



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC FF

### Introduction

This hearing dealt with an application by the tenants pursuant to the *Residential Tenancy Act* ("the Act") for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause ("1 Month Notice") pursuant to section 47 *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

All parties named in the dispute attended the hearing. All parties present were given a full opportunity to be heard, to present their sworn testimony and to make submissions under oath.

The tenants confirmed receipt of the landlords' 1 Month Notice to End Tenancy for Cause on August 6, 2018 after it was posted on their door. Pursuant to section 89 & 90 of the *Act*, the tenants are deemed served with this document on August 9, 2018.

While the landlords confirmed receipt of the tenants' application for dispute and evidentiary package after they were sent to the landlords by Post and placed in their mailbox, the tenants said no evidence was received from the landlords. The landlords confirmed they did not provide the tenants with a copy of the evidence submitted to the *Residential Tenancy Branch*.

Rule of Procedure 3.15 states, "The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant not less than seven days before the hearing." While Rule 3.17 states, "Evidence not provided to the other party and the Residential Tenancy Branch...may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant

and was not available at the time that their application as made or when they served and submitted their evidence.”

I find the landlords failed to serve the tenants with their evidentiary package precludes them from relying on this evidence at the hearing. No reason was provided as to why the tenants were not given the landlords’ evidentiary package. I therefore decline to consider the evidence submitted by the landlords prior to the hearing.

#### Issue(s) to be Decided

Can the tenants cancel the landlords’ 1 Month Notice? If not, are the landlords entitled to an order of possession?

Can the tenants recover the filing fee?

#### Background and Evidence

Testimony provided by the tenants explained this tenancy began on March 1, 2012. Rent is currently \$1,560.00 per month, while a security deposit of \$700.00 paid at the outset of the tenancy continues to be held by the landlords.

On August 6, 2018 the landlords posted a 1 Month Notice to End Tenancy for Cause (“1 Month Notice”) on the tenants’ door. The reason cited on the 1 Month Notice was listed as follows:

- *Tenant is repeatedly late paying rent*

The landlords alleged the tenants had repeatedly paid rent after it was due and more recently cited rent for April, May and August 2018 as being late. Specifically, for the most recent late payments, the landlords said rent was paid on April 11, May 2 and August 2 as opposed to the first of the month as he had requested, and as the tenants were required to do so under the terms of the tenancy agreement. The landlords argued three separate 10 Day Notices to End Tenancy for Unpaid rent were served on the tenants, and the landlords stated prior to these most recent late payments discussed at the hearing, the tenants had for many years failed to pay rent as it was due per the terms of their tenancy agreement. The landlords said they accepted the rent but did not want it paid in the bi-weekly form it was received.

The tenants argued the landlords had consistently, for over two years accepted rent in bi-weekly payments. As part of their evidentiary package, the tenants submitted a document signed by the landlords and dated May 16, 2016. This letter said, “I D.H.D., the owner of the house will not evict Mr. and Mrs. M and family if they pay the rent regularly.”

The tenants acknowledged receiving a second letter from the landlords on April 10, 2018 which indicated to them that the landlords wished to receive rent on the first of the month, not in bi-weekly payments. The tenants said it was difficult for them to change their payment schedule on this short notice and argued rent was paid as promptly as these new rules would dictate.

### Analysis

The tenants sought a cancellation of the landlords’ 1 Month Notice to End Tenancy arguing the landlords had consistently and repeatedly accepted bi-weekly rental payments. The tenants said they were only informed in April 2018 that the landlords wished to collect rent on the first of each month. The landlords argued the tenants had unilaterally chosen to pay rent in a bi-weekly fashion and were never given express permission to do so.

*Residential Tenancy Policy Guideline #11- Amendment and Withdrawal of Notices* provides guidance in consideration of disputes in which a determination must be made on whether an end to a tenancy has been waived. The Guideline states [underlining added]:

*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...*

*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.*

The landlords stated they accepted late rent on two occasions following the issuance of a warning letter directing the tenants to pay rent in one payment on the first of each month. No receipts for *use and occupancy only* were issued to the tenants. Further to the Guideline, the landlords' intent can be determined by considering "*the conduct of the parties.*" The tenants submitted two documents, one dated May 2016 was a letter from the landlords stating they must "pay rent regularly" while a second letter from April 2018 informed them they must pay rent on the first of each month.

I have considered the testimony of both parties and I find the landlords have waived their right to rely on a 1 Month Notice to End Tenancy for *repeated late payments of rent* through their conduct. The landlords accepted rent in bi-weekly payments for over two years, only informing the tenants in April 2018 that rent was to be due on the first of each month. Testimony from the landlords explained only two late payments were received since the tenants were given clear instructions as to when rent was due. For these reasons, I dismiss the landlords' 1 Month Notice.

The tenants are cautioned to ensure rent is paid according to the landlords written instructions of April 2018. The landlords have clearly indicated they wish for rent to be paid on the first day of each month, and future late payments do not preclude the landlords from seeking further relief under the *Act*.

As the tenants were successful in their application, they may recover the \$100.00 filing fee from the landlords. Pursuant to section 72 of the *Act*, the tenants may withhold \$100.00 from a future rent payment on **ONE** occasion in full satisfaction for a return of the filing fee.

### Conclusion

The tenants were successful in cancelling the landlords' 1 Month Notice to End Tenancy dated August 6, 2018. This tenancy shall continue until it is ended in accordance with the *Act*.

The tenants are entitled to a return of the \$100.00 filing fee and may withhold this amount from a future rent payment on **ONE** occasion.

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: September 28, 2018

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Residential Tenancy Branch