



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Community Builders Group

## **DECISION**

Dispute Codes      CNR, MT, MNDC, MNR, OPR and FF

### Introduction

This hearing dealt with an application by both parties pursuant to the *Residential Tenancy Act* for orders as follows:

The landlord applied for:

1. an Order of Possession for unpaid rent pursuant to section 55;
2. a Monetary Order for unpaid rent and late fees pursuant to section 67; and
3. to recover the filing fee from the tenant for the cost of this application pursuant to section 72.

The tenant applied for:

1. cancellation of the Notice to End Tenancy pursuant to section 47; and
2. more time to make an application to cancel the Notice to End Tenancy pursuant to section 66

The tenant did not appear, while the landlord was represented at the hearing by shift-supervisor and building manager, MC, an employee of the landlord. MC (the landlord) stated that he had full authority to speak and make decisions on behalf of the landlord. MC was given full opportunity to be heard, to present evidence and to make submissions.

MC gave sworn testimony that a 10 Day Notice to End Tenancy for Unpaid Rent and Utilities ("10 Day Notice") was personally served to the tenant on November 10, 2016. I

find that the 10 Day Notice for unpaid November 2016 rent was served to the tenant on November 10, 2016, in accordance with section 88 of the *Act*.

On November 16, 2016, the tenant filed a Tenant's Application for Dispute Resolution. As MC confirmed receipt of the Tenant's application, I find that the tenant's application was duly served to the landlord in accordance with section 89 of the *Act*.

MC stated that the tenant was served with the Landlord's Application for Dispute Resolution hearing package ("dispute resolution hearing package") on November 25, 2016 by Registered Mail. In the evidentiary package submitted for the hearing, the Canada Post tracking number was provided to confirm this. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's dispute resolution hearing package on November 30, 2016, the fifth day after its registered mailing.

#### Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the landlord entitled to a Monetary Order for unpaid rent, and recovery of the filing fee for this application?

#### Background and Evidence

MC gave evidence that the tenancy agreement in question was in fact the third fixed-term tenancy agreement that the landlord and tenant had entered into. The first of these tenancies began on December 1, 2015 and ended on January 31, 2016. Following this, a 6 month fixed-term agreement ran from February 1, 2016 to July 31, 2016. Finally, the tenancy agreement at the centre of this dispute was signed on August 1, 2016. It was a 6 month fixed-term agreement, ending on February 1, 2017. Rent of \$375.00 was due on the first day of each month. During the course of the first fixed-term tenancy, a security deposit of \$275.00 was collected. MC testified that the landlord continued to hold the \$275.00 security deposit that the tenant paid on December 1, 2015.

The landlord has applied for an Order of Possession for non-payment of rent for November 2016, along with a monetary order for \$750.00 in unpaid rent for November and December 2016. The landlord's application submitted to the RTB on November 25, 2016 indicated that they wished to collect rent for December 2016 despite it not yet being due. MC testified that the landlord did not want to pursue the monetary portion of

their claim as the tenant had paid the entire amount due on December 19, 2016. MC testified that he wanted to pursue the order of possession as there had been a history of late payment of rent by the tenant and he did not want to have to "chase rent in January."

The landlord issued the 10 Day Notice in person to the tenant on November 10, 2016. The landlord testified that the tenant did not pay November rent after receiving the 10 Day Notice on November 10, 2016. After the expiration of that 10 Day period, the landlord applied for an Order of Possession.

### Analysis - Order of Possession

The landlord testified that the tenant paid the outstanding rent owing for November and December 2016.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day 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.*

The landlord provided undisputed evidence at this hearing, as the tenant did not appear. The tenant failed to pay the outstanding rent due on November 1, 2016, within five days of receiving the 10 Day Notice.

After the tenant was deemed to have received the 10 Day Notice on November 10, 2016, she made two rent payments for November and December 2016 on December 19, 2016. I find that the landlord's conduct of accepting full rent payments for two months after filing the Application on November 25, 2016, to be a waiver of the 10 Day Notice. The landlord did not provide any evidence that they had issued any receipts for the rent payments or indicate that they were being accepted for "use and occupancy only." The landlord failed to provide any evidence that the landlord specifically informed the tenant that the November and December 2016 rent payments were being accepted for "use and occupancy only." I find that the landlord did not communicate with the tenant about their intention to pursue an end to this tenancy.

The landlord did not withdraw its Application or cancel the hearing at any time prior to this hearing. I found that the tenant was deemed served with the landlord's Application and had sufficient notice of the hearing. The tenant did not appear at this hearing to present her position. The tenant did not allege any express or implied waiver of the 10 Day Notice. However, I find that the tenant relied on the landlord's conduct, amounting to waiver, of continuing to accept November and December 2016 rent payments without issuing any receipts or verbal notifications that the rent was being accepted for "use and occupancy only" or that an end to tenancy was still desired.

For the above reasons, and given the conduct of the parties, I find that the landlord waived its rights to pursue an Order of Possession based on the 10 Day Notice. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenant after the corrected effective date of November 20, 2016.

On a balance of probabilities and for the reasons stated above, I dismiss the landlord's application for an order of possession based on the landlord's 10 Day Notice, dated November 10, 2016, without leave to reapply. The landlord's 10 Day Notice, dated

October 10, 2015, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

#### Analysis – Monetary Order

The landlord withdrew their application for a Monetary Order as all outstanding rent was paid on December 19, 2016.

As the landlord was unsuccessful in their application for an Order of Possession, the landlord is not entitled to recover the \$100.00 filing fee from the tenant.

#### Conclusion

The tenant is successful in their application to cancel the landlord's notice to end tenancy and for more time to file. The landlord's 10 Day Notice of November 10, 2016 is cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*.

The landlord withdrew their request for a monetary order.

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: January 4, 2017

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Residential Tenancy Branch