



DECISION

Introduction

This hearing dealt with repeated applications from the Tenant, including:

the Tenant's February 22, 2024, Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- cancellation of the Landlord's One Month Notice to End Tenancy for Cause (One Month Notice) under section 47 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

The Tenant's March 9, 2024, Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- cancellation of the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice) under sections 46 and 55 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

The hearing was attended by the Tenant and their Daughter.

The Landlord attended the hearing with their friend, and with support of legal counsel, N.M.

Preliminary Matters

The parties participated in a hearing on April 18, 2024, before a different Arbitrator regarding the Tenant's application to cancel the 10-day notice. The assigned Arbitrator issued an Interim Decision on that day ordering that the Tenant's two applications be crossed and heard together, as they were on May 3, 2024, during the hearing that was heard by myself.

I allowed the Landlord to upload proof of a sworn affidavit from the Landlord's Accountant. This question of evidence related to the Accountant was flagged by the Arbitrator who conducted the April 18, 2024, hearing.

The Tenant was served with a copy of the affidavit on the day prior to the hearing, and stated that they were happy to have the document included as evidence in this dispute because it supports claims put forward by the Tenant that there were new tenancy agreements.

I used my discretion under RTB Rule of Procedure 3.17 to allow this late evidence.

Counsel for the Landlord stated that there was a delay in their serving this affidavit because Counsel was not added as a party to the dispute as had been requested by Counsel during the April 18, 2024, hearing. I confirmed this during the May 3, 2024, hearing and subsequently added Counsel as a party to the dispute under RTB Rule of Procedure 7.7.

I raised the question of waiver during the hearing because the Landlord submitted a statement of accounts showing rent owing since 2019. Counsel for the Landlord requested that waiver not be applied because the Landlord primarily lives out of country and only recently, in November 2023, became aware of the Tenant's arrears in rent.

Recent Case Law, *Schlieper v. Canada Lands Company CLC Limited*, 2024 BCSC 761, "Schlieper" confirms the legal test for waiver, as follows in paragraph 23:

"..the law of waiver requires two things. First, that the person waiving has full knowledge of the rights that are being waived...The second requirement of waiver is that the person waiving have a conscious intention to abandon its rights."

Service of Notice and Evidence

The parties testified that they accepted service of the others' notice and evidence.

Issues to be Decided

- Should the landlord's One Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?
- Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession and a monetary order for rent?
- Is the tenant entitled to recover the filing fee for these two applications from the landlord?

Background and Evidence

The residential property is a single-family dwelling. The parties agreed that:

- the Tenant has been renting the full property since 2012
- Monthly rent was initially set at \$3,800.00
- Rent is due on the first of the month

- The Tenants paid a \$1,900.00 security deposit when the tenancy started
- The Tenant pays rent by writing a cheque and depositing it at the bank for the Landlord
- The Landlords served a One-Month Notice dated February 13, 2024
 - It was issued on a RTB-33 template notice document
 - It was served by registered mail
 - The Tenants received the Notice on February 20, 2024
 - It was issued for “repeated late payment of rent”
 - The stated move out date on this Notice is March 31, 2024
- The Landlords served a 10 Day Notice dated March 5, 2024
 - It was issued on a RTB-30 template notice document
 - It was served by registered mail
 - The Tenants received the Notice on March 6, 2024
 - It was issued for rent owing of \$20,645.40 owing as of March 1, 2024
 - The stated move out date on this Notice is March 14, 2024

The parties also agreed on the history of rent payment dating back to January 2019 and that there is an error in the Tenant’s favour on the Landlord’s written account statement because only \$2885.00 was received in January 2019, and not \$5,885.00 as written, which is confirmed by the Landlord’s bank statements for that same month.

The parties disagreed on the amount of rent owed during this time.

The Tenants provided a written copy of a tenancy agreement that started April 1, 2020, showing that rent was \$2,500.00 a month.

Counsel for the Landlord stated this the Landlord had not seen this agreement prior to being served with the Tenant’s evidence for this dispute. Counsel stated that the Landlord lives outside of Canada and relies on the Tenant to pay rent. Counsel referred to the sworn affidavit from the Landlord’s accountant and emphasized that this document was sworn by a separate legal authority and not counsel in this dispute.

