



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      OPR, OPB, MND, MNR, MNSD, MNDC, FF, CNC, OLC

### Introduction

This hearing dealt with applications from the landlord and the tenant pursuant to the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an Order of Possession for unpaid rent and for breach of an agreement pursuant to section 55;
- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to ask questions.

The parties agreed that the landlord has issued numerous notices to end tenancy since June 30, 2012. The tenant agreed that the landlord handed him a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) on June 30, 2012. The tenant also agreed that he had received the landlord's 1 Month Notice issued by the landlord on July 17, 2012. Although the tenant applied for dispute resolution to cancel the 1 Month Notice, the date of his application to cancel that Notice was July 5, 2012, 12 days before that Notice was issued. As such, it would appear that the tenant erred in his July 5, 2012 application by seeking a cancellation of the 1 Month Notice instead of the 10 Day Notice that had been issued by that date. Since this appears to have been a clear error

made by the tenant and it would not have been possible for the tenant to have sought cancellation of the 1 Month Notice that had not yet been issued, I amend the tenant's application to cancel the 10 Day Notice, the only notice to end tenancy that had been issued by July 5, 2012, the date of his application for dispute resolution.

The parties also agreed that the landlord had served a 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) to the tenant on July 31, 2012, the night before this hearing. The tenant also testified that he had also applied for dispute resolution to seek cancellation of one of the landlord's notices to end tenancy and for other remedies in a separate application that was scheduled to be heard on August 23, 2012 (RTB File # 123456).

The landlord confirmed that she had received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on July 9, 2012. The landlord testified that she handed the tenant a copy of her dispute resolution hearing package on July 11, 2012. The tenant testified that he did not receive a copy of the landlord's hearing package and evidence package until July 23, 2012, when this was handed to him by a representative of the landlord. I am satisfied that both parties received one another's hearing packages for the two applications properly before me in sufficient time to consider the case against them and respond accordingly. I am satisfied that the parties served one another with these hearing packages in accordance with the *Act*.

Much of the written evidence submitted by both parties was late and prevented the other party from adequately responding to the case against them. Little of this late evidence was of relevance to the issues submitted in the parties' original applications for dispute resolution that was before me in this hearing. In addition, both parties attempted through their introduction of written evidence to seek monetary awards without amending their applications for dispute resolution to reflect these changes. As the issues properly before me were much narrower than those outlined in the written evidence of both parties, I was able to consider the parties' applications with little weight attached to their late evidence. At the hearing, I advised the parties that I would not be considering their attempts to seek monetary awards in excess of those outlined in their original applications. While both parties had witnesses available at this hearing, I did not hear their testimony as their evidence related to issues that were not properly before me.

During this hearing, I found it exceedingly difficult to keep the parties focussed on those issues that were properly before me in the context of their respective applications for dispute resolution that were scheduled to be considered at this hearing. Both in their written evidence and their sworn oral testimony, they were persistent in their

unsuccessful attempts to try to introduce issues that had no bearing on the applications before me. While this is partially understandable given the landlord's multiple notices to end tenancy and their multiple applications for dispute resolution, I could not consider issues beyond those set out in their applications for dispute resolution. To do otherwise would have deprived the other party from knowing the case against them and being afforded a proper opportunity to respond, both fundamental components of the principles of natural justice.

#### Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent? Is the landlord entitled to an Order of Possession for breach of an agreement? Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to a monetary award for damage and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Should orders be issued regarding this tenancy? Are either of the parties entitled to recover their filing fees for their applications from one another?

#### Background and Evidence

This tenancy originally commenced on March 1, 2007 as a one-year fixed term tenancy. In a series of fixed term tenancy agreements entered into written evidence, the tenancy continued. The most recent fixed term tenancy was a 15-month tenancy commencing on March 1, 2011. Monthly rent for this period was set at \$850.00, payable in advance on the 30<sup>th</sup> of each month, plus heat and hydro. The landlord continues to hold the tenant's \$437.50 security deposit and \$437.50 pet damage deposit paid on March 1, 2010.

