



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

**Dispute Codes**      **MT, CNC**

### **Introduction**

This is the tenant's application pursuant to s. 47(4) of the *Residential Tenancy Act* (the "Act") for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause dated November 29, 2016 with an effective date of January 1, 2017 (the "1 Month Notice"). The tenant has also applied for an order allowing her more time to apply to cancel the 1 Month Notice.

The tenant attended the hearing with her former co-tenant, and the property manager attended the hearing on behalf of the owner. At my request the owner was conferenced into the hearing for a short while to give evidence.

At the outset of the hearing, the hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and had the opportunity to present their evidence orally and in written and documentary form, to make submissions, and to respond to the other party.

It was undisputed that the tenant was served with the landlord's 1 Month Notice on either November 29 or 30, 2016 (the landlord's property manager believed it was the 30 and the tenant believed it was the 29). The landlord's property manager confirmed receipt of the tenant's application to dispute the 1 Month Notice and the Notice of Hearing and supporting evidence. The landlord's evidence was submitted to the Residential Tenancy Branch ("RTB") and to the tenant late, on January 12, 2017. This evidence consisted of banking records and texts between the property manager and the tenant. Certain of the text messages are clearly dated and others are not. The landlord's agent testified that she left this evidence in the tenant's mailbox.

The tenant confirmed receipt of the landlord's evidence on the evening of January 13, 2017 and argued that she had not had sufficient time to respond to it. In particular, the former co-tenant testified that he still often "made up" any shortfall in the amount owing if the tenant was unable to pay the full amount owing, sometimes by providing money to the tenant and sometimes by providing it to the property manager directly, but without

going over his own banking records he could not advise of when these payments had been made.

The landlord's agent was advised that the landlord's evidence was late and the tenant may not have had adequate time to respond to it. Ultimately, however, it was not necessary to consider an adjournment to allow the tenant to respond to the evidence, because, even if I were to accept the landlord's late evidence, I would decide this application in the tenant's favour.

At the outset and the conclusion of the hearing I advised the parties of their option to have me assist in mediating an agreement with respect to this tenancy. Neither party was receptive to settlement. Unfortunately, and as set out in more detail below, this is a highly toxic relationship.

Also at the outset of the hearing the property manager raised a concern with the person the tenant wished to have with her at the hearing. The property manager stated that she did not want to have him participate because he had been residing in the rental unit without permission and interfering with the tenancy. There was no legal basis for her objection and he was allowed to participate in the hearing.

### **Issues to be Decided**

Is the tenant entitled to an extension of time for her application to dispute the 1 Month Notice?

If so, is the tenant entitled to an order cancelling the 1 Month Notice?

If not, is the landlord entitled to an order of possession?

## **Background and Evidence**

### ***Background***

Neither party submitted a copy of the tenancy agreement in evidence. However, they agreed that the tenancy began September 15, 2014 as a fixed term, and that the tenancy agreement was rewritten in or about February of 2016 when one of the two tenants left. The parties further agreed that the tenancy then became a month to month tenancy, with a monthly rent of \$1,100.00. Although there was some uncertainty as to whether rent was due on the 15<sup>th</sup> of the month under the terms of the original tenancy, the tenant acknowledged that since the tenancy agreement was rewritten, around February of 2015, monthly rent has been due on the 1<sup>st</sup> of the month.

The parties also agreed that a security deposit of \$550.00 was paid at the beginning of the tenancy and that the landlord continues to hold that amount in trust. The tenant and the former tenant both testified that a pet deposit of \$250.00 was also paid at the beginning of the initial tenancy, and the landlord continues to hold that amount as well. The landlord's agent did not believe this was the case.

Both the tenant and the property manager understood that the tenancy agreement did not prohibit smoking in the residence. The owner believed that it did. Again, the tenancy agreement was not before me.

The tenant provided undisputed affirmed testimony that she was suffering from cancer and that she smokes medicinal marihuana as a result.

### ***Application for more time to dispute the 1 Month Notice***

The tenant's application to dispute the 1 Month Notice was filed outside of the 10 day time limit set out in s. 47(4) of the Act. The tenant received the 1 Month Notice on November 29 or 30, and her application was not filed until December 14, 2016.

The tenant testified that she did not apply to dispute the 1 Month Notice earlier because she spoke with the owner on or shortly before December 8, 2016 and understood that they had reached an agreement whereby she could disregard the 1 Month Notice if she would commit to not smoking marihuana inside of the rental unit. She stated that the owner asked her to email him a commitment to refrain from smoking inside of the unit and that he dictated the language of an email for her to this effect. She says that she then sent him the email he had asked her to write on December 8.

Although neither party submitted this email in evidence, the tenant did submit an email from the property manager to her dated December 13, 2016. In the December 13 email, which is copied to the owner, the property manager states, in part, as follows: "Since the eviction you made an agreement with the home owner (in which you are not to contact as I am the property manager) that you would not smoke pot in the house or on the side balcony or interfere with other tenants. It seems that you think this nullifies your eviction . . . it absolutely does NOT !!! (reproduced as written)."

