



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC

### Introduction

This hearing was convened in response to an application by the Tenant for an order cancelling a notice to end tenancy pursuant to section 47 of the *Residential Tenancy Act* (the “Act”).

The Landlord’s Agent (the “Agent”) and Tenant were each given full opportunity under oath to be heard, to present evidence and to make submissions.

### Issue(s) to be Decided

Is the notice to end tenancy valid?

Is the Tenant entitled to a cancellation of the notice to end tenancy?

### Background and Evidence

The following are agreed facts: A written tenancy agreement exists. The tenancy started in 2011 with rent of \$850.00 payable on the 3<sup>rd</sup> day of each month. The tenancy agreement sets out that a security deposit of \$850.00 was collected. On May 12, 2017 the Landlord served the Tenant with a one month notice to end tenancy for unpaid rent.

The Agent states that they were told that the Tenant only paid \$425.00. The Tenant states that \$850.00 was paid for the security deposit as set out in the tenancy agreement.

The Agent states that the Tenant was late paying rent for March, and April 2017. The Agent states that the Tenant was also late paying rent for a few months in 2016. The Agent confirms that May 2017 rent was paid on time.

The following Decisions were provided as evidence by the Landlord and are summarized as follows: In a Decision dated February 9, 2017 following a mutual agreement to settle the dispute the Tenant was ordered to deduct \$850.00 from March 2017 rent. This Decision made no finding nor was any evidence noted in relation to the amount of rent that was payable at the time. In a Decision dated April 5, 2017 the Landlord's notice to end tenancy for repeated unpaid rent to and including February 2017 was dismissed. This Decision notes that the Parties agreed that the rent from at least January 2017 is \$910.67 payable on the 3<sup>rd</sup> day of each month and that the Tenant was to be credited \$101.07 for an overpayment of rent for January to March 2017, inclusive. The Tenant was also ordered to deduct the \$100.00 filing fee from future rent. In this decision the Tenant's claim for repairs was dismissed with leave to reapply while the Tenant was ordered to provide the Landlord, no later than April 12, 2017, a one page written request setting out the repairs required. The Decision continues that following receipt of this written request the Landlord has 30 days to make the repairs.

The Agent states that the Tenant paid no rent for March 2017 and that the Landlord served the Tenant with a 10 day notice for unpaid rent of \$49.06. The Agent states that the Tenant paid this amount on March 8, 2017. The Landlord's evidence submissions indicate that the Landlord calculated that rent of this amount was owed based on a rental amount of \$944.36 and deductions of \$850.00 as ordered and \$45.30 noted as an overpayment from "February 2016 to 2017". No oral evidence was provided at the hearing in relation to the overpayment noted.

The Tenant states that she did not pay rent on March 3, 2017 as she deducted the \$850.00 as ordered in the Decision dated February 9, 2017 and also made deductions

for an overpayment of rent totalling \$140.00 that had been collected by the Landlord for the months of February, March, April and May 2013. The Tenant states that she also paid the amount on the 10 day notice despite not owing that amount. The Tenant provided a copy of a letter written by the Landlord and a copy of a cheque for \$240.00, both dated May 16, 2017. This letter indicates that the \$240.00 represented rental overpayments of \$35.00 for each of February, March, April and May 2013 along with another error in collecting another rent overpayment of \$100.00 in July 2015. The Tenant states that the Landlord has also made errors with the over collection of utilities owed by the Tenant. The Tenant requests that she be able to provide post-dated cheques to the Landlord for rent as the Tenant no longer trusts the Landlord's accounting of monies payable. The Agent states that there does not appear to be any impediment to paying rent by post-dated cheques.

#### Analysis

Section 47 of the Act provides that a landlord may seek to end a tenancy where the tenant has been repeatedly late paying rent. The Landlord provided no accounting records showing rents owed and collected over the tenancy. The Parties were in disputes recently dealing with rent overpayments and rent deductions indicating that, beyond proper business practices, it would be incumbent on the Landlord to maintain and provide clear records of rents collected. The Act allows a tenant to deduct rent overpayments without penalty. The Tenant made her calculations and made the deductions for March 2017 rent according to her calculations which were provided for this hearing. The Landlord's letter of May 16, 2017 confirms that the Tenant's calculations of rent overpayments were correct. I find that the Tenant therefore rightfully made the deductions and in fact overpaid the Landlord for March 2017. As a result I find that the Tenant was not late in paying rent for March 2017.

The legal principle of ***Res judicata*** prevents a party from pursuing a claim that has already been decided. Where a disputed matter is identical to or substantially the same as the earlier disputed matter, the application of *res judicata* operates to preserve the

effect of the first decision or determination of the matter. As the dispute in relation to late rent payments for 2016 has already been determined in the Decision dated April 5, 2017, I find that res judicata applies to the current claim of late rent payments in 2016 and that I may no longer consider evidence of late rent payments for that period.

As there otherwise is only evidence of one late payment by one day on April 4, 2017, I find that the Landlord has not substantiated that the Tenant has been repeatedly late on rent. I find therefore that the Notice is not valid and that the Tenant is entitled to a cancellation of the Notice. The tenancy continues.

As this is the second notice to end tenancy for cause that the Landlord issued without valid reason, I strongly caution the Landlord against serving any other notices to end tenancy that have no merit as to do so may be seen as a form of harassment of the Tenant for which compensation may be payable if applied for by the Tenant. I also strongly caution the Landlord to create and maintain a proper accounting system for the collection of rents and utility payments as there is some indication that the Tenant considers that there has also been an overpayment of utilities and another dispute may be in the making.

As the Tenant has requested the payment of rent by way of postdated cheques, as there is no evidence that the Tenant must pay rent in any certain manner, and as I consider this form of rent payment to be the best in the circumstances I find that the Tenant may pay rent by post-dated cheques. I therefore order the Landlord to accept any rent payments made by post-dated cheques from the Tenant.

Section 19 of the Act provides that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. This section further provides that if a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted, the tenant may deduct the overpayment from rent or otherwise

recover the overpayment. Based on the oral evidence of the Tenant and the written tenancy agreement I accept that the Landlord collected a greater security deposit amount than allowed. As a result I find that the Tenant may deduct the overpayment amount of **\$425.00** from future rent payable in full satisfaction of this entitlement.

Conclusion

The Notice is cancelled and the tenancy continues.

I grant the Tenant an order under Section 67 of the Act for **\$425.00**. If necessary, this order may be filed in the 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: June 28, 2017

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Residential Tenancy Branch