supports the landlord's contention that the tenant attempted to contact the landlord on September 2, 2015 by way of telephone calls and text messages and that he subsequently paid rent on September 3, 2015. The tenant acknowledged that another cheque was dishonored earlier during this tenancy, but he did not provide a date.

Accordingly, I find that the tenant was late paying rent, despite the above circumstances of his cheques and bank accounts, at least three times during his tenancy in June, July and September 2015.

Although the tenant paid rent late 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. I have found that the landlord established that the tenant paid rent late most recently in June, July and September 2015. The landlord issued the 1 Month Notice on September 4, 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.

Accordingly, I find that the landlord's 1 Month Notice was issued for a valid reason. The next issue is whether the landlord waived her 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 a rent payment in November 2015 from the tenant after the effective date on the 1 Month Notice of October 9, 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.” 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 (“RTB”) on October 14 and 15, 2015. Although the tenant’s application was filed on September 8, 2015, his evidence was received by the RTB on November 2, 2015, just 7 days prior to this hearing. This is recent evidence of both parties’ intention to attend this hearing to determine whether this tenancy would end, pursuant to the landlord’s 1 Month Notice. Both parties attended the hearing and made submissions regarding the 1 Month Notice.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive her rights to pursue the 1 Month Notice and she 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 a rent payment 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 she made an oral request at this hearing.

The landlord testified that an order of possession effective on December 15, 2015 would be agreeable, in order to allow the tenant additional time to vacate the rental unit. Accordingly, I issue an **Order of Possession to the landlord effective at 1:00 p.m. on December 15, 2015.**

As the tenant was unsuccessful in his Application, he is not entitled to recover the \$50.00 filing fee from the landlord. The tenant must bear the cost of this fee.

### 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 December 15, 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: November 09, 2015

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Residential Tenancy Branch