The owner was called as a witness. He was unclear about exactly what he had said to the tenant at this time. He stated that he may have said something about talking to the property manager and seeing what he could do if the tenant promised not to smoke inside. He further stated that, two days later, he received a text from the tenants living below the applicant tenant, complaining about the tenant whose application is before me, and that this angered him.

### ***Smoking as cause for ending the tenancy***

The 1 Month Notice alleges there is cause to end the tenancy for several reasons. It alleges that the tenant is repeatedly late paying rent. It also alleges that the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord or seriously jeopardized the health or safety or lawful right of another occupant or the landlord. It further alleges that the tenant has engaged in illegal activity that has adversely affected the quiet enjoyment, security, safety or physical well-being of another occupant, or jeopardized a lawful right or interest of another occupant or the landlord.

Regarding the second and third grounds, the property manager testified that the downstairs tenants have temporarily left the downstairs rental unit because they are so badly affected by the upstairs tenant's smoking. She also testified that one of the downstairs tenants had been pregnant and was vomiting because of the smell of marijuana caused by the upstairs tenant. The property manager further testified that the downstairs tenant had now had her child but was not living in the downstairs unit because of the smoke. She said that the furnace in the residence is central and pulls the air from the upstairs suite directly into the downstairs suite.

No evidence was submitted in support of these submissions. The downstairs tenants were not called as witnesses and did not submit written statements. It was not clear when the downstairs tenancy began or how many complaints the downstairs tenants have made. The only warning in evidence to the upstairs tenant was a text from the property manager stating: "There are tenants down stairs and their house is hot boxed . . you rent a non smoking house . . open your doors pls to air out . . she is almost due

with her baby and the vents go downstairs . . 1st and last warning!! (reproduced as written).”

The tenant denies that she has significantly interfered or unreasonably disturbed the other occupants or seriously affected their health or safety or lawful right. Both the tenant and her witness testified that the tenant is not often home because of medical appointments out of town. They suggest the tenant cannot be significantly interfering with others in light of how little she is at home. Both further say that the downstairs suite is illegal.

***Repeated late payment of rent as cause for ending the tenancy***

The property manager testified that rent has been late and/or short eight times in the last year. She also said that it was repeatedly late in 2015. She said that the owner has become tired of this and because he is responsible for making timely mortgage payments he instructed her to end the tenancy.

The banking statements submitted by the landlord’s agent appear to record deposits into an account controlled by the property manager. It is not clear whether the deposits were made by the tenant or by the property manager. The banking statements highlight the following late payments:

September 8, 2015
November 3, 2015
December 2, 2015 (and \$100.00 short)
January 4, 2016
February 2, 2016 (and \$100.00 short)
April 12, 2016 (and short)
July 5, 2016
August 2, 2016 (and \$100.00 short)
October 12, 2016 (and short)
November 2, 2016 (and \$100.00 short)

The tenant believed that she had only been late two or three times in the past year. She also stated that when the rent is late it is never significantly late, and most of the time it is paid before the 5<sup>th</sup> of the month. Both the tenant and her witness also stated that thought they were allowed to pay rent within five days of the beginning of the month.

The tenant also stated that she always advised the property manager in advance if rent was going to be late and that the property manager appeared to understand and accept this. In response the property manager said that the late payment is not acceptable simply because the money is accepted late.

Both of the parties agreed that at some point the tenant was advised that a late fee would be charged if she continued to pay late. The property agent did not say that the tenant had ever been charged a late fee. No late fees appear to have been charged based on the banking statements in evidence. Nor was there any evidence that the tenant had actually been served with a 10 Day Notice, although one of the texts from the property manager, sent after service of the 1 Month Notice, threatens a 10 Day Notice.

One of the texts in evidence records the property manager saying to the tenant: "I have proof of almost all late rent payments and you don't seem to care about the other tenants . . . sorry you have had more than enough warnings." No warnings were in evidence and the property manager did not mention any warnings in her submissions.

The tenant also stated that one of her employer's pay cycles has complicated her ability to pay rent on the 1<sup>st</sup> of the month, and that her medical treatments have also affected her ability to pay rent on the 1<sup>st</sup> of the month.

## **Analysis**

### ***Application for more time to dispute the 1 Month Notice***

The tenant received the 1 Month Notice on November 29 or 30, 2016. Section 47(5) provides that a tenant who has not applied to dispute a notice within 10 days of receipt is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice. On the property manager's evidence, the tenant was four days late in filing.

Section 66 of the Act allows me to extend a time limit established by the Act "in exceptional circumstances." The Residential Tenancy Branch's Policy Guideline #36 offers some guidance on what qualifies as exceptional. It states that "exceptional" means "out of the ordinary." I am satisfied that this is an exceptional circumstance. An agreement between the tenant and the owner to withdraw the 1 Month Notice on certain conditions is out of the ordinary.

