



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **OPR, MNRL-S, FFL**

### Introduction

This hearing by conference call was convened as a result of the Landlords' application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act"). The Landlords applied for the following:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent pursuant to section 67;
- authorization to keep the Tenant's security deposit; and
- authorization to recover the filing fee for the Application from the Tenant pursuant to section 72.

An agent ("MC") for the Landlords, legal counsel ("MD") for the Landlords and the Tenant attended the hearing. They were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

MD stated the Landlords served the Tenant with the Notice of Dispute Resolution Proceeding ("NDRP") by registered mail March 25, 2022. MD submitted a signed and witness Proof of Service on form RTB-34 to corroborate his testimony and provided the Canada Post tracking number for the mailing. The Tenant acknowledged receipt of the NDRP. I find the Landlords served the NDRP on the Tenant in accordance with section 89 of the Act.

MD stated the Landlords served their evidence on the Tenant by ExpressPost on June 23, 2022. MD provided the Canada Post tracking number for service of the Landlords' evidence on the Tenant. I find the Landlords served their evidence on the Tenant in accordance with the provisions of section 88 of the Act.

The Tenant stated he did not serve any evidence on the Landlords.

### Preliminary Matter – Withdrawal of Monetary Claim by Landlords

MD stated the Tenant paid rent the rental arrears of \$930.00 for the rental unit as stated in the Ten Day Notice for Unpaid Rent and/or Utilities dated March 3, 2022 (“10 Day Notice”) served on the Tenant by the Landlords after the effective date of the 10 Day Notice. MD stated that as a result of this payment, the Landlords were no longer seeking payment for unpaid rent from the Tenant. As such, I dismiss, without leave to reapply, the Landlords’ claim in the Application for a monetary order for rental arrears. MD stated that Tenant also paid compensation for use and occupancy of the rental unit for the months of April, May, June and July 2022 and the Landlords were seeking an Order of Possession for July 31, 2022.

### Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession for non-payment of rent?
- keep the Tenant’s security deposit?
- recover the filing fee of the Application from the Tenant?

### Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

MC stated one of the two Landlords (“AP”) purchased the residential property in April 2018 and it was the successor in title to the residential property. MC stated the other Landlord was the property manager for AP. MD submitted into evidence a copy of a tenancy agreement dated December 8, 2003 between the Tenant and AP’s predecessor in title. The parties agreed that the tenancy commenced on January 1, 2004, on a month-to-month basis, with rent of \$645.00 payable on the 1<sup>st</sup> day of each month. The parties agreed the last rent increase occurred sometime during 2019 and the monthly rent is now \$930.00. The Tenant was to pay a security deposit of \$322.50 by December 8, 2003. MD stated the Landlords received the Tenant’s security deposit from the predecessor landlord and the Landlords are holding the deposit in trust for the Tenant.

MD stated the 10 Day Notice was served on the Tenant's door on March 3, 2022. MD submitted a copy of the 10 Day Notice, together with a copy of a signed and witnessed Proof of Service to End Tenancy on Form RTB-34 dated March 3, 2022, to corroborate his testimony on service of the 10 Day Notice on the Tenant. I find the 10 Day Notice was served on the Tenant in accordance with the provisions of section 88 of the Act. The 10 Day Notice stated the effective date for move-out was March 16, 2022.

MD testified the 10 Day Notice stated the Tenant had rental arrears of \$930.00 as of March 1, 2022. MD stated the Tenant paid \$955.00 on March 28, 2020 for the rental arrears together with a \$25.00 late payment fee. MD stated he served the Tenant with a letter dated March 25, 2022 giving the Tenant notice that any further payments of rent would be considered for "temporary use and occupancy" of the rental unit. MD submitted into evidence of copy of his letter dated March 25, 2022 to corroborate his testimony. MD stated the Tenant paid rent, for use and occupancy, for the months of April through July 2022 inclusive. MD stated, as noted earlier, the Tenant did not have any rental arrears as of the date of this hearing. MD requested an Order of Possession, if granted, be dated for July 31, 2021 as the Tenant has paid the Landlord compensation for use and occupancy of the rental unit until July 31, 2021.

The Tenant admitted he was late paying the rent for March 2022. The Tenant confirmed he did not make an application for dispute resolution to dispute the 10 Day Notice. The Tenant stated he has been late paying the rent about once a year since the tenancy commenced and that the landlord always accepted the late payments of rent. The Tenant stated he was unable to pay the rent for March 2022 until late March. The Tenant did not provide any testimony or evidence that he was entitled to withhold payment of the rent for March 2022 pursuant to any provision of the Act.

MD stated the Landlords served the Tenant with two Ten Day Notices to End Tenancy dated April 29, 2021 and October 21, 2021 ("Two Notices"). MD submitted copies of the Two Notices into evidence as evidence the Landlords had not acquiesced in the Tenant's failure to pay the rent on time on two occasions in 2021.

### Analysis

#### **1. Landlords' Claim for Order of Possession**

Subsections 26(1) and 46(1) through 46(5) of the Act state:

- 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.
- 46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) Within 5 days after receiving a notice under this section, the tenant may
- (a) pay the overdue rent, in which case the notice has no effect, or
  - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
- (a) *is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
  - (b) *must vacate the rental unit to which the notice relates by that date.*

[emphasis added in italics]

MD testified the 10 Day Notice was served on the Tenant's door on March 3, 2022. MD submitted a signed and witnessed Proof of Service, dated March 3, 2022, confirming the Tenant was served with the 10 Day Notice. Pursuant to section 90 of the Act, the Tenant was deemed to have been served with the 10 Day Notice on March 6, 2022. Pursuant to section 46(4), the Tenant had until March 11, 2022, to make an application for dispute resolution to dispute the 10 Day Notice. The Tenant acknowledged he did not make an application for dispute resolution to dispute the 10 Day Notice.

