



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, FFT

### Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenants applied for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47; and
- an authorization to recover the filing fee for this application, under section 72.

Tenants RC (the tenant) and KS and landlord KP (the landlord) attended the hearing. The landlord represented landlord DP. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand the parties are not allowed to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5,000.00."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with section 89 of the Act.

I note that section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the Act.

### Issues to be Decided

Are the tenants entitled to:

1. Cancellation of the Notice?
2. An authorization to recover the filing fee?

If the tenants' application is dismissed, are the landlords entitled to an order of possession?

### Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started in February 2018. Monthly rent currently is \$1,810.00, due on the first day of the month. At the outset of the tenancy a security deposit of \$945.00 and a pet deposit of \$250.00 were collected and the landlords hold them in trust. The tenancy agreement was submitted into evidence. It indicates that monthly rent is due on the first day of the month.

The parties agreed that at the outset of the tenancy monthly rent was \$1,890.00 and it included cable service. At a later point, the parties agreed to reduce monthly rent to \$1,810.00 and exclude cable service.

The landlord served the Notice via registered mail on February 18, 2022. The tenants confirmed receipt of the Notice on February 23, 2022. The tenants submitted this application on March 01, 2022 and continue to occupy the rental unit.

The Notice was submitted into evidence. It is dated February 15, 2022 and the effective date is March 31, 2022. The reason to end the tenancy is: "The tenant is repeatedly late paying rent." The details of the cause indicate the tenants paid rent late for several months since 2018.

The landlord submitted a spreadsheet indicating that in 2018 the tenants paid rent late every month except in February, March and August. In 2019 the tenants paid rent late every month except in March. In 2020 the tenants paid rent late every month except in April, June, July and October. In 2021 the tenants paid rent late every month except in

February, May, August and October. The tenant affirmed that he was not late on all the months mentioned in the spreadsheet.

The tenants confirmed receipt of the email sent by the landlord on December 02, 2021: "Please note that the December rent was due on the 1<sup>st</sup> yesterday, and please send the overdue rent at your earliest convenience."

The landlord stated the tenancy agreement does not indicate how rent must be paid and the tenants have been paying rent via electronic transfer.

The tenant testified the landlord did not warn that the tenancy may end if the tenants continue to pay rent late. The tenant apologized to the landlord when he paid rent late and the landlord thanked him for his apologies.

### Analysis

I accept the undisputed testimony that the landlord served the Notice and the tenants received it on February 23, 2022. I find the tenants' application was submitted before the ten-day deadline to dispute the Notice, in accordance with Section 47(4) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on a balance of probabilities, that the notice issued to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct and sufficient cause to end the tenancy.

Section 47(1)(b) of the Act states:

A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:  
the tenant is repeatedly late paying rent;

Residential Tenancy Branch Policy Guideline 38 states:

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

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. 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

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.

[...]

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

I accept both parties uncontested testimony and the tenancy agreement that rent is due on the first day of the month.

Based on the testimony offered by both parties, I find the landlord did not warn the tenants that the landlords were no longer accepting payment of rent after the first day of the month. I find the December 02, 2021 email is not a warning that the landlords were no longer accepting late payment of rent, but a reminder of rent overdue.

The landlords have not been enforcing their right to receive payment in full on the first calendar day of the month. The legal doctrine of estoppel is a concept that restricts a party from relying on its full legal rights if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice in writing, that they are changing their conduct and are now going to enforce the right previously waived or not enforced.

In the March 16, 2020 decision from the British Columbia Supreme Court, *Guevara v. Louie*, 2020 BCSC 380, Justice Sewell writes:

[65] The following broad concept of estoppel, as described by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, was adopted by the Supreme Court of Canada in *Ryan v. Moore*, 2005 SCC 38 at para. 51:

...When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or

mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[66] The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in *Desbiens v. Smith*, 2010 BCCA 394:

...it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." [emphasis added]. That statement was affirmed by the English Court of Appeal in *Habib Bank and*, as we read the decision, accepted by that Court in *Peyman v. Lanjani*, [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.), p. 731 (May L.J.) and p. 735 (Slade L.J.).

The landlords are estopped from enforcing the provision of the tenancy agreement that rent is due in full on the first of the month by their past conduct of accepting late payments of rent.

The landlords are required to provide reasonable notice in writing to the tenants of their intention to reassert their right to be paid rent in full on the first calendar day of the month pursuant to the tenancy agreement.

As such, I find the landlords failed to prove, on a balance of probabilities, the ground of the Notice. Accordingly, the Notice is cancelled and of no force or effect.

I authorize the tenants to recover the filing fee, as the tenants were successful.

### Conclusion

The Notice dated February 15, 2022 is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenants are authorized to deduct \$100.00 from the next rent payment to recover the filing fee.

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 10, 2022

---

Residential Tenancy Branch