



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes:

OPC, CNC, AAT, LRE, MNDC, OLC, O, OPT, RP, RPP, RR, FF

### Introduction

These proceedings relate to cross applications.

The Landlord filed an Application for Dispute Resolution in which the Landlord applied for an Order of Possession and to recover the fee paid to file an Application.

The Landlord stated that on August 20, 2016 the Landlord's Application for Dispute Resolution, the Notice of Hearing, and documents that were submitted to the Residential Tenancy Branch with the Application were sent to the Tenants, via registered mail. The male Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

The Tenants filed an Application for Dispute Resolution, in which the Tenants applied:

- for an Order requiring the Landlord to comply with the tenancy agreement or the *Residential Tenancy Act (Act)*;
- for access to the rental unit;
- to suspend or set conditions on the Landlord's right to enter the rental unit;
- for a monetary Order for money owed or compensation for damage or loss;
- for authority to change the locks;
- for an Order requiring the Landlord to make repairs to the rental unit;
- for a rent reduction; and
- to recover the fee to file an Application for Dispute Resolution.

The male Tenant stated that the Tenants' Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via registered mail, although he cannot recall the date of service. The Landlord stated that these documents were received on July 26, 2016.

On August 19, 2016 the Landlord submitted 37 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was sent to the Tenants, via registered mail, on August 20, 2016. The male Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On August 25, 2016 the Tenants submitted 109 pages of evidence to the Residential Tenancy Branch (111 with Residential Tenancy Branch Cover Sheets). The male Tenant stated that on August 23, 2016 a copy of this evidence was personally served to

a male he believed was acting as an agent for the Landlord. The Agent for the Landlord stated that this male gave the Landlord 115 pages of evidence on August 26, 2016.

The Advocate for the Tenants stated that a duplicate copy of the 109 pages of evidence was mailed to the Landlord. The Agent for the Landlord acknowledged receiving this evidence in the mail. As the Landlord acknowledged receipt of the 109 pages of evidence, it was accepted as evidence for these proceedings.

On August 03, 2016 the Tenants filed an Amendment to an Application for Dispute Resolution, in which the Tenants increased the amount of their monetary claim from \$17,105.00 to \$17,267.10 and in which they applied to cancel a One Month Notice to End Tenancy for Cause. I am satisfied that the Tenants filed the amendment with the Residential Tenancy Branch within ten days of receiving the One Month Notice to End Tenancy for Cause.

The male Tenant stated that the Amendment to an Application for Dispute Resolution was served to the Landlord with the 109 pages of evidence. The Agent for the Landlord acknowledged receiving an unsigned Amendment to an Application for Dispute Resolution with the Tenants' evidence package of 109 pages. Although the Agent for the Landlord stated that the Landlord did not receive a signed copy of the Amendment to an Application for Dispute Resolution, it is apparent from the evidence submitted by the Landlord that she is prepared to support the One Month Notice to End Tenancy at these proceedings and I cannot conclude that she is prejudiced because she did not receive a signed copy of the Amendment to an Application for Dispute Resolution. I therefore did not consider adjourning the proceedings for the purpose of providing the Tenants with the opportunity to serve a signed copy of the Amendment to the Landlord.

On August 29, 2016 the Landlord submitted 51 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was sent to the Tenants, via courier, on August 26, 2016. The male Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On August 29, 2016 the Tenants submitted 15 pages of evidence to the Residential Tenancy Branch. The male Tenant stated that this evidence was personally served to the Landlord on August 29, 2016.

On August 30, 2016 the Landlord submitted 19 pages of evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was sent to the Tenant, via registered mail, on August 30, 2016. The male Tenant acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

The hearing on September 07, 2016 was adjourned for reasons outlined in my interim decision of September 08, 2016. The hearing was reconvened on September 23, 2016 and was concluded on that date.

On September 21, 2016 the Tenants submitted 110 pages of evidence to the Residential Tenancy Branch (113 with cover sheets). This is a duplicate copy of the 109 pages of evidence previously submitted by the Tenants, except that the pages are numbered and page 91 was not provided with my original package of 109 pages. This package was not considered as new evidence.

