



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes          OPC, MNDCL-S, FFL, CNC, FFT, OLC

### Introduction

This hearing, conducted by a conference call, dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*).

The landlords applied for:

- an Order of Possession pursuant to section 55;
- a monetary order for damages and loss pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants applied for:

- cancellation of the landlords' 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order that the landlords comply with the Act, regulations or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord MY primarily spoke on behalf of the co-landlords (the "landlord"). The tenant NA primarily spoke on behalf of both co-tenants (the "tenant").

As both parties were in attendance I confirmed service. The landlord testified that they issued a 1 Month Notice on October 17, 2017, a revised 1 Month Notice on October 23, 2017 and their application for dispute resolution on November 2, 2017. The tenant confirmed receipt of the landlord's two 1 Month Notices, application for dispute resolution and evidentiary materials. The tenant testified that they filed their application for dispute resolution on October 20, 2017 in response to the initial 1 Month Notice. The landlord confirmed receipt of the tenant's application

and evidence. I find that the landlords' 1 Month Notices, application and evidence were served in accordance with sections 88 and 89 of the *Act*.

There was clearly confusion caused by the landlords' issuance of two 1 Month Notices. The landlord confirmed that both Notices deal with the same issue and the second was served correcting some errors found in the form of the first Notice. The tenants' application is clearly directed at the landlords' notice to end this tenancy. Even though the tenants filed their application in response to the first 1 Month Notice I find that in accordance with the power delegated to me pursuant to paragraph 71(2)(c) of the *Act*, the landlords were sufficiently served with the tenants' application for dispute resolution disputing both 1 Month Notices for the purposes of the *Act*. I find that the landlord was served with the tenants' evidentiary materials in accordance with section 88 of the *Act*.

#### Issue(s) to be Decided

Should the 1 Month Notice be cancelled? If not are the landlords entitled to an Order of Possession?

Are the landlords entitled to a monetary award for damage and loss as claimed?

Should the landlords be ordered to comply with the *Act*, regulations or tenancy agreement?

Is either party entitled to recover the filing fee for this application from the other?

#### Background and Evidence

The parties agreed on the following facts. This month-to-month tenancy began in November, 2013. There is no written tenancy agreement. The current monthly rent is \$1,185.00.

The parties disagree on when the rent is due. The position of the landlords is that the rent is due on the first of each month. The tenants submit that the rent is not due until the 6<sup>th</sup> of the month. The tenant testified that because they receive payment on the second business day of each month, they are unable to pay the rent on the first. The tenant said that this has been the case for the entire duration of the tenancy. The parties gave undisputed testimony that throughout the tenancy, the tenants have not made payment by the first of the month.

The landlord testified that they have not previously issued Notices to End Tenancy for Unpaid Rent or for Repeated Late Payment of Rent as they were unaware that was an option. However, they said that rent is due on the first of the month and they have given the tenants numerous reminders to pay their rent by that time.

The rent was increased from \$1,150.00 to \$1,185.00 as of June, 2017 by a Notice of Rent Increase issued by the landlords on March 1, 2017. A copy of the Notice of Rent Increase was submitted into written evidence.

The parties said that in October, 2017 the tenants failed to pay the full monthly rent and the landlords issued a 10-Day Notice to End Tenancy for Unpaid Rent. A copy of the 10-Day Notice was submitted into evidence. The 10-Day Notice is dated October 5, 2017 and states that the tenants failed to pay the sum of \$1,200.00 due on October 1, 2017. The tenant said that the amount is incorrect, that the full rent is \$1,185.00. The tenant testified that they made full payment of the \$1,185.00 in two installments, the second paid on October 11, 2017. The landlord confirmed that the rent arrears was paid during that month. The parties submitted into written evidence a copy of a receipt showing rent payment of \$1,185.00 on October 11, 2017.

The parties gave evidence that in October, 2017 they attempted to renegotiate their tenancy agreement. The parties said that the landlords suggested a new monthly rent of \$1,500.00 payable by the first of each month. The landlords prepared a draft tenancy agreement which they provided to the tenants. The parties said that they did not come to an agreement at that time and the tenants did not sign the draft tenancy agreement prepared by the landlords.

The tenant testified that since the negotiations of October, 2017 did not result in a new signed tenancy agreement the tenancy has continued under the original agreement with monthly rent being paid by the 6<sup>th</sup> of each month.

