



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes          OPC, FFL

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for cause based on the 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they received the landlord's 1 Month Notice on November 21, 2017, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*.

As the tenant confirmed that they received a copy of the landlord's dispute resolution hearing package including the notice of this hearing as well as the landlord's written evidence package on December 18, 2017, I find that the tenant was duly served with these packages in accordance with sections 88 and 89 of the *Act*.

The tenant testified that she handed the landlord her written evidence package at 10:00 a.m. on the morning of this hearing. The tenant also said that she had digital evidence that was on its way to the Residential Tenancy Branch (the RTB). Although Landlord representative TP (the landlord) confirmed receipt of this package, they said that they had only had a short period of time to consider this written evidence.

The RTB's Rules of Procedure call for the Respondent's provision of written evidence at least seven days before a hearing. While late evidence can be considered, arbitrators have the discretion as to whether to consider such late evidence. In this case, as the landlord did not object to the consideration of the tenant's written evidence, even though it was served to the landlord far after the time frame for doing so had expired, I have considered the tenant's written

evidence. I could not consider the digital evidence referred to by the tenant, as it had not been provided by the time of this hearing.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for cause based on the 1 Month Notice? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The tenant testified that this month-to-month tenancy began in August 2011. Monthly rent is currently set at \$635.00, payable in advance on the first of each month. The landlord continues to hold a \$424.50 security deposit paid by the tenant when this tenancy began.

In the tenant's written evidence, the tenant referred to a previous decision issued by an arbitrator appointed under the Act, which was issued on November 20, 2017. The arbitrator cancelled the landlord's 1 Month Notice that was the subject of that participatory hearing. That decision involved a previous 1 Month Notice issued by the landlord. The reasons cited in that 1 Month Notice for seeking an end this tenancy for cause were different than the following reason identified in the landlord's 1 Month Notice of November 21, 2017.

*Tenant is repeatedly late paying rent.*

The tenant confirmed that they had not applied to cancel the landlord's 1 Month Notice of November 21, 2017, explaining that they did not realize they had to do this.

In the landlord's written evidence, the landlord provided copies of receipts and 10 Day Notices to End Tenancy for Unpaid Rent (10 Day Notices) issued to the tenant. At the hearing, the landlord gave sworn testimony, referencing these receipts, in which the following late payments of rent were identified:

<b>Date of Payment and Receipt</b>	<b>Payment</b>
June 16, 2017	\$635.00
July 4, 2017	635.00
August 14, 2017 (\$100.00 short in payment)	535.00
September 6, 2017	655.00
October 5, 2017	635.00
November 8, 2017	635.00

The landlord gave undisputed sworn testimony that each of the above payments were due as of the first of that month.

The landlord testified that there are multiple ways that tenants can pay their monthly rent. The landlord said that some tenants in this complex prefer to place their payments in envelopes

directed to the landlord in their locked personal mailboxes and the landlord retrieves these payments as the landlord has a key. Other tenants choose to place their payments in the landlord's locked mailbox. Still other tenants pay their monthly rent by way of post-dated cheques.

The tenant testified that they never use one of the methods for rent payment identified by the landlord because those methods are not secure. The tenant said that there have been break-ins to the mailbox area and that her practice has always been to hand the payments directly to the landlord. The tenant maintained in her written evidence that the landlord is not always present when monthly rent becomes due and that the landlord's absences were responsible for most of the late payments. The tenant said that the late payments have never been an issue until she succeeded in her attempt to cancel the last 1 Month Notice provided to the tenant. The tenant maintained that other tenants in the building also have a history of late payment of rent and that the tenant's long-time history in the building as well as the most recent three rent payments have all been made on time or in advance. The tenant asked for consideration of the impact an eviction would have on the tenant's four children, as the tenant has nowhere else to go.

The landlord confirmed that the landlord has accepted rent from the tenant for use and occupancy only and not to reinstate this tenancy, and that the tenant is current with her payments. The most recent payment was received for use and occupancy only for the month of February 2018. The landlord maintained that the tenant's January 2018 rent was paid on January 3, 2018; the tenant said that this was because the landlord was not available until then to receive the tenant's rent payment.

### Analysis

The tenant has not made application pursuant to section 47(4) of the *Act* within ten days of receiving the 1 Month Notice. Although I have taken into consideration the tenant's claim that they did not realize that they had to do so within ten days, I note the following wording from the November 20, 2017 decision issued by the arbitrator who considered the landlord's last 1 Month Notice issued on different grounds:

*...This hearing was convened in response to an application by the tenant filed September 01, 2017 to cancel a 1 Month Notice to End Tenancy for Cause (Notice to End) dated August 21, 2017...*

Thus, it would seem that the tenant was well aware of the process for seeking cancellation of a 1 Month Notice, as they received a decision on their previous application to cancel the landlord's 1 Month Notice the day before the current 1 Month Notice was received by the tenant.

In considering this matter, I have reviewed the landlord's 1 Month Notice to ensure that the landlord has complied with the requirements as to the form and content of section 52 of the *Act*. I find that the landlord's 1 Month Notice meets all of the requirements of section 52.

In addition, I note the wording of RTB Policy Guideline #38, which provides the following guidance regarding the circumstances whereby a landlord may end a tenancy where the tenant is repeatedly late paying rent.

*Three late payments are the minimum number sufficient to justify a notice under these provisions...*

*However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late...*

Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent." There is no dispute that the tenancy agreement requires the tenant to pay all of the rent by the first of each month. The landlord has provided convincing evidence that the tenant was late in paying their rent on six successive occasions, prior to the issuance of the 1 Month Notice. The tenant's explanation that the landlord was unavailable for a direct payment on some of these occasions does not transfer responsibility for the tenant's ongoing pattern of paying rent after it became due to the landlord. Other arrangements could clearly have been made by the tenant and were available to ensure that the rent was paid on time. I am satisfied that there is a pattern of late payment of rent throughout the months leading up to the landlord's issuance of this 1 Month Notice.

Section 47(5) of the *Act* reads as follows:

*(5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant*

*(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*

*(b) must vacate the rental unit by that date...*

In accordance with section 47(5) of the *Act*, the tenant's failure to apply to cancel the landlord's 1 Month Notice within ten days led to the end of this tenancy on the corrected effective date of the notice. In this case, this required the tenant to vacate the premises by December 31, 2017. In the interim, the landlord accepted two payments from the tenant for use and occupancy only, which has allowed the tenant to remain in the rental unit until February 28, 2018.

I find that the landlord is entitled to an Order of Possession that takes effect at 1:00 p.m. on February 28, 2018, the last day in which the landlord's acceptance of payment for use and

occupancy only enables the tenant to remain in this rental unit. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit by 1:00 p.m. on February 28, 2018, the landlord may enforce this Order in the Supreme Court of British Columbia.

As the landlord has been successful in this application, I allow the landlord to recover the \$100.00 filing fee for this application from the tenant. Although the landlord's application does not seek to retain a portion of the tenant's security deposit, using the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$100.00 from the tenant's security deposit to implement the recovery of the landlord's filing fee from the tenant.

### Conclusion

The landlord is provided with a formal copy of an Order of Possession effective by 1:00 p.m. on February 28, 2018. Should the tenant or any occupant on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I allow the landlord to recover the filing fee from the tenant by ordering the landlord to retain \$100.00 from the tenant's security deposit. The value of the tenant's security deposit is hereby reduced from \$424.50 to \$324.50.

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 29, 2018

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Residential Tenancy Branch