In accordance with this most recent 15-month fixed term Residential Tenancy Agreement (the Agreement), the tenancy was scheduled to end on May 1, 2012, by which time both parties agreed that the tenant was to vacate the rental premises. As the end of the 15-month tenancy period approached, the landlord entered into two oral agreements, confirmed by emails submitted as written evidence, which extended the 15-month tenancy by an additional two months. The landlord maintained that these were extensions to the 15-month fixed term Agreement. She asserted that these two extensions of one month each did not affect the requirement that the tenant would have to vacate the rental premises at the end of these additional months. The tenant testified that by extending the original fixed term, the landlord had renewed his tenancy on a month-to-month basis. He maintained that the landlord's failure to act on the terms of the Agreement and acceptance of his monthly rent payments of \$875.00 continued his tenancy as a periodic tenancy for an agreed monthly rent of \$875.00. At the hearing, I advised the parties that I found that when the landlord agreed to allow the tenant to

remain in this tenancy beyond May 1, 2012, the scheduled end date to the fixed term tenancy, the tenancy converted to a periodic tenancy. I advised the parties of my finding that an oral extension of the fixed term tenancy would not extend the fixed term, but would continue the tenancy on a month-to-month basis.

The landlord's application for a monetary award of \$1,356.00, included the following items:

| <b>Item</b>                      | <b>Amount</b>     |
|----------------------------------|-------------------|
| Unpaid Rent Owing from May 2012  | \$75.00           |
| Unpaid Rent Owing from June 2012 | 75.00             |
| Unpaid July 2012 Rent            | 931.00            |
| Estimated Damage to Lawn         | 350.00            |
| <b>Total of Above Items</b>      | <b>\$1,431.00</b> |

The landlord also requested the recovery of her \$50.00 filing fee for her application. The landlord applied for an immediate end to this tenancy on the basis of the tenant's failure to pay \$131.70 identified as owing in the 10 Day Notice as of April 1, 2012. In addition, the landlord made a separate request to end this tenancy on the basis of the tenant's alleged breach of an agreement. Although the landlord was vague as to the agreement breached, she described this as the tenant's oral agreement to repair damage that he had caused to her yard and/or driveway area.

As outlined above, I have accepted that the only reasonable interpretation to be given to the tenant's application to cancel the landlord's notice to end tenancy is that he intended to seek cancellation of the notice then before him, the 10 Day Notice issued on June 30, 2012. The tenant maintained that he has paid the correct allowable monthly rent throughout this tenancy, most recently \$875.00. He testified that he has been late in his payments on a few occasions, although the landlord refused his rental payment for July 2012, until recently.

Although the tenant did not apply to dispute the landlord's January 3, 2012 Notice of Rent Increase, in his oral and written evidence he asserted that the amount of unpaid rent identified as owing in the landlord's 10 Day Notice reflected the landlord's attempt to obtain an rent increase in excess of the 4.3% allowed under the legislation. The landlord's Notice of Rent Increase, issued on a discontinued residential tenancy form, identified the current monthly rent as \$875.00, the amount of the rent increase as \$56.44, for a total new monthly rent of \$931.44, which was to take effect on March 31, 2012. The landlord noted on this form that part of this increase included a corresponding increase in the tenant's security deposit. The tenant requested the

issuance of an order regarding the correct monthly rent to be charged during this tenancy.

The tenant also applied for the issuance of orders requiring the landlord to provide written receipts for any payments made by the tenant. The tenant entered into written evidence a copy of a July 23, 2012 receipt issued by the landlord for his payment of \$875.00 in rent for July 2012. This receipt noted that the landlord had accepted the payment “for use and occupancy only” and did not reinstate the tenancy. At the hearing, the landlord confirmed that she had issued this receipt for use and occupancy only. She also confirmed that she issued receipts to the tenant from January 2012 until June 2012 on July 17, 2012, and that she now realized her obligation to issue written receipts on an ongoing basis. None of the landlord’s receipts for these months noted that the tenant’s \$875.00 payments had been accepted for use and occupancy only, nor did they identify any outstanding amount owing for the months of April, May or June 2012, months when the landlord had claimed that the monthly rent had increased to \$931.44.

#### Analysis – 10 Day Notice to End Tenancy for Unpaid Rent

Section 52(e) of the *Act* requires that “in order to be effective, a notice to end a tenancy must be in writing and must...when given by a landlord, be in the approved form.” As noted at the hearing, the landlord issued the 10 Day Notice on what would appear to have been a 2006 version of the 10 Day Notice form. Although this was not the most current form issued by the Residential Tenancy Branch (RTB), I find that the information contained in the RTB form used by the landlord is essentially the same in all meaningful ways as the current form in use. Under these circumstances, I accept that the landlord’s 10 Day Notice meets the requirements of section 52(e) of the *Act*.

