



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

**Dispute Codes:** CNC FFT OLC

### Introduction

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

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

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.

The landlord confirmed receipt of the tenants' dispute resolution application ('Application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the Application. All parties confirmed receipt of each other's evidentiary materials and that they were ready to proceed.

The tenants confirmed receipt of the 1 Month Notice dated July 4, 2019. Accordingly, I find that the 1 Month Notice was served to the tenants in accordance with section 88 of the *Act*.

## **Issues**

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Are the tenants entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement?

Are the tenants entitled to recover the filing fee for this application?

## **Background and Evidence**

This tenancy originally began as a fixed-term tenancy on July 1, 2017 with monthly rent set at \$1,695.00, payable on the first of the month. Both parties signed a new fixed-term tenancy agreement that took effect on July 1, 2018, with monthly rent set at \$1,850.00. Both parties confirmed that rent is currently set at \$1,850.00, although the tenants feel that the landlord had increased the rent in a manner that was not in accordance with the Act.

The landlord served the notice to end tenancy dated July 4, 2019, providing the following grounds:

1. The tenant is repeatedly late paying rent

The tenants do not dispute that rent payments were sometimes made past the first day of the month, but testified that the landlord had given permission them to do so. The tenants testified that they had approached the landlord about how they feel the landlord had increased the rent beyond the allowable amount, and that is when the landlord had served them with the 1 Month Notice. The tenants included a screen shot of a text message in their evidentiary materials. The text message reads: *"If you guys decide to stay on month to month and able to pay at 5<sup>th</sup> of each month and continue to pay 1850 it works for us but we can't adjust overpayment. If you decide to move then I can adjust in this month and pay me the balance"*. The screenshot indicates a time of 11:20 a.m. but contains no details of who the sender or receiver was, and on which date the text message was sent. The tenants testified that this is the first notice to end tenancy they have ever received from the landlord, and that they now pay the rent on time.

The landlord disputes that any agreements were ever made, verbal or written, and that the landlord had always communicated to the tenants the expectation that the tenants were required to make all payments on time, by the first of each month, as per the tenancy agreement and the *Act*. The landlord disputes ever giving the tenants permission to change the due date to the fifth day of each month, nor pay their rent late. The landlords included a series of text message communication between the parties which the landlords feel support that the tenants continue to pay the rent late, in only partial instalments, and despite the fact that the landlords have informed the tenants that the expectation is that they make their payments in full by the first of the month. The landlord feels that they have made it very clear to the tenants that they are to pay their rent by the first of each month.

The landlord provided evidence to show that the July 2018 rent payment was paid in installments, with the remaining portion not paid until at least July 19, 2018. The August 2018 rent was paid on August 3, 2018. On November 30, 2018, the landlord received a text message from the tenants requesting permission to pay half of the December 2018 rent later due to issues with their compensation cheque. The landlord responded with the following text message: *"But I told you before I need full rent first day of each month"*.

On December 5, 2018 the landlord sent a text to the tenants: *"I understand but I also don't have any control on my bank they take my money first day of each month. I understand your problems. This month is ok, but make sure this is not happen in future months"*.

On March 29, 2019, the landlord received the following text message from the tenants: *"I hoping I can ask a favor it's both my sons birthdays and I was wondering if we can drop off 1500 today and the other 400 on Friday the 5<sup>th</sup> just this month because I need some extra money for there birthday celebrations if possible"*.

On May 3, 2019, the tenants were late again with their rent, and the landlord sent the following text message to the tenants: *"I have to pay my mortgage first day of each month. In our contract you guys was agreed to pay full amount of rent first day of each month. And almost every month you guys pay late that's so hard for me. So I am so sorry to say that I will give you guys a notice to move out at end of this contract"*.

The June 2019 rent was paid on June 7, 2019. On June 27, 2019, the tenants sent a text to the landlord that they would make the July 2019 payment by the fifth of the

month because “*engine blew it’s dead*”. The landlord responded: “*I told you guys so many times that I need rent first day of each month*”. The landlord served the tenants the 1 Month Notice on July 4, 2019, and is requesting an Order of Possession for the repeated late rent payments.