The landlord said that after they issued the 1 Month Notice they entered into a tenancy agreement with a family member intending to rent the suite for a monthly rent of \$1,500.00. The landlords submitted into written evidence a copy of a signed tenancy agreement which indicates the family member's tenancy would start on December 1, 2017. The landlords claim \$630.00, the difference in the rent of \$315.00 for the months of December and January.

### Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause, the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the 1 Month Notice.

The landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the 1 Month Notice. In the matter at hand the landlords must demonstrate that the tenants have been repeatedly late in paying their rent.

Residential Tenancy Policy Guideline 38 sets out that three late payments are the minimum number sufficient to justify a notice under these provisions. The Guideline further states that, "a landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision".

The parties provided undisputed evidence that the tenants have not made rent payment by the first of the month throughout this tenancy. The tenant submits that the tenancy agreement provides that rent is due by the 6<sup>th</sup> of each month. No written tenancy agreement was prepared for this tenancy.

Section 13 of the *Act* provides that:

13(1) A landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004...

(2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:

(v) the day in the month, or in the other period on which the tenancy is based, on which the rent is due

The landlord failed to comply with the *Act* by not preparing a written tenancy agreement when this tenancy began in November, 2013. In the absence of a written tenancy agreement I must first determine what agreement exists between the parties based on their conduct, surrounding evidence, testimonies and what would be reasonable under the circumstances.

The parties gave evidence that the tenants have not paid the rent by the first of the month for the duration of this tenancy. The tenant said that they have made payment by the sixth of each month as they are paid on the second business day of the month. The tenant testified that this has been the agreement with the landlord and there have been no issues until October, 2017. The landlords gave evidence that they have not issued any Notices to End Tenancy until October, 2017.

Based on the evidence of the parties I find the tenants' position that rent is due by the 6<sup>th</sup> of the month to be more reasonable. I do not find it reasonable for a landlord to allow consistent late payment for nearly four years without taking any action. I find it more likely that both parties were aware of the tenants' payment schedule and entered an agreement that rent would be due after the tenants were paid.

I do not find the landlord's testimony that they failed to any earlier action as they were unaware of the options available to be credible or persuasive. Landlords are in the business of renting accommodations and it is their duty to be aware of their rights and responsibilities under the *Act*. Furthermore, I note that the landlords issued a Notice of Rent Increase in March, 2017 using the prescribed form. This indicates that the landlords were aware of some of the resources available and had the ability to learn about their options had repeated late rent payment been an issue.

The landlords failed to prepare a tenancy agreement in writing as required under the *Act*. I do not find that it is now open to the landlord to interpret the ambiguity created because of the

absence of a written agreement in their favor. Based on the evidence of the parties I find that the tenancy agreement is that rent is payable by the 6<sup>th</sup> of each month.

I accept the evidence of the parties that the tenants have consistently paid their full rent by that date throughout the tenancy. Accordingly, as I find that there is insufficient evidence to conclude that the tenants have been repeatedly late in paying rent I find that there is no basis for the 1 Month Notice.

The 1 Month Notice is cancelled and of no further force or effect. This tenancy will continue until ended in accordance with the Act.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the Act, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

The landlord claims the amount of \$630.00 in lost revenue. I find that the landlords have not shown that they have suffered any damage or loss as a result of the tenants' violation of the Act, regulations or tenancy agreement. The tenants filed their application to dispute the landlords' Notice to End tenancy in accordance with the *Act*. I find that as there has been no violation by the tenants the landlords are not entitled to a monetary award for damages or loss.

As the tenants' application was successful the tenants are entitled to recover the \$100.00 filing fee for this application.

### Conclusion

The tenants' application to cancel the 1 Month Notice is granted. The 1 Month Notice is cancelled and of no further force or effect.

The landlords' application is dismissed without leave to reapply.

I find that there is an oral, implied tenancy agreement between the parties which provides that the monthly rent, currently of \$1,185.00 is payable on the 6<sup>th</sup> of each month. I order that the parties abide by this tenancy agreement

As the tenants' application was successful, the tenants are entitled to recovery of the \$100.00 filing fee for the cost of this application. As this tenancy is continuing, I allow the tenants to

recover his \$100.00 filing fee by reducing the monthly rent by that amount on their next monthly rental payment to the landlord.

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 11, 2018

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Residential Tenancy Branch