



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

## DECISION

Dispute Codes      MND MNR FF

### Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for damage to the unit site or property, for unpaid rent or utilities, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord to the Tenant, was done in accordance with section 89 of the *Act*, served personally by the Male Landlord to the Tenant on December 3, 2010, in the presence of the female Landlord. The Tenant confirmed receipt of the hearing documents.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

### Issue(s) to be Decided

1. Has the Tenant breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach?

### Background and Evidence

I heard undisputed testimony that the parties entered into a fixed term tenancy agreement effective March 8, 2010 that was set to switch to a month to month tenancy after March 8, 2011. Rent was payable on the first of each month in the amount of \$700.00. The Tenants did not pay the security deposit of \$350.00 that was required as noted on the written tenancy agreement.

The Landlord testified she conducted a move-in inspection report and gave the Tenants a copy of the document on March 6, 2010. No move out inspection was completed. The Tenants failed to pay the July 2010 rent on time so on July 4, 2010 a 10 Day Notice to End Tenancy was issued and served to the Tenants. The parties attended a dispute resolution hearing on September 28, 2010 where the Tenants confirmed they had moved out of the rental unit just prior to the hearing. The Dispute Resolution Office granted the Landlords an Order of Possession September 28, 2010, even though the Tenants had stated they had vacated the property.

The Landlord stated she was not able to re-rent the unit until February 1, 2011. She began to advertise the unit on the local news website and posted a sign up at work. She was not able to provide a date when these advertisements were placed but did say they could not re-rent the unit until they cleaned it up. She is seeking compensation for loss of rent from August 1, 2010 to January 31, 2011 of \$4,200.00 (6 x \$700.00).

The Landlord states that her daughter and she cleaned the unit over a period of two weeks so she is seeking \$300.00 as compensation for the time spent and for cleaning supplies. She states the unit smelled of cigarette smoke even though the Tenants were not supposed to be smoking inside the unit. She stated there is no provision in the tenancy agreement about not smoking. In addition she said the toilet, which is over ten years old, was badly stained because it was never cleaned properly by the Tenants.

The Tenant testified and confirmed they vacated the property mid September 2010, just prior to the September 28, 2010 hearing to dispute the 10 Day Notice to End Tenancy. They did not pay rent for August or September 2010 as they were awaiting the outcome of the hearing. The Landlord was granted an Order for them to vacate the unit so they should not be responsible to pay rent.

The Tenant states they never smoked inside the rental unit. The Landlords broke into their unit when they tried to illegally evict them and saw that his wife had brought in three ashtrays to empty and clean, which were sitting on the counter. He confirms the toilet was badly stained but that was not due to their lack of cleaning. It was due to the bad water they had. The complex even had to change their water system because the water was so bad, so they cannot be held responsible for that.

### Analysis

Based on the foregoing, the copy of the tenancy agreement provided in the Landlord's evidence, and on a balance of probabilities, I find as follows:

The evidence in this case supports the Tenants paid the July rent in full, sometime after receiving a 10 Day Notice to End Tenancy issued July 4, 2010.

A Notice to End Tenancy can be waived and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when a landlord has accepted rent from a tenant after the Notice to End Tenancy has been served. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End Tenancy, no question of "waiver" can arise as the landlord is entitled to that rent.

In these circumstances the Landlord was able to accept rent for the period up to July 14, 2010 without waiving the 10 Day Notice to End Tenancy. The Landlord was entitled to collect rent of \$322.19 for the period between July 1, 2010 and July 14, 2010, which is calculated at a daily rate of \$23.01.

If the landlord accepts rent for the period after the effective date of the Notice to End Tenancy, the intention of the parties will be in issue. In these circumstances the Landlord had accepted rent of \$700.00, which exceeds the amount that was due by July 14, 2010; and therefore reinstated the tenancy.

Based on the aforementioned the Tenants vacated the property mid September 2010, in breach of the fixed term tenancy. That being said the Landlords were not informed the Tenants vacated the property until the parties attended the September 28, 2010, hearing. The Landlord was issued an Order of Possession, pursuant to section 55 of the Act, which was effective September 30, 2010, two days after service. Therefore, I find this is the date, September 30, 2010, that the Tenants' contractual obligations relating to the fixed term tenancy agreement ended.

Therefore, I find the Tenant's contractual obligations to pay rent remained in full force and effect until September 30, 2010. The Tenant had no contractual obligation after September 30, 2010. Therefore I find the Landlord is entitled to monetary compensation for unpaid rent for August 2010 and September 2010, in the amount of **\$1,400.00** (2 x \$700.00).

Section 7(1) of the Act provides that if a landlord or tenant does not comply with this Act, the Regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for the damage or loss which results. That being said, section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

There is testimony that a move-in inspection report was completed, however no copies were provided in the Landlord's evidence. Furthermore there is no evidence before me to support the actual cost of cleaning supplies purchased. In the absence of documentary evidence to support the condition of the unit at move-in and at move-out, and the absence of evidence to support the actual costs incurred, I find the Landlord provided insufficient evidence to meet the burden of proof, as listed above, and I hereby dismiss her claim of \$300.00, without leave to reapply.

The Landlord has been partially successful with her application; therefore I award partial recovery of their \$100.00 filing fee in the amount of **\$50.00**.

I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the parties to familiarize themselves with their rights and responsibilities as set forth under the *Residential Tenancy Act*.

### Conclusion

The Landlord's decision will be accompanied by a Monetary Order in the amount of **\$1,450.00** (\$1400.00 + 50.00). This Order must be served on the respondent Tenant and may be filed in 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 *Residential Tenancy Act*.

Dated: March 24, 2011.

Residential Tenancy Branch