The Landlord and the Tenants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. I note that only the documentary evidence that is directly related to my decision has been referenced in this decision.

#### Preliminary Matter

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. In these circumstances the parties have identified several issues in dispute on the Application for Dispute Resolution, which are not sufficiently related to be determined during these proceedings.

It is apparent that the most urgent issues in dispute relate to possession of the rental unit and I will, therefore, only consider issues that relate to that matter, which include:

- the Landlord's application for an Order of Possession;
- the Tenants' application to set aside a One Month Notice to End Tenancy for Cause;
- the Tenants' application for an Order granting the Tenants access to the rental unit;
- the Tenants' application for authority to change the lock(s) at the rental unit; and
- the Tenants' application to suspend or set conditions on the Landlord's right to enter the rental unit?

I find that the Tenants' applications for repairs to the rental unit, for a rent reduction, and for a monetary Order are not sufficiently related to continued possession of the rental unit, and they will not be considered at these proceedings. These issues are dismissed, with leave to re-apply.

#### Issue(s) to be Decided

Should the One Month Notice to End Tenancy for Cause, dated July 26, 2016, be set aside?

Should the Landlord be granted an Order of Possession on the basis of the One Month Notice to End Tenancy for Cause, dated July 26, 2016?

Is there a need to issue an Order granting the Tenants access to the rental unit?

Should the Tenants be granted authority to change the lock(s) at the rental unit?

Is there a need to suspend or set conditions on the Landlord's right to enter the rental unit?

### Background and Evidence

The Landlord and the Tenant agree that:

- the tenancy began on November 02, 2013;
- the tenancy agreement was initially between the Tenant and the Landlord's spouse, however the Landlord's spouse passed away in 2015;
- the current monthly rent is \$1,200.00;
- when the tenancy began the parties agreed that rent was due by the first day of each month;
- the male Tenant has worked for the Landlord at a variety of locations;
- the Landlord has either paid wages to the Tenant or agreed that the wages owed could be deducted from rent;
- the Tenants were served with a One Month Notice to End Tenancy for Cause, dated July 26, 2016;
- the One Month Notice to End Tenancy declared that the tenancy was ending because the Tenants were repeatedly late paying rent and the Tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after receiving written notice to do so; and
- the One Month Notice to End Tenancy declared that the Tenants must vacate by August 31, 2016.

The Landlord contends that there is a term in the tenancy agreement that prohibits smoking in the rental unit.

The Agent for the Landlord stated that:

- the Landlord cannot locate a signed tenancy agreement that prohibits smoking in the rental unit;
- her father assured her mother that he had informed the Tenants they were not allowed to smoke in the rental unit;
- when this tenancy began there was a plaque on the wall that declared smoking was not permitted in the rental unit;
- the Tenants should have understood this meant that smoking was not permitted inside the rental unit; and
- smoking has always been prohibited in units offered for rent by the Landlord.

The Landlord stated that:

- her husband did not tell her he had provided the Tenants with an air purifier or an ashtray, and she believes he would have;
- on December 12, 2015 her daughter told her the Tenants were smoking in the rental unit;
- on December 13, 2015 she spoke with the male Tenant regarding smoking in the unit;
- the male Tenant assured her it was an isolated occurrence;
- the male Tenant assured her that he understood smoking was not allowed in the rental unit;
- the male Tenant assured her that smoking was not be permitted in the future; and
- in May of 2016 she reminded the female Tenant that smoking was not permitted in the rental unit.

The male Tenant stated that:

- when this tenancy began the Landlord's husband did not tell them smoking was not permitted in the rental unit;
- when this tenancy began the Landlord's husband gave them an ashtray and an air purifier;
- when this tenancy began the Landlord's husband told them to use the air purifier and to open a window if they were smoking inside the rental unit;
- when they moved into the rental unit there was nothing posted in the rental unit that declared smoking was prohibited;
- the smoked in the rental unit;
- he knows other people smoke in units offered for rent by the Landlord;
- he did not tell the Landlord that he understood smoking was not allowed in the rental unit; and
- he did not tell the Landlord he would not smoke in the rental unit in the future.