The Tenant stated he had been late paying the rent once or twice a year and the landlord had accepted late payments. MD stated the Tenant was served with the Two

Notices when the Tenant was late paying the rent on two occasions during 2021 as evidence the Landlords did not acquiesce in the Tenant's failure Tenant to pay the rent on time.

The legal concept of estoppel has been addressed in a recent decision of the B.C. Supreme Court, *Guevara v. Louie*, 2020 BCSC 380. The presiding Judge, the Honourable Mr. Justice Sewell, wrote as follows:

[62] ... Therefore, the proper question was whether Ms. Louie could rely on past instances of rent not being paid on the first of the month to terminate the tenancy agreement when for years she had acquiesced in the manner that rent was paid. Specifically, had Ms. Louie represented through her conduct and communications that she did not require strict compliance with the term of the tenancy agreement stating that rent must be paid on the first day of the month.

[63] While the legal test of waiver requires a "clear intention" to "forgo" the exercise of a contractual right, the equitable principle of estoppel applies where a person with a formal right "represents that those rights will be compromised or varied:" *Tymchuk v. D.L.B. Properties*, [2000 SKQB 155](#) at paras. [11-17](#). Unlike waiver, the principle of estoppel does not require a reliance on unequivocal conduct, but rather "whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:" *Bowen v. O'Brien Financial Corp.*, [1991 Canlll 826 \(BC CA\)](#), [1991] B.C.J. No. 3690 (C.A.)...

[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 SEC 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* [1988 Canlll 174 \(BC CA\)](#), [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.).

[67] ... I find that Ms. Louie was required to give the Ms. Guevara reasonable notice that strict compliance would be enforced, before taking steps to terminate the residency for late payment. Such notice was not provided.

[68] Estoppel has been a fundamental principle of the law for a long time: see *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439. However, the Arbitrator failed to address this fundamental principle in his reasons. By so doing he deprived Ms. Guevara of the right to show that in the circumstances of the application before him it would have been unjust to permit Ms. Louie to terminate the tenancy agreement given the long course of conduct in which she acquiesced.

In the *Guevara v. Louie* case referred to above, the landlord's acquiescence accepting late payments from the tenant had occurred over a period of years. In his testimony, the Tenant stated he was late paying the rent once or twice a year. Based on the Tenant's testimony, I find the Tenant's late payments of rent were infrequent. I also find that, as the Landlords served the Tenant with the Two Notices during 2021, they demonstrated they did not acquiesce in the manner in which the Tenant paid the rent after the due date. As such, I find the doctrine of estoppel does not apply in these circumstances.

The 10 Day Notice stated the Tenant had rental arrears of \$930.00 for March 1, 2022. I am satisfied upon hearing the testimony of MD, the Tenant had rental arrears of \$930.00 for March 1, 2022. Furthermore, the Tenant admitted he did not pay the rent for March 2022 until March 28, 2022. Based on the foregoing, I find the Landlords have satisfied their onus to prove, on a balance of probabilities, that the 10 Day Notice was issued for a valid reason. Pursuant to section 46(5), the Tenant was conclusively presumed to have accepted that the tenancy ended on the effective date of the 10 Day Notice.

Subsections 55(2) and 55(4) state:

- 55(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:
- (a) a notice to end the tenancy has been given by the tenant;
  - (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for

dispute resolution and the time for making that application has expired;

- (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
- (c.1) the tenancy agreement is a sublease agreement;
- (d) the landlord and tenant have agreed in writing that the tenancy is ended.

[...]

- (4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [*Resolving Disputes*],
  - (a) grant an order of possession, and
  - (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

I have reviewed the 10 Day Notice and find it complies with the section 52 form and content requirements. As noted above, the Tenant did not make an application to dispute the 10 Day Notice. The Tenant did not vacate the rental unit on the effective date of the 10 Day Notice on March 16, 2022. The Tenant has paid for use and occupancy of the rental unit until July 31, 2022. The Landlords have consented to the Tenant having possession of the rental unit until July 31, 2022. Accordingly, pursuant to section 55(4)(a) of the Act, I order the Tenant provide the Landlords with vacant possession of the rental unit by 1:00 pm on July 31, 2022. Pursuant to section 68(2)(b) of the Act, I find the tenancy ends on July 31, 2022.

## **2. Reimbursement of Landlord's Filing Fee**

As the Landlords have been successful in the Application, they may recover the \$100.00 filing fee for the Application from the Tenant pursuant to section 72(1) of the Act. Pursuant to section 72(2)(b) of the Act, the Landlords may deduct the \$100.00 filing fee of the Application from the Tenant's deposit of \$322.50. The balance of the security deposit of \$222.50 is to be administered by the Landlords in accordance with the provisions of the Act.

Conclusion:

I order the Tenant deliver vacant possession of the rental unit to the Landlords by 1:00 pm on July 31, 2022, after being served with a copy of this decision and the attached Order of Possession by the Landlords. Should the Tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I order that the Landlords may deduct the \$100.00 filing fee of the Application from the Tenant's security deposit.

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: July 13, 2022

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Residential Tenancy Branch