As I have accepted that the tenant could only have intended to seek the cancellation of the 10 Day Notice, I find that the tenant did dispute the 10 Day Notice within the 5-day time frame established under section 46 of the *Act*. There is also agreement between the parties that the tenant has not paid the \$131.70 identified as owing by the landlord in her 10 Day Notice within the 10 day time period for doing so. The matter in dispute thus narrows to whether the landlord has established that the amount identified as owing in her 10 Day Notice was in fact owing at the time noted in the 10 Day Notice.

The landlord’s 10 Day Notice of June 30, 2012 identified \$131.70 as owing as of April 1, 2012. I have had difficulty reconciling this amount with the landlord’s extensive written evidence she entered in support of her attempt to obtain an escalating monetary award beyond that claimed in her original application for dispute resolution. As noted above, without a formal amendment to the landlord’s application, the only monetary claim I am

willing to consider is her original claim for a monetary award of \$1,356.00. In that claim, she identified \$75.00 in unpaid rent owing for May 2012, \$75.00 owing for June 2012, and \$931.00 for July 2012, the latter of which appears to have been derived from January 2012 Notice of Rent Increase. She also testified at the hearing that the tenant continues to owe her \$75.00 for unpaid rent from August 2011. On this point, I find that the landlord's practice of failing to issue rent receipts for rental payments until very recently disentitles her from obtaining reimbursement for unpaid rent for August 2011. I find that there is an absence of clear and consistent evidence from the landlord with respect to the composition of the \$131.70 amount identified as owing in the 10 Day Notice. Consequently, I rely on the sworn oral testimony of the parties and the Details of the Dispute section of the landlord's original application for dispute resolution. On this basis, I find on a balance of probabilities that it is more likely than not that the \$131.70 identified in the 10 Day Notice was intended to represent the difference between the tenant's \$875.00 monthly rental payments and the amounts that the landlord believed she was entitled to receive in accordance with her Notice of Rent Increase. In coming to this determination, I recognize fully that the landlord's claims for unpaid rent of \$75.00 each for May and June 2012 do not equal the \$131.70 identified in the landlord's 10 Day Notice. However, given the changing nature of the landlord's claim for a monetary award, I find it more likely than not that the amount identified in the 10 Day Notice was intended to represent the tenant's refusal to pay the rent increase for May and June 2012.

Although the landlord used a 2003 Form for the Notice of Rent Increase issued by the then Residential Tenancy Office of the Ministry of Public Safety and Solicitor General, I find that for all meaningful ways the information contained on this form is consistent with that on current forms issued by the RTB. However, the form used by the landlord correctly noted that a landlord may only impose a rent increase up to the amount calculated in accordance with the regulations or as ordered by a dispute resolution officer. The landlord noted on the Notice of Rent Increase form that she was seeking a 4.3 % increase, but included a requested retroactive increase in the tenant's security deposit in the \$56.44 rent increase she was seeking. The *Act* does not allow for a landlord to increase a security deposit after a tenant moves into rental premises. I find that the landlord's attempt to increase the tenant's monthly rent by \$56.44, exceeded the 4.3% allowed under the *Regulations* for 2012. Rather than the \$931.44 identified as the new monthly rent owing as of March 31, 2012, the maximum that the landlord could have obtained had she issued this Notice correctly would have been \$912.62 effective April 30, 2012.

I find that the landlord's 10 Day Notice is fatally flawed and is of no legal effect. The landlord's 10 Day Notice issued on June 30, 2012, asserted that there was unpaid rent

of \$131.70 owing as of April 1, 2012. The landlord has not provided sufficient evidence to demonstrate that this outstanding rent was owing as of April 1, 2012 as claimed in her 10 Day Notice. Her Notice of Rent Increase was intended to take effect on March 31, 2012. However, the *Act* requires that any legally established Rent Increase of this nature could only take effect after three whole months had expired. In this case, the earliest possible date when a valid Notice of Rent Increase issued on January 3, 2012 could take effect would be April 30, 2012. Consequently, I find that the rent increase included in the landlord's 10 Day Notice could not possibly have taken effect, even if it had been correctly calculated, which it had not, by the April 1, 2012 date when the unpaid rent was claimed as due. I also note that the landlord accepted the tenant's monthly rent payments for April, May and June 2012, the latter two of which occurred following the scheduled end to the fixed tenancy that commenced on March 1, 2011.