The Landlord submitted a letter from a former tenant who declares smoking was not allowed during her tenancy.

The Landlord and the Tenants agree that the Landlord served the Tenant with written notice that smoking was prohibited in a letter dated June 24, 2016.

Several emails and text messages were submitted in evidence which include electronic messages that show that:

- prior to December of 2015 the parties agreed to apply wages owed to the Tenant to rent owed by the Tenant;
- the parties disagree on how much money is owed to the Tenant in wages;
- the Landlord terminated the Tenant's employment in May of 2016;
- in December of 2015 the Landlord informed the Tenant that "I think in January we need to get back to the normal way of paying the rent";

- the Tenant responds to the December text message that it was his “intention for Jan, I was going to pay up front till the end of April”; and
- on January 01, 2016 the Landlord sent a text message that declared “It’s rent time again too”.

The Advocate for the Tenant argued that the text message in December of 2015 did not specify that rent was due by the first day of each month. She stated that the Tenant interpreted the text message to mean that the wages owed to him would no longer be applied to rent, but he did not understand it to mean that rent would again be due by the first day of each month.

The Agent for the Landlord argued that the Tenant should have interpreted the text message that was sent in December to mean that was again due by the first day of each month, effective January 01, 2016.

The Landlord and the Tenant agree that:

- rent for January of 2016 was paid on January 07, 2016;
- rent for February of 2016 was paid on, or before, February 01, 2016;
- rent for March of 2016 was paid on, or before, March 01, 2016;
- rent for May of 2016 was paid on, or before, May 01, 2016;
- rent for July of 2016 was paid on, or before, July 01, 2016; and
- rent for August of 2016 was paid on August 07, 2016.

The Agent for the Landlord stated that rent for April was paid on April 02, 2016, by electronic transfer. The male Tenant initially stated that rent for April was paid on March 31, 2016, by electronic transfer. The male Tenant subsequently changed his testimony to declare that the rent for April was paid on April 01, 2016, by electronic transfer.

The Agent for the Landlord stated that rent for June was paid on June 03, 2016, by electronic transfer. The male Tenant stated that rent for June was paid on June 01, 2016, by electronic transfer.

Both parties submitted documentary evidence regarding some of the aforementioned rent payments, which were made by e-transfer.

The male Tenant argued that the emails from his financial institution establish when the Landlord accepted various electronic payments and that they do not establish when the payment was actually made.

The Agent for the Landlord argued that the “Interac e-Transfer” dated June 01, 2016 does not establish that an electronic transfer was made on June 01, 2016, as the electronic transfer is not completed. She noted that at the bottom of the document there is a note that declares the send must click “confirm” before the amount will be drawn from the account.

At the hearing on September 07, 2016 the male Tenant stated that there was no longer a need for an Order granting the Tenants access to the rental unit.

At the hearing on September 07, 2016 the male Tenant stated that he wanted authority to change the locks on a storage container on the property because he believes the Landlord had removed some of the Tenants' personal property from the container. The Landlord and the Tenants agree that they both have the right to store property in this container.

At the hearing on September 07, 2016 the male Tenant stated that he wanted authority to change the locks on a storage container on the property because he believes the Landlord had removed some of the Tenants' personal property from the container. The Landlord and the Tenants agree that they both have the right to store property in this container.

At the hearing on September 07, 2016 the male Tenant stated that the Tenants do not want suspend or add additional conditions on the Landlord's right to enter the rental unit, they simply want the Landlord to comply with the legislation when she wants to access the rental unit.

### Analysis

On the basis of the undisputed testimony I find that the Tenants and the Landlord's spouse, who has since passed away, entered into a tenancy agreement that required the Tenants to pay rent by the first day of each month.