The Accountant declares that they are an accountant for personal tax reasons only and did not represent the Landlord in any other capacities. The Accountant declares that they prepared the tenancy agreement the Tenant provided as evidence, because the Accountant did not have access to the original 2012 tenancy agreement. Counsel for the Landlord stated that the draft tenancy agreement was likely created to represent a monthly payment based on monies received from the Tenant at that point in time.

Counsel for the Landlord acknowledged that the Landlord verbally offered to reduce rent to 3,200.00 from 2021 onwards, but that they never offered to reduce it down to \$2,500.00 as claimed by the Tenant.

The Tenant referred to the affidavit and emphasized that it legitimizes the text of the written tenancy agreement provided by the Tenant showing monthly rent as \$2,500.00 a Month from April 1, 2020, onwards and previously \$2,000.00 from April 1, 2019.

Counsel for the Landlord referred to bank records submitted and proof of written 3-page table summarizing rent owed and paid for the calendar months between January 2019 and March 1, 2024. Counsel stated that the Tenant currently owes \$31,515.00 because the Tenant has not paid rent January, February, March, April, or May 2024.

The Tenant denied not paying rent, and testified that they always pay rent in advance, and that if you calculate all payments based on \$2,500.00 a month, that rent is paid in full with a significant credit through 2024. They referred to a spreadsheet submitted.

The Tenant and their daughter made repeated references to the residential property being old (despite being built in 1990s), with various issues including roof leaks and problems with the heating system. The Tenant agreed that they have not received approval from the RTB to reduce rent in exchange for work needed, and that they are not claiming compensation from the Landlord for work done by the Tenant at the property.

Counsel for the Landlord referred to a copy the original 2012 tenancy agreement and emphasized that this document is signed by both parties. Counsel stated that it is in the spirit of fairness and transparency that they are calculating rent monies owed based on rent of \$3,200.00 from 2019 onwards and not \$3,800.00 as seen in the original 2012 tenancy agreement as agreed to and signed by the Tenant.

Counsel stated that this is a binding agreement and that the Landlord never agreed to replace it by the written tenancy agreement put forward by the Accountant on the Accountants' own initiative. Counsel also emphasized, that if you look at the Tenant's payment records, they often pay in \$3,200.00 increments but never in \$2,500.00 increments.

The Tenant and their Daughter both stated that the written 2020 tenancy agreement is their only evidence to support their claim that rent is \$2,500.00 a month.

Counsel for the Landlord stated that the Landlord lives out of the country and had been relying on the Tenant to make payments as required. However, when the Landlord returned to BC in November 2023, they discovered that the Tenant was significantly behind on payments. This resulted in the Landlord retaining Counsel and attempting to take back possession of their property.

The Tenant asked, why if money was owing, have you not previously told us?

Analysis

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

This is the Landlord as required by RTB Rule of Procedure 6.6.

Did the Tenant apply to Dispute the One Month Notice as required?

Section 47 of the Act states that a landlord may issue a Notice to End Tenancy for Cause to a tenant if the landlord has grounds to do so. Section 47 of the Act states 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.

The Tenant disputed this Notice on February 22, 2024, after receiving the Notice on February 20, 2024. I find that the Tenant applied to dispute the One Month Notice within the time frame allowed by section 47 of the Act.

Did the Tenant apply to dispute the 10-Day Notice as required?

Section 46 of the Act states that a landlord may issue a Notice to End Tenancy for non-payment of rent if rent is unpaid on any day after the day it is due. A tenant may dispute this notice within 5 days of receiving it, or they are conclusively presumed to have accepted the end of the tenancy under 46(5) of the Act. A tenant may also cancel a 10-day notice by paying all arrears within 5 days of receiving the notice under 46(4) of the Act.

The parties to this dispute agreed that the Tenant has not paid rent since December 2023, and so I find that the Tenant has not cancelled the Notice by paying all arrears.

I therefore find that the Tenant applied to dispute the Notice within the deadline allowed by the Act because they filed for dispute resolution on March 9, 2024, after receiving the 10-Day Notice dated March 5, 2024, on March 6, 2024, by registered mail.

Should Either Notice be Cancelled? If not, is the landlord entitled to an Order of Possession and a Monetary Order for Payment of Rent?

The legal test for both Notices is threefold:

- 1) Was the Notice served as required by section 88 of the Act?
- 2) Does the Notice comply with section 52 of the Act?
- 3) Did the landlord establish on the balance of probabilities that they had grounds to issue each Notice?