## **Analysis**

Section 47(1) of the *Act* allows a landlord to end a tenancy for cause for any of the reasons cited in the landlord’s 1 Month Notice.

The landlord is requesting an Order of Possession on the grounds of repeated late rent payments, which the tenants did not dispute, but stated was done so with the permission of the landlord.

The tenants expressed concern that this tenancy should not end on the grounds of repeated late rent payments when the landlord had accepted late rent payments in the past. The tenants also included a text message which they believe confirms the change of the due date to the fifth of the month. Furthermore, the tenants feel that the landlord had increased the rent in a manner that was not compliant with the *Act*.

Residential Tenancy Policy Guideline #11 states the following about express and implied waivers:

*“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....*

*In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional.”*

As noted above, a notice to end tenancy must be clear, unambiguous and unconditional. This extends to the terms of a tenancy, including how and when

payments must be made. Accepting late rent payments on multiple occasions could possibly imply the landlord's consent to these late rent payments.

Ongoing acceptance of late rent payments without properly informing the tenants in writing that these payments were considered late, and could possibly be considered a breach of the tenancy agreement and the *Act*, would contribute to the ambiguity of the terms of the tenancy. However, I find that in this case the landlord had provided detailed evidence to support that despite the fact that they had accepted these late rent payments, they had always communicated to the tenants the expectation that they make the rent payments on time, or the tenants may be subject to possible eviction on the basis of these late rent payments. I find that the landlord was clear in communicating to the tenants the terms of the tenancy, and that there was no ambiguity or implied waiver despite the acceptance of the late rent payments as evidenced by the numerous messages to the tenants that they were to pay their rent by the first of the month.

The tenants also testified that the landlord had given them permission to make their rent payments on the fifth of the month instead of the first. The landlord disputes that they had ever given the tenants permission, verbal or written, to change the due date for rent payments. I find that the landlord has met their evidentiary burden on a balance of probabilities. The landlord had provided several detailed text messages that support the fact that rent was due on the first of each month. I do not find the tenants' submissions to be convincing or persuasive. The single text message included by the tenants does not clearly show who the sender or receiver is, and when this message was sent. Although the tenants feel that the amount of rent expected by the landlords exceeds the amount that is allowed under the *Act*, I find that the tenants had signed a new tenancy agreement that clearly shows rent is now set at \$1,850.00, and is due on the first of each month. Although the tenants may file an application disputing a rent increase, there is no evidence to support that any applications have been filed by tenants under section 43 of the *Act*. I find the tenants' position to not be supported in the evidence. I find that the tenants did not have permission or consent to withhold any rent payments.

**Section 26** of the *Act*, in part, states as follows:

**Rules about payment and non-payment of rent**

**26** (1) 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.

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...*

I find that the repeated late rent payments meet the criteria for sufficient cause to end this tenancy under section 47(1)(b) of the *Act*. Therefore, I am dismissing the tenants' application to cancel the 1 Month Notice dated July 4, 2019, without leave to reapply.

**Section 55(1)** of the *Act* reads as follows:

- 55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
  - (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

A copy of the 1 Month Notice was submitted for this hearing, and I find that the landlord's 1 Month Notice complies with section 52 of the *Act*, which states that the Notice must: be in writing and must: (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and (e) when given by a landlord, be in the approved form.

Based on my decision to dismiss the tenants' application for dispute resolution and pursuant to section 55(1) of the *Act*, I find that this tenancy ended on the corrected,

effective date of the 1 Month Notice, August 31, 2019. As the tenants have not moved out, I find that the landlord is entitled to a 2 day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenants. If the tenants do not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

The tenants also applied for an order for the landlord to comply with the *Act*. I am not satisfied that the tenants had provided sufficient evidence to support how the landlords have failed to comply with the *Act*, and accordingly this portion of their application is dismissed without leave to reapply.

As the tenants were not successful with this application, their application to recover the filing fee is also dismissed without leave to reapply.

### **Conclusion**

I dismiss the tenants' application entire application without leave to reapply. I find that the landlord's 1 Month Notice is valid and effective as of August 31, 2019.

I grant an Order of Possession to the landlord effective two **days after service of this Order** on the tenant. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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 13, 2019

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Residential Tenancy Branch