



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

This matter dealt with an application by the Landlords for an Order of Possession and a Monetary Order for unpaid rent and utilities, to recover the filing fee for this proceeding and to keep the Tenant's security deposit in partial payment of those amounts.

At the beginning of the hearing, the Tenant said she had not received the Landlords' documentary evidence package. The Landlords' agents said they believed these documents were included in the hearing package sent to the Tenant, however they admitted that another agent of the Landlord prepared the hearing package and was unavailable to give evidence as to whether he had included the documentary evidence. The Landlords have the burden of proof and must show that it served the Tenant with their documentary evidence. Given the contradictory evidence of the parties on this issue, however and in the absence of any corroborating evidence from the Landlords to resolve the contradiction, I find that there is insufficient evidence to conclude that the Tenant was served with the Landlords' documentary evidence and for that reason, it is excluded pursuant to RTB Rule of Procedure 11.5(b).

### Issue(s) to be Decided

1. Do the Landlords have grounds to end the tenancy?
2. Are there rent and utility arrears and if so, how much?
3. Are the Landlords entitled to keep the Tenant's security deposit?

### Background and Evidence

This fixed term tenancy started on February 1, 2012 and expires on January 31, 2012. Rent is \$695.00 per month payable in advance on the 1<sup>st</sup> day of each month plus the cost of hydro which is in the Landlord's name. The Tenant paid a security deposit of \$347.50 at the beginning of the tenancy.

The Landlords' agents said the Tenant did not pay rent for July 2012 when it was due and as a result on July 9, 2012, the Tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated July 9, 2012. The Tenant admitted that she received this Notice. The Landlords' agents said the Tenant did not make a payment on the rent arrears until August 2, 2012 when she paid \$800.00. The Landlords' agents

said the Tenant was sent a letter by post dated August 10, 2012 advising her that this payment was accepted “for use and occupancy only and did not reinstate the tenancy.” The Tenant said she did not receive a copy of this letter. The Landlords’ agents claimed that according to their financial records, the Tenant also had other accumulated rent arrears of \$165.00.

The Landlords’ agents also claimed that the Tenant had unpaid utilities for the period, February 1 – February 9, 2012 in the amount of \$6.64, for the period April 11 – June 11, 2012 in the amount of \$85.76 and that it was “possible” the invoice for February 9 – April 11, 2012 in the amount of \$77.33 was also unpaid. The Tenant said she believed that all three hydro invoices were unpaid but that according to a letter accompanying the April 11 – June 11, 2012 invoice, it was not due until September 1, 2012.

### Analysis

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 (if they believe the amount is not owed) 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 will end on the effective date of the Notice and they must vacate the rental unit at that time.

I find that the Tenant was served on July 9, 2012 by registered mail with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated July 9, 2012. Pursuant to s. 90(a) of the Act, the Tenant was deemed to receive this Notice five days later or on July 16, 2012 (given that the 14<sup>th</sup> fell on a Saturday). I find that the Tenant did not pay the overdue rent and did not apply for dispute resolution to cancel the Notice within the 5 days granted under s. 46(4).

However, I find that the Tenant paid the rent arrears on August 2, 2012 and although the Landlords’ agents claim the Tenant was given a letter by mail on August 10, 2012 advising her that her payment was accepted for use and occupancy this was denied by the Tenant. In the absence of any corroborating evidence from the Landlords to resolve this contradiction, I find that there is insufficient evidence to conclude that the Landlords did not reinstate the tenancy. Furthermore, the Landlords’ agents admitted that the Landlords reinstated the tenancy on two previous occasions. Consequently, I find that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated July 9, 2012 is cancelled and the Landlords’ application for an Order of Possession is dismissed without leave to reapply. In any event, in the absence of a copy of the 10 Day Notice to End Tenancy dated July 9, 2012 (which was excluded from evidence) I also find that there was insufficient evidence that the 10 Day Notice complied with s. 52 of the Act and it would also have been cancelled for that reason.

I find on a balance of probabilities that there is unpaid rent for August 2012 in the amount of \$590.00. In the absence of any financial evidence from the Landlords, I find that there is insufficient evidence of any other rent arrears for prior months and the Landlords' application for rent arrears prior to July 2012 is dismissed without leave to reapply. I also find on a balance of probabilities that the Tenant has utility arrears of \$6.64 for the period, February 1 – 9, 2012 and \$77.33 for the period, February 9 – April 11, 2012. I find that there is insufficient evidence to conclude that the hydro bill for the period, April 11 – June 11, 2012 in the amount of \$85.76 is past due and that part of the Landlords' application is dismissed with leave to reapply.

The Landlords sought to recover a late payment fee for July 2012 rent of \$25.00. Section 7 of the Regulations to the Act says a landlord may recover a late payment fee of no more than \$25.00 provided that it is included as a term in the Parties' tenancy agreement. As the Landlords' documentary evidence was excluded, I find that there is insufficient evidence of such a term and accordingly, this part of the Landlords' application is dismissed without leave to reapply. As the Landlords have been successful on only part of their claim, I find that they are entitled to recover only one-half of the filing fee for this proceeding or \$25.00.

### Conclusion

The Landlords' application for an Order of Possession is dismissed without leave to reapply. As the tenancy has not ended, the Landlord's application to keep the Tenant's security deposit is dismissed with leave to reapply. A Monetary Order in the amount of **\$698.97** has been issued to the Landlords and a copy of it must be served on the Tenant. If the amount is not paid by the Tenant, the Order may be filed in the Provincial (Small Claims) Court of British Columbia 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: August 21, 2012.

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Residential Tenancy Branch