I allow the tenant's application to cancel the landlord's 10 Day Notice and dismiss the landlord's application to end this tenancy on the basis of the 10 Day Notice. I also dismiss the landlord's application to obtain an Order of Possession on the basis of the 10 Day Notice.

#### Analysis – Landlord's Application to End Tenancy for Breach of an Agreement

I have also considered the landlord's application to end this tenancy on the basis of the tenant's alleged breach of an agreement with the landlord. When the landlord filed her application for dispute resolution on July 6, 2012 and sought an end to this tenancy on the basis of an alleged breach of an agreement, she had not issued a notice to end tenancy for this cause. She did not do so until she issued a 1 Month Notice on July 17, 2012. As such, I find that the landlord's July 6, 2012 application had no basis for seeking an end to this tenancy for an alleged breach of an agreement as no notice to end this tenancy had been issued on that basis when she filed her application.

In addition, and as noted during the hearing, I find that the landlord failed to demonstrate that any oral agreement that she may have had with the tenant regarding damage or repair to the rental property had been breached to the extent that she would be entitled to end this tenancy on this basis and obtain an Order of Possession for this alleged breach. I dismiss the landlord's application to end this tenancy for an alleged breach of an agreement as her application of July 6, 2012 was not based on her issuance of a notice to end tenancy for that cause.

#### Analysis – Tenant's Application for the Issuance of Orders Requiring the Landlord to Comply with the *Act*

Given the significant errors made by the landlord in the Notice of Rent Increase, I find that the landlord has not properly followed the legislation related to rent increases and,

as such, the Notice of Rent Increase issued on January 3, 2012 is of no legal effect. I order that the monthly rent for what is now a periodic tenancy for this rental unit remains at \$875.00, as no valid Notice of Rent Increase has been issued to the tenant.

I order the landlord to provide receipts for all payments made by the tenant for the remainder of this periodic tenancy.

#### Analysis – Landlord's Application for a Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof.

In this case, the landlord has confirmed that by the time of this hearing she has received monthly payments of \$875.00 from the tenant for April, May, June and July 2012. As I find that this is the correct monthly rent for these months of this tenancy, I dismiss the landlord's application for a monetary award for unpaid rent or losses under the *Act*

At the hearing, the landlord confirmed that her claim of \$350.00 for lawn damage was based on an estimate and that she has not actually incurred any losses in this regard. I dismiss the landlord's claim for damage to her lawn with leave to reapply as she has not demonstrated any entitlement to a monetary award for this item.

As this tenancy is continuing, I dismiss the landlord's application to retain the tenant's security deposit at this time.

#### Analysis – Remaining Issues

Given that the tenant has been successful in his application, I allow his application to recover his \$50.00 filing fee from the landlord. To implement this finding, I order the tenant to reduce his next scheduled monthly rental payment by \$50.00.

As the landlord has been unsuccessful in her application, I dismiss her application to recover her filing fee.

#### Conclusion

I allow the tenant's application to cancel the landlord's 10 Day Notice and dismiss the landlord's application for an Order of Possession. This tenancy continues as a periodic tenancy.



I dismiss the landlord's application for a monetary award for unpaid rent owing as of July 6, 2012 without leave to reapply. I dismiss the landlord's application for damage to her lawn with leave to reapply once this tenancy is ended. I dismiss the landlord's application to retain the tenant's security deposit as this tenancy is continuing.

I order that the current monthly rent for this tenancy is set at \$875.00. I order the landlord to issue written receipts for payments made by the tenant during this tenancy.

I allow the tenant's application to recover his \$50.00 filing fee from the landlord. To give effect to this finding, I order the tenant to reduce his next scheduled monthly rental payment by \$50.00. In the event that this tenancy should end before the tenant's next scheduled rental payment to the landlord, I order that the tenant's recovery of his \$50.00 filing fee be added to the value of the tenant's security deposit retained by the landlord for this rental unit. I dismiss the landlord's application to recover her filing fee from the tenant.

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: August 02, 2012

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Residential Tenancy Branch