The tenant testified that she and the owner reached an agreement under which the 1 Month Notice could be disregarded and that she sent him her email promise to refrain from smoking indoors on December 8, 2016. The tenant's testimony is consistent with the email from the property manager dated December 13, 2017, in which the property owner suggests that the tenant misunderstood the owner. Based on this acknowledgement that there has been a misunderstanding, and the owner's own testimony, I accept that the tenant reasonably believed that the owner had committed to withdrawing the 1 Month Notice. It may be that he actually had committed, but that he changed his mind after receiving the complaint from the downstairs tenants soon after his conversation with the upstairs tenant.

Policy Guideline #36 also sets out relevant considerations for an arbitrator when assessing whether an application to extend a timeline should succeed. These include whether the applicant purposefully failed to meet the deadline, and whether the application brought the application as soon as practicable after the deadline. In this case I am satisfied that the tenant did not intend to miss the deadline. Rather, she understood that the deadline had disappeared, along with the 1 Month Notice. She also brought her application as soon as she became aware that there was no agreement to withdraw the 1 Month Notice.

I conclude that what the tenant understood as an assurance from the owner that he would not proceed on the 1 Month Notice qualifies as an exceptional circumstance. Accordingly, I grant the tenant's application for an extension of time for the filing of her application to dispute.

### ***Cause to end the tenancy***

The landlord's agent has chosen not to call the downstairs tenants, who are allegedly being significantly affected by the tenant's smoking, as witnesses. Nor has she provided written statements from those tenants or any documentary evidence of their complaints to the landlord. The tenant says she is often away, and that since receiving the 1 Month Notice she has been smoking only outside. The landlord has not submitted any evidence to counter this. As a result, I am unable to ascertain how often and for what duration and how severely the downstairs tenants may be adversely affected.

Based on these deficiencies, I find that cause has not been made out by the landlord under s. 7(1)(d)(i) or (ii) or s.47(1)(e)(ii) or (iii). There is insufficient evidence that the tenant has significantly interfered with or unreasonably disturbed another occupant or seriously jeopardized the health of safety or lawful interest of another occupant. For the

same reasons there is insufficient evidence that she has engaged in illegal activity that has adversely affected the quiet enjoyment, security, physical well-being, or safety of another occupant, or jeopardized the lawful right or interest of another occupant or the landlord. Again, the burden of proof is on the landlord in these circumstances, and there is insufficient evidence before me to find in favour of the landlord.

Based on the undisputed documentary evidence and testimony of both parties provided during the hearing, I find that the tenant has failed to pay rent when it was due on 10 occasions since September of 2015. However, it is also clear that the tenant usually paid by before the 5<sup>th</sup> of the month. I also accept that the tenant understood that this was acceptable.

It does not appear that the landlord has ever issued a warning to the tenant the rent must be paid on the first day of the month. Nor does it appear that the landlord has ever issued a 10 Day Notice for Late Payment of Rent. This is so in spite of the fact that the tenant is repeatedly late paying rent. In the circumstances, the landlord is estopped from insisting on his strict legal right without first issuing a warning.

Estoppel is a legal doctrine under which a party (here, the landlord) may not be allowed to strictly enforce his legal right if he has established a pattern of failing to enforce this right and another party (here, the tenant) has relied on this pattern. In order to return to a strict enforcement of his legal right to receive payment on the 1<sup>st</sup> of the month without fail, the landlord must first give the tenant notice that he is changing his approach and is now going to strictly enforce the right that was previously waived.

Over the last 18 months, the landlord has accepted late payment on many occasions, apparently without comment or complaint. He cannot now rely on the tenant's repeated late payment as cause to end the tenancy without first giving the tenant clear notice that he will no longer accept late payment. There is no evidence before me that the landlord has given that tenant clear notice. Late fees do not appear to have been charged. There are no warning letters in evidence. There are no 10 Day Notices in evidence.

However, the landlord has now, by way of the 1 Month Notice currently under dispute, given the tenant clear notice that further late payments will not be allowed. The tenant has now been put on notice that she must pay her rent in full by the 1<sup>st</sup> of the month.

## **Conclusion**

The tenant's application to extend the time for filing her application to dispute the 1 Month Notice is allowed.



The tenant's application to dispute the landlord's 1 Month Notice is also allowed, and the landlords' 1 Month Notice is cancelled.

As the tenant is successful, I grant her the filing fee in the amount of \$100.00 and authorize her to withhold this amount on a one time basis from rent owing pursuant to s. 72(2)(a) of the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*. Pursuant to s. 77 of the *Act*, a decision or an order is final and binding, except as otherwise provided in the *Act*

Over the course of the hearing the tenant and the property manager spoke over one another, accused one another of lying, and criticized one another repeatedly. The property manager suggested that if the landlord was not successful on this application, additional evidence would be submitted and another notice to end tenancy would be issued. This is clearly a toxic relationship. The parties are reminded that they may also negotiate a mutual end to this tenancy on terms that are agreeable to both.

The tenant is also reminded that she has now been given clear notice by the landlord that late payment of rent, and smoking that affects the downstairs tenants, will not be tolerated.

Dated: January 23, 2017

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Residential Tenancy Branch