



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

## **AMENDED DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent, to recover the filing fee for this proceeding. During the hearing, the parties claimed that they were unaware of a security deposit having been paid and as a result, the Landlord's application to keep a security deposit it dismissed without leave to reapply.

### Issue(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there rent arrears and if so, how much?

### Background and Evidence

This tenancy started sometime prior to November 1, 2007. Rent is \$570.00 per month payable in advance on the 1<sup>st</sup> day of each month. On November 26, 2010, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated November 26, 2010 by regular mail which the Tenant acknowledged receiving. The 10 Day Notice showed that there were rent arrears of \$830.00 owing as of November 1, 2010. In support, the Landlord provided a tenant ledger for the period November 1, 2007 to December 16, 2010.

The Landlord said the Tenant made a payment of \$200.00 on December 16, 2010 and a payment of \$600.00 on December 31, 2010 by cheque and both cheques had stop payments put on them. The Tenant's co-tenant said she sent the Landlord a money order for \$1,640.00 by regular mail on January 14, 2011.

### Analysis

Section 7(1)(c) of the Regulations to the Act says that a Landlord may charge a late payment fee of no more than \$25.00 provided that there is a term in the Parties' tenancy agreement to that effect. Section 7(1)(e) of the Regulations to the Act also states that a Landlord may charge a Tenant the actual service fees charged by a financial institution for the return of a tenant's cheque.

The Parties do not have a written tenancy agreement and the copy of the tenant ledger provided by the Landlord shows that the Landlord has charged the Tenant late fees since at least November 2007. The Landlord argued that the late fees should only be deducted from any amount owed by the Tenant from September 2010 as that was when the Tenant started falling behind in rent payment. The Tenant argued that all late fees should be deducted from any amount owed by him as the Landlord was not entitled to charge them.

Given that the Act specifically prohibits a Landlord from charging late fees in the absence of a written term of a tenancy agreement, I find all unauthorized late payment fees made by the Tenant during the tenancy (but no earlier than 2004 when the Act came into force) may be deducted from any amount owed by him. In other words, the unauthorized late fees collected by the Landlord are deemed prepayments of rent which would be applied to the following months' rent or any arrears. However in this matter I can only have regard to the period, November 2007 to date, as that is the only evidence before me of excess payments made *to this Landlord*. Based on the Landlord's ledger, I find that the Tenant was charged with a total of 21 late fees (from November 1, 2007 to November 1, 2010) at \$25.00 each for a total of \$525.00.

The Landlord's agent claimed that the Landlord was charged \$25.00 for each returned cheque by the Tenant however he provided no evidence of that. Consequently, I find that the Landlord's agent has not shown that he was entitled to charge the Tenant NSF fees for the same period. Based on the Landlord's ledger, I find that the Tenant was charged with a total of 4 NSF fees at \$25.00 each (from November 1, 2007 to November 1, 2010) for a total of \$100.00. When these payments totalling \$625.00 are applied to the Tenant's accruing rent account, I find that as of November 1, 2010, the Tenant had rent arrears of \$905.00 ~~as alleged on the 10 Day Notice~~.

Section 46(4) of the Act states that **within 5 days of receiving** a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice and they must vacate the rental unit at that time. Under s. 90 of the Act, the Tenant is deemed to have received the Notice to End Tenancy 5 days after it was mailed or on December 1, 2010. Consequently, the Tenant would have had to pay the amount on the Notice or apply to dispute that amount no later than December 6, 2010.

I find that the Tenant did not pay the overdue rent or apply for dispute resolution within the 5 days granted under the Act. Consequently, I find pursuant to s. 55(2)(b) of the Act that the Landlord is entitled to an Order of Possession to take effect at 1:00 p.m. on January 31, 2011.

Although the Tenant claimed that he sent the Landlord a payment for \$1,640.00 on January 14, 2010, he provided no documentary evidence of it and the Landlord said he

has not yet received that payment. Consequently, I also find that the Landlord is entitled to recover the following amounts:

Rent arrears to November 30, 2010:	<u>\$905.00</u>
Rent for December 2010:	\$570.00
Rent for January 1 – 17, 2011:	\$312.58
Loss of rental income Jan. 18 – 31, 2011:	<u>\$257.42</u>
<u>Subtotal:</u>	\$2,045.00
<u>Less: Payment November 26, 2010:</u>	(\$600.00)
<u>Hydro Credit December 03, 2010:</u>	<u>(\$579.00)</u>
<u>Total Owning:</u>	\$866.00

As the Landlord has been successful in this matter, he is also entitled to recover from the Tenant the \$50.00 filing fee for this proceeding.

### Conclusion

An Order of Possession effective January 31, 2011 and a Monetary Order in the amount of **\$916.00** have been issued to the Landlord. A copy of the Orders must be served on the Tenant; the Order of Possession may be enforced in the Supreme Court of British Columbia and the Monetary Order may be enforced in the Provincial (Small Claims) Court of British Columbia.

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 17, 2011.

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Residential Tenancy Branch

### **Note:**

**This Amended Decision corrects and replaces the Decision I issued on January 17, 2011.**