



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **CNC, FFT**

### Introduction

This hearing dealt with the tenant's application pursuant 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;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing. The tenants were assisted by an advocate. In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given a full opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

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

Are the tenants entitled to recover their filing fee from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This tenancy began on February 1, 2021. Monthly rent is \$2,200.00 payable on the first of each month. The tenants were late in paying rent for the months of March, April, May, June, July, August and September, 2021. The landlord issued the 1 Month Notice dated March 2, 2022 indicating the reasons for the tenancy to end are that the tenants have been repeatedly late paying rent and that the tenants or persons permitted on the property have seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The landlord submits that the tenants have been repeatedly late in paying rent and seek an Order of Possession. The landlord submits that rent was also paid on January 4, 2022. The parties agree that payment of rent is made by electronic fund transfer and the landlord has not issued receipts to the tenant.

The landlord also gave testimony that the tenant is denying access to the landlord which they submit constitutes a serious jeopardy.

The tenants disagree that the rent was paid late for January 2022 and submitted into evidence copies of bank transactions showing rent being paid early on or time for November and December 2021, and January, February, March, April and May of 2022. The tenant also submitted a screenshot of a text message conversation with the landlord on September 11, 2021 where the tenants write, "Thanks for your patience too" and the landlord responds "No problem".

The parties agree that rent has been paid in full as at the date of the hearing.

### Analysis

Section 47 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. In the present case the tenants filed their application to dispute the 1 Month Notice of March 2, 2022 on March 8, 2022, within the statutory time limits.

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 present case the landlord must establish either that there has been repeated late payment or a serious jeopardy to the health or safety of the landlord or other occupants.

I find little evidence in support of the claim that there has been serious jeopardy to health and safety. I find the brief mention of a the tenants denying the landlord access to be insufficient to determine there has been a breach or that this has resulted in or is likely to result in serious jeopardy.

The landlord cited repeated late payment as the cause for ending the tenancy. Residential Tenancy Policy Guideline 38 provides that three late payments are the minimum number to justify a notice to end tenancy.

The agreed upon evidence of the parties is that, pursuant to the tenancy agreement rent is due on the first of each month. The parties agree that the tenants failed to pay the rent on the first of the month in March, April, May, June, July, August and September, 2021. I find that the documentary evidence demonstrates that rent was paid on or before the first of the month on November and December 2021, and January, February, March, April and May of 2022.

Accordingly, I find that the landlord has shown on a balance that the tenants have been repeatedly late paying rent.

The tenants submit that the landlords have accepted the late rent payment and are estopped from enforcing the terms of the tenancy agreement. Estoppel is a legal

principle whereby a party is barred from enforcing a contractual right when it is inequitable to do so due to the party's previous conduct or representations.

In order to successfully raise an estoppel defence, the party seeking to defeat the rights of the other must show:

1. that the party seeking to enforce their legal rights, took some action, whether by representation or conduct, with the intention that the other party rely on that action; and
2. the other party relied on that action to its detriment changing their course of action based on the representation.

In the present case I find that there is insufficient evidence that the landlord agreed to accept late payment of rent creating an estoppel. The conduct of the landlord in not issuing an immediate 10-Day Notice to End Tenancy for Unpaid Rent is not conduct which I find to be a clear and unambiguous representation that the tenants may pay late rent under this tenancy. Similarly, I find a singular text message conversation where the landlord writes "No problem" to be insufficient to find that the landlord has waived their right to expect payment of rent on the first of each month.

I find that the tenants have not met the evidentiary threshold necessary to establish a waiver and estoppel. If there was estoppel, it would be reasonable to expect that the tenants would have consistently paid the monthly rent after the first of every month. However, the undisputed evidence of the parties is that the tenants were aware of when rent was due and paid on or before the first of the month after November, 2021.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a notice to End Tenancy:

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

In the present circumstances while I find insufficient evidence to find that the landlord has expressly waived the 1 Month Notice, I do find sufficient evidence to support that there has been an implied waiver of the notice.

The undisputed evidence of the parties is that after the issuance of the notice on March 2, 2022 the landlord has accepted full payment on the first of the month for April, May and June without issuing a written receipt or correspondence indicating that payment was being accepted for “use and occupancy only”.

Based on the post-Notice conduct of the parties, I find on a balance of probabilities that the landlord’s acceptance of monthly rent without correspondence or documentation indicating the payment was accepted only for use and occupancy, amounts to a waiver of the landlord’s right to seek an Order of Possession.

I find that the landlords waived their right to pursue an Order of Possession on the basis of the 1 Month Notice of March 2, 2022 I find that the landlord reinstated this tenancy by accepting full rent payments from the tenants for April, May and June, after the effective date of the 1 Month Notice without specifying that the payments were accepted for use and occupancy only.

Accordingly, I allow the tenants’ application and cancel the 1 Month Notice of March 2, 2022.

As the tenants were successful in their application, they are entitled to recover their filing fee from the landlord. As this tenancy is continuing I allow the tenants to satisfy this monetary award by making a one-time deduction of \$100.00 from their next scheduled rent payment.

Conclusion

The tenants' application is successful. The 1 Month Notice is cancelled and of no further force or effect. This tenancy continues until ended in accordance with the Act.

The tenants are authorized to make a one-time deduction of \$100.00 from their next scheduled rent payment.

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 23, 2022

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Residential Tenancy Branch