Section 47(1)(h) of the *Act* authorizes a landlord to end a tenancy if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

I find that the Landlord has submitted insufficient evidence to establish that there was a term in the tenancy agreement, oral or written, that prohibited smoking inside the rental unit. As the Landlord has failed to establish that the Tenants agreed not to allow smoking in the rental unit, I find that the Landlord does not have the right to end this tenancy, pursuant to section 47(1)(h) of the *Act*, because the Tenants did smoke in the rental unit.

In determining that there is insufficient evidence to show that there was a term in the tenancy agreement that prohibited smoking I was influenced, in part, by the absence of evidence to corroborate the Landlord's submission that the Tenants were told they could not smoke in the rental unit or to refute the male Tenant's submission that the Landlord's husband provided the Tenants with an ashtray and told them to use an air purifier and to open the windows if they smoked.

In determining that there is insufficient evidence to show that there was a term in the tenancy agreement that prohibited smoking I was influenced, in part, by the absence of

evidence that corroborates the Agent for the Landlord's testimony that there was a signing prohibiting smoking posted in the rental unit or that refutes the male Tenant's testimony that no such sign was posted.

In adjudicating this matter I have placed no weight on the Landlord's submission that smoking has always been prohibited in units offered for rent by the Landlord or on the letter from the former tenant who declared that smoking was not permitted during her tenancy. While I accept that the Landlord typically does not allow smoking, it does not establish that the Landlord and the Tenants specifically discussed the issue of smoking prior to the start of this tenancy.

In determining that there is insufficient evidence to show that there was a term in the tenancy agreement that prohibited smoking I was influenced, in part, by the absence of evidence that corroborates the Landlord's testimony that the male Tenant told her that he understood smoking was not allowed in the rental unit or that refutes the male Tenant's testimony that he did not tell the Landlord that he understood smoking was not permitted inside the unit.

In adjudicating this matter I have placed no weight on the Landlord's submission that in May of 2016 the female Tenant was reminded that smoking was not permitted in the rental unit. Even if this is true, this testimony simply confirms that the Landlord believed smoking was not permitted in the rental unit. It does not establish that the Tenants and the Landlord's spouse agreed, at the start of the tenancy, that smoking was prohibited.

In adjudicating this matter I have placed no weight on the fact that the Landlord served the Tenant with written notice that smoking was prohibited in a letter dated June 24, 2016. This letter simply confirms that the Landlord believed smoking was not permitted in the rental unit. It does not establish that the Tenants and the Landlord's spouse agreed, at the start of the tenancy, that smoking was prohibited.

On the basis of the undisputed testimony and the electronic messages submitted in evidence, I find that after the tenancy began the parties mutually agreed to apply wages owed to the male Tenant to rent owed by the Tenants. I find that this mutual agreement altered the due date of the rent until such time as the Landlord informed the Tenants she no longer wished to apply wages to rent owed and that rent was again due by the first day of each month.

On the text message submitted in evidence, I find that in December of 2015 the Landlord informed the Tenants, via text message, that she would like to return "to the normal way of paying the rent". I find that it was reasonable for the Tenants to interpret this text message to mean that the wages owed to the male Tenant would no longer be applied to rent. I find that this text message does not clearly inform the Tenant that rent would again be due by the first day of each month.

On the basis of the text message submitted in evidence, I find that the text message sent on January 01, 2016 clearly informed the Tenants that the Landlord expected rent



to be paid on January 01, 2016. I find that the Tenants should have understood, on the basis of the text message sent in December and the text message sent on January 01, 2016, that the Landlord expected rent to be paid on the first day of each month.

Section 47(1)(b) of the *Act* authorizes a landlord to end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent.

As the parties mutually agreed to alter the due date of rent during this tenancy and the Tenants were not clearly informed that rent would again be due on the first of every month until January 01, 2016, I find that the Landlord did not have the right to end this tenancy, pursuant to section 47(1)(b) of the *Act*, on the basis that rent was not paid on time prior to January 01, 2016.

On the basis of the undisputed evidence, I find that rent was not paid until January 07, 2016. I therefore find that rent was not paid on time in January of 2016.