The One Month Notice

- The parties agreed that it was served by registered mail and received by the Tenant on February 20, 2024, as permitted by 88(c) of the Act.
- I find that the Notice complies with section 52 of the Act.
- The stated move-out date of March 31, 2024, has now passed.
- RTB Policy Guideline 38, states that paying rent late at least 3 times is justification for the landlord to issue a one-month notice under this section.

- The Landlord issued the Notice under 47(1)(b) of the Act for repeated late payment of rent.
- The parties agreed that rent is due monthly.
- The parties agreed that the Tenant paid rent in different lump sums at different times through the years as shown in the written summary of payments.

The 10-Day Notice

- The parties agreed it was served by registered mail and received on March 6, 2024, as permitted by 88(c) of the Act.
- I find that the Notice complies with section 52 of the Act.
- The stated move-out date of March 14, 2024, is automatically adjusted under section 53 of the Act, to March 17, 2024, which has passed.
- The Notice specifies that \$20,965.40 in rent was owed on March 1, 2024.

With the parties in this dispute agreeing on payment history, what remains to be resolved is the monthly rental amount owed to the Landlord. The parties agreed that rent was initially set at \$3,800.00 a month back in 2012 but disagreed on what amount it had been subsequently reduced to.

The Landlord verbally agreed to reduce rent to \$3,200.00 a month in 2021 and retroactively applied this reduction to rent owing since January 1, 2019. The Landlord provided bank statements and a written month-by-month summary, to confirm that the Tenant currently owes \$31,515.00 through to May 30, 2024, and that no rent has been paid by the Tenant since December 2023 when \$55,000.00 was paid in November and December 2023.

Oct. 01. 2023	3.200	0	-	-59.965.40
Nov. 01. 2023	3.200	TOTAL = 33,000 (5000 + 20,000 + 10,000)	(Nov. 06) (Nov. 28) (Nov. 21)	- 28,165.40
Dec. 01. 2023	3.200	TOTAL: 20,000 (10,000 + 10,000)	(Dec. 01) (Dec. 08)	- 11,365.40

In contrast, the Tenant argues that they currently have a credit on their account of \$30,600.00 based on the same rental payment history. The Tenant makes these calculations based on a monthly rent of \$2,500.00 from April 1, 2020, as justified by the written tenancy agreement dated April 1, 2020, that is not signed by the Landlord.

The parties agreed that this tenancy agreement was given to the Tenant by the Landlord's accountant but disagreed on the significance of this action. As shown in the affidavit dated May 2, 2024, sworn by the Landlord's Accountant in front of 3rd party Notary Public:

2. I have compiled the tenancy agreements using the standard form found on www.gov.bc.ca. I was not acting as an agent for any parties, nor I was a trained professional in preparing a tenancy agreement.
3. The version of the agreement attached on the February 26, 2020 email were meant to be draft only and they required further discussion and agreement between the landlord and the tenant. There were no signatures on these agreements when they were sent.
4. I did not witness any discussions, any agreement (either verbal or written), nor any signatures on the terms of these agreements in its entirety between the landlord and the tenant.

The Landlord's Accountant further declares that they are the Landlord's accountant for personal tax only in clause 5 of this affidavit.

I therefore find that the Landlord successfully established on the balance of probabilities that monthly rent was never reduced to \$2,500.00 because:

- The written 2012 tenancy agreement sets monthly rent at \$3,800.00
- The Landlord provided a sworn affidavit from their Accountant that explains their independent involvement in the creation of the 2020 tenancy agreement, provided by the Tenant as evidence, which is not signed or authorized by the Landlord
- The Tenant agreed that they do not have an Order from the RTB authorizing them to reduce rent to the claimed amount of \$2,500.00

I therefore find that monthly rent has been \$3,200.00 since January 1, 2019, because the Landlord submitted a 3-page written summary of rent payments received since this time and calculates rent owing based on this amount. I created the table below based on the payment records submitted by the Landlord because the Tenant agreed that the payment records were accurate:

	Owed	Paid	Difference
2019	\$38,400.00	\$17,685.00	-\$20,715.00
2020	\$38,400.00	\$33,199.60	-\$5,200.40
2021	\$38,400.00	\$50,600.00	+12,200.00
2022	\$38,400.00	\$15,000.00	-\$23,400.00
2023	\$38,400.00	\$61,150.00	+\$22,750.00
2024	\$16,000.00	\$0	-\$16,000.00
	5 x \$3,200.00		
Total		Total Owing	\$30,365.40

I therefore find that the Tenant owes the Landlord \$30,365.40 in rent through to May 30, 2024.

