



# Dispute Resolution Services

Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

Dispute Codes      CNR, OPR, MNR, MNSD, MNDC, FF

## Introduction

This hearing dealt with an application by the tenants for an order setting aside a notice to end this tenancy and a cross-application by the landlord for an order of possession, a monetary order and an order to retain the security deposit in partial satisfaction of the claim. Both parties participated in the conference call hearing.

The hearing originally convened on January 12 at which time the tenant advised that he had not received the landlord's evidence. I ordered that the matter be adjourned and instructed the parties to meet to allow the landlord to exchange evidence and the tenant to pay rent which he acknowledged had not been paid. At the reconvened hearing, the landlord stated that he called the tenant repeatedly in order to arrange a time to meet and had several copies of his evidence available in his vehicle and in his wife's vehicle in order to ensure that they could give it to the tenant any time he was available to meet. The landlord testified that he telephoned the tenant several times to try to arrange a time to meet but the tenant continually told him he would phone back and failed to do so. The tenant denied having been telephoned by the landlord. The landlord testified that he had sent the evidence to the rental unit, which was the address for service listed on the tenant's application made on December 17, 2010, and provided copies of the registered mail receipt. The tenant advised that he had lost his mail key some 2 ½ months previously and was unable to collect his mail.

As explained below, my decision turned on the landlord's evidence, which was a copy of the tenancy agreement. Administrative fairness demands that each party have the others evidence in order to respond to that evidence. I adjourned the hearing in order to give opportunity for evidence to be exchanged, but I find that the tenant purposely avoided service of the evidence. The parties both had a burden upon them, the landlord to make the evidence available and the tenant to make himself available to receive it. The tenant's explanation that he was waiting for a call from the landlord which never came does not have the ring of truth, nor does the explanation that he could not collect his registered mail because he had lost his mail key. At the original hearing date there was some discussion of registered mail and the tenant did not at any time advise the landlord that he did not have access to the mailbox. Further, the tenant listed the rental unit as his address for service on his application for dispute resolution when he should have known that he would be unable to retrieve

documents served via post. The landlord was highly motivated to meet with the tenant as the tenant had promised to pay \$2,800.00 in overdue rent. I found it unlikely that the landlord would not have made every effort to meet with the tenant. The hearing proceeded despite the tenant not having received the evidence as I found that the tenant had thwarted efforts to serve evidence.

In this decision where “tenant” is used in the singular, it refers to A.K. who represented both tenants at the hearing. Where it appears in its plural form it refers to both tenants.

### Issues to be Decided

Should the notice to end tenancy be set aside?

Is the landlord entitled to a monetary order as claimed?

### Background and Evidence

The parties agreed that the tenancy began on May 15, 2010 and was set to run for a fixed term of 6 months. The tenancy agreement shows that the parties agreed that on November 15, the end of the fixed term, the tenants were obligated to vacate the rental unit. The tenant testified that he knew the fixed term was set for 6 months but could not recall whether the agreement required him to vacate the unit at that point. The tenant claimed that the landlord had never given him a copy of the tenancy agreement at the outset of the tenancy, although the landlord insisted that he had done so. The parties further agreed that rent was set at \$1,400.00 per month and that the tenants had not paid rent in December or January.

The tenant claimed that he tried to pay his rent in December but the landlord would not accept it. The landlord denied having refused to accept rent.

The tenant claimed that the landlord had verbally assured him that he would extend the tenancy for a further 6 months but later changed his mind when he decided he wanted to use the unit for family purposes. The landlord testified that he agreed to permit the tenants to stay in the rental unit until December 1 as their new accommodation would not be ready until that time but denied having agreed to extend the tenancy further. The parties agreed that there was no written agreement to extend the tenancy.

On or about December 15, 2010 the landlord served the tenant with a 10 day notice to end tenancy for unpaid rent (the “Notice”) but at the hearing relied on the term in the tenancy agreement which required the tenants to vacate the rental unit on November 15. The landlord characterized the rent which was due as occupational rent for the period in which the tenants had overstayed in the unit.

### Analysis

The tenancy agreement is clear that the tenancy was to end on November 15 and the tenants were to vacate the rental unit on that date. In the absence of a written agreement changing that contractual term, I find insufficient evidence to show that the term of the tenancy was extended by mutual agreement. I find that the landlords agreed to permit the tenants to remain in the unit through the end of November as a gratuitous gesture but find that this did not indicate that the tenancy was extended. I find that the landlords are entitled to an order of possession based on the end of the fixed term and I grant the landlords an order of possession. If the tenants fail to comply with this order, it may be filed in the Supreme Court and enforced as an order of that Court. The tenants' claim for an order setting aside the Notice is dismissed as it is unnecessary for me to address the Notice in light of my findings on the contractual terms of the tenancy agreement.

I find that the landlords are entitled to occupational rent and loss of income for the months of December and January and I award the landlords \$2,800.00. I award the landlords a further \$50.00 as the cost of the filing fee paid to bring their application. I order the landlords to retain the \$700.00 security deposit in partial satisfaction of the claim and I grant them a monetary order under section 67 for the balance of \$2,150.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

### Conclusion

The tenants' claim is dismissed in its entirety. The landlords are granted an order of possession and a monetary order for \$2,150.00. The landlords may retain the 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: January 20, 2011

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Residential Tenancy Branch