



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## A matter **DECISION**

Dispute Codes      OPR, FF

### Introduction

This hearing addressed the landlords' application pursuant to the *Residential Tenancy Act* (the "Act") for:

- an order of possession for unpaid rent, pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The landlords' application was originally initiated as a direct request proceeding, which is a non-participatory hearing. In an interim decision issued on February 27, 2017, an adjudicator determined that the matter was not appropriate for a non-participatory hearing and ordered that a participatory hearing take place. The interim decision directed the landlord to serve the tenant with a copy of the interim decision and a Notice of Reconvened Hearing (the "Hearing Package").

The tenants did not participate in the conference call hearing, which lasted approximately 10 minutes. Landlord AC and landlord DC (collectively the "landlord") attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Landlord AC testified that on March 4, 2017 he posted the Hearing Package to the rental unit door where the tenants are residing. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were deemed served with the Hearing Package on March 7, 2017, three days after its posting.

### Issue(s) to be Decided

Are the landlords entitled to an order of possession for unpaid rent?

Are the landlords authorized to recover the filing fee for this application from the tenants?

### Background and Evidence

As per the submitted tenancy agreement and testimony of the landlords, the tenancy began on September 1, 2016 on a fixed term until July 31, 2017. Rent in the amount of \$3,200.00 is payable on the first of each month. The tenants remitted a security deposit in the amount of \$1,600.00 at the start of the tenancy. The tenants continue to reside in the rental unit.

Landlord AC testified that he served the tenants with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated February 10, 2017 ("10 Day Notice"), on the same date, by way of posting to the rental unit door where the tenants are residing. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were deemed served with the landlord's 10 Day Notice on February 13, 2017, three days after its posting.

Landlord AC testified that since issuing the 10 Day Notice he has received two payments from the tenants. First, he received a payment of \$6,400.00 on March 1, 2017 for February and March rent and secondly on March 3, 2017 he received a \$3,200.00 payment for April rent. The landlords submitted a letter dated March 3, 2017, addressed to the tenants which confirm receipt of payment for use and occupancy only. In the letter, the landlords indicate they are seeking an order of possession effective April 30, 2017.

### Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent the tenant may, within five days, pay rent in full or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant does not pay rent in full or file an application, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice and must move out of the rental unit.

Although the tenants failed to pay rent due on February 1, 2017 and did not pay the rent within five days of receiving the 10 Day Notice dated February 10, 2017, the tenants did make two payments in March 2017. Because of this, it must be decided whether the landlords waived their right to pursue the 10 Day Notice, dated February 10, 2017. Residential Tenancy Policy Guideline 11 discusses the issue of waiver:

*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 landlords accepted rent after the effective date on the 10 Day Notice, I do not find this to be a waiver of the 10 Day Notice. The landlords did not withdraw their application to enforce the 10 Day Notice dated February 10, 2017, at any time prior to this hearing. Landlord AC testified that after receiving the payments he issued a receipt in the form of a letter for "use and occupancy only." Upon review of this letter, I am satisfied that the landlords intentions were clear, the landlords still sought vacant possession of the unit albeit effective April 30, 2017. This letter is recent evidence of the landlords' intention to pursue the 10 Day Notice and obtain an order of possession against the tenants.

For the above reasons, and given the conduct of the parties, I find that the landlords did not waive their right to pursue the 10 Day Notice and did not waive the 10 Day Notice expressly or impliedly. I find that the landlords did not intend to reinstate this tenancy, despite accepting rent payments after the effective date of the 10 Day Notice.

Section 52 of the *Act* provides that a notice to end tenancy from a landlord must be in writing and must be signed and dated by the landlord, give the address of the rental unit, state the effective date of the notice, state the grounds for ending the tenancy, and be in the approved form.

Based on the landlords' testimony and the notice before me, I find the tenants were served with an effective notice and therefore grant the landlord an order of possession effective April 30, 2017 at 1:00 p.m.

As the landlords were successful in this application, I find that the landlords are entitled to recover the \$100.00 filing fee paid for the application.

### Conclusion

I grant an order of possession to the landlord effective **April 30, 2017 at 1:00 p.m.**

I issue a monetary order in the landlord's favour in the amount of \$100.00.

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: March 24, 2017

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Residential Tenancy Branch