I find that the Tenants submitted insufficient evidence to establish that the rent for April was paid on, or before, April 01, 2016. I placed little weight on the email of April 02, 2016 from the male Tenant's financial institution, which declares that the Landlord accepted an electronic transfer on April 02, 2016. I find that this email simply establishes when the electronic transfer was accepted; it does not establish when the payment was made.

To establish that rent was paid on time, via electronic transfer, I find that the Tenants should have sent some sort of evidence to show when the electronic transfer was sent. As the Landlord would not have access to this confirmation, I find that the onus is on the Tenants to submit evidence that the electronic transfer was sent on April 01, 2016 and that this evidence should have been available to the Tenant. In the absence of evidence to show that the rent was paid on time, I find that the rent was not paid on time in April of 2016.

I find that the Tenants submitted insufficient evidence to establish that the rent for June was paid on, or before, June 01, 2016. I placed little weight on the email of June 03, 2016 from the male Tenant's financial institution, which declares that the Landlord accepted an electronic transfer on June 03, 2016. As has been previously stated, I find that this email simply establishes when the electronic transfer was accepted. It does not establish when the payment was made.

I also placed little weight on the "Interac e-transfer" document dated June 01, 2016. I find that this document does not establish that an electronic transfer was made on June 01, 2016, as it does not establish that the electronic transfer was completed. I note that the document indicates the sender must click "confirm" before the amount will be drawn from the account. I find it entirely possible that the transfer was cancelled after this document was reproduced.

On the basis of the undisputed evidence, I find that rent was not paid until August 07, 2016. I therefore find that rent was not paid on time in August of 2016.

Residential Tenancy Branch Policy Guideline #38, with which I concur, stipulates that three late payments are the minimum number needed to justify a notice to end tenancy pursuant to section 47(1)(b) of the *Act*. I find that the Landlord has the right to end this tenancy, pursuant to section 47(1)(b) of the *Act* on the basis of the late rent payments that were made in January, April, and June of 2016. The fact that rent was also late in August of 2016 simply reinforces that there are grounds to end the tenancy.

As the Landlord has established grounds to end this tenancy pursuant to section 47(1)(b) of the *Act*, and the Tenants were served with notice of the Landlord's intent to end the tenancy because of repeated late payment of rent, I dismiss the Tenants' application to set aside the One Month Notice to End Tenancy, dated July 26, 2016, and I grant the Landlord's application for an Order of Possession.

As the male Tenant stated there was no longer a need to issue an Order granting the Tenants access to the rental unit, I have not considered the Tenants' application for this Order.

On the basis of the undisputed evidence I find that the Landlord and the Tenants both have the right to store property in a storage container on the residential property. As both parties have the right to use this container, I dismiss the Tenants' application to change the lock on the container.

As all landlords have an obligation to comply with the legislation when they wish to enter a rental unit, I do not find it necessary to issue an Order requiring the Landlord to comply with the legislation when she wishes to access the rental unit. In an effort to provide stability to the remainder of this tenancy, however, both parties are advised that section 29 of the *Act* reads:

A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

- (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
  - (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
    - (i) the purpose for entering, which must be reasonable;
    - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
  - (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
  - (d) the landlord has an order of the director authorizing the entry;
  - (e) the tenant has abandoned the rental unit;
  - (f) an emergency exists and the entry is necessary to protect life or property.
- (2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

I find that the Landlord's Application for Dispute Resolution has merit and that the Landlord is entitled to recover the fee for filing an Application for Dispute Resolution.

I find that the Tenants have failed to establish the merits of their Application for Dispute Resolution and I dismiss their application to recover the fee for filing an Application.

### Conclusion

I grant the Landlord an Order of Possession that is effective **1:00 p.m. on September 30, 2016**. This Order may be served on the Tenants, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

The Landlord has established a monetary claim of \$100.00 in compensation for fee the Landlord paid to file an Application for Dispute Resolution. I grant the Landlord a monetary Order for the amount of \$100.00. In the event that the Tenants do not comply with this Order, it may be served on the Tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: September 23, 2016

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Residential Tenancy Branch