Regarding the Landlord's grounds for issuing both the One-Month Notice and the 10-Day Notice, I find that there have been significant arrears on the Tenant's account, and that these arrears have consistently grown since 2019, and that specifically, the Tenant has not had a credit on their account since March 2019.

I therefore find that the Landlord successfully established on the balance of probabilities that:

- The Tenant paid rent late at least 3 times prior to issuing the One-month Notice dated February 13, 2024.
- The Tenant owed at least \$20,645.40 on March 1, 2024, when the 10-Day Notice dated March 5, 2024, was issued.
- The Tenant has not made a rent related payment to the Landlord since December 2023.
- The Landlord had grounds to issue both the:
 - One-month Notice dated February 13, 2024;
 - 10-Day Notice dated March 5, 2024.
- The Landlord served two valid Notices to End Tenancy including the:
 - One-month Notice dated February 13, 2024;
 - 10-Day Notice dated March 5, 2024.

I therefore dismiss the Tenant's application for cancellation of the Landlord's One Month Notice to End Tenancy for Cause (One Month Notice) under section 47 of the Act.

I also dismiss the Tenant's application for cancellation of the Landlord's 10-Day Notice to End Tenancy under section 46 of the Act.

Section 55(1) of the Act states that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed, the Arbitrator must grant the landlord an order of possession if the notice complies with section 52 of the Act. I find that the Notices comply with section 52 of the Act.

I award the Landlord an Order of Possession. I use my discretion under RTB Policy Guideline 54 to make this Order effective **May 31, 2024**, despite the Tenant's significant arrears because this tenancy has been ongoing since 2012.

Is the Landlord entitled to a Monetary Order for Unpaid Rent?

Section 26 of the Act states that a tenant must pay rent to the landlord, regardless of whether the landlord complies with the Act, regulations or tenancy agreement, unless the tenant has a right to deduct all or a portion of rent under the Act.

Under 55(1.1) of the Act, if a Tenant's application to cancel a 10-day Notice is unsuccessful, the Director "must grant an order requiring the payment of the unpaid rent". As noted above, I find that the Tenant owes \$30,365.40 in rent through to May 30, 2024.

I find that the Landlord is entitled to rent monies owing back to 2019 because I find that the Landlord has not waived their right to collect all rent monies owed, as shown in the legal test set out within the Preliminary Matters section of this report.

I therefore grant the Landlord with a Monetary Order in the amount of \$30,365.40.

Since the parties agreed that the Landlord collected a \$1,900.00 security deposit when the tenancy started, I find that the Landlord is entitled to retain the current value of this deposit against monies owed by the Tenant.

I find that this \$1,900.00 deposit was valued at \$1,954.71 on the day of the hearing according to the online security deposit interest calculator.

I order that the Landlord is entitled to retain this amount as permitted by RTB Policy Guideline 17, Security Deposits and Set Offs and section 72 of the Act.

Is the tenant entitled to recover the filing fee for this application from the landlord?

The Tenant was not successful in their application. I dismiss their request to recover the two \$100.00 payments for these dispute resolution applications under section 72 of the Act, and do not give leave to reapply.

Conclusion

The Tenant's application for cancellation of the Landlord's One Month Notice to End Tenancy for Cause (One Month Notice) under section 47 of the Act, and for cancellation of the Landlord's 10-Day Notice to End Tenancy under section 46 of the Act, are both dismissed without leave to reapply.

I grant an Order of Possession to the Landlord **effective by 1:00 PM on May 31, 2024, after service of this Order on the Tenant.** Should the Tenant(s) 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 grant the Landlord is entitled to a Monetary Order in the amount of \$28,410.69, set out as follows:

Monetary Order for Unpaid Rent	\$30,365.40
Authorization to retain full value of security deposit	-\$1,954.71
Total owing to Landlord	\$28,410.69

The Landlord is provided with this Order and the Tenant(s) must be served with this Order as soon as possible. Should the Tenant(s) fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: May 9, 2024

Residential Tenancy Branch