



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes**

Landlord's Application: OPR, MNR, MNDC, FF

Tenant's Application: CNC, CNL, CNR, DRI, MNDC, MNR, MNSD, O, RR

### **Introduction**

This hearing dealt with cross applications. The landlord applied for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent and loss of rent. The tenant applied for several remedies including a request to cancel Notices to End Tenancy; dispute of a rent increase, monetary compensation for damage or loss under the Act, regulations or tenancy agreement; compensation for emergency repairs and other repairs; return of the security deposit; and, authorization to reduce rent payable.

### **Preliminary and Procedural Matters**

In filing this application, the tenant indicated he was seeking to dispute a 10 Day Notice to End Tenancy for Unpaid Rent in the details of dispute; however, the tenant indicated the dispute codes associated to other types of Notices to end Tenancy. I confirmed that the only Notices to End Tenancy served upon the tenant have been 10 Day Notices to End Tenancy for Unpaid Rent. I amended the dispute codes on the tenant's application accordingly.

The parties were in disagreement with respect to the amount of rent paid and payable by the tenant yet I had not been provided a copy of the tenancy agreement or copies of all the subsequent "lease renewals" prior to the hearing. I heard that two 10 Day Notices were issued but I was provided with a copy of only one of the Notices.

Preliminary submissions indicated that the tenant may have been overpaying rent since 2010. I determined it to be appropriate and necessary to adjourn the hearing and order the parties to provide me and the other party with documentation in their possession pertaining to the issue of rent, including:

- The original tenancy agreement;
- "Lease renewal" documents;
- 10 Day Notices to End Tenancy for Unpaid Rent served upon the tenant;

- A detailed ledger or accounting of all payments made to the landlord during the tenancy; and,
- Any other document relevant to the issue of rent paid or payable.

Some of the above documents were received from the parties during the adjourned period. The tenant indicated that he did not have all of the records requested. The landlord indicated in a written submission that she needed more time to retrieve records. Neither party submitted a detailed ledger or accounting of payments made to the landlord during the tenancy.

At the reconvened hearing on January 31, 2013 the tenant confirmed receipt of the landlord's evidence package; however, the landlord stated she had not received the tenant's evidence package. The tenant provided a registered mail receipt and tracking number as proof of service of his package. Upon a search of the tracking number I was satisfied the tenant had sent his package to the landlord within the time I had specified at the original hearing; however, since the landlord's address is in the United States the tracking information merely showed that the registered mail was processed by the US postal system. I proceeded to describe the documents the tenant had submitted to the landlord to confirm whether she was familiar with certain documents. The landlord confirmed she was familiar with the tenancy agreement and "lease renewal" documents the tenant had submitted. The receipt for a shower handle repair was described to the landlord as she had not seen that document before.

As neither party had provided a detailed ledger or accounting of payments made by the tenant during the tenancy I informed the parties that I would be unable to determine the amount of rent overpaid by the tenant or the sum the tenant is entitled to withhold. Rather, I would make findings as to the amount of monthly rent the tenant should have been paying during the tenancy and a formula for the parties to calculate the overpayment themselves. I would also make findings as to the tenant's entitlement to deduct amounts for repairs or emergency repair costs submitted by the tenant; and, entitlement to compensation for the landlord wishing to end the tenant to sell the property.

#### Issue(s) to be Decided

1. What is the monthly rent the tenant should have been paying to the landlord under the Act?
2. Is the tenant entitled to deduct amounts from rent for repairs or emergency repairs?

3. Is the tenant entitled to compensation for the landlord wishing to end the tenancy to sell the property?
4. Should the 10 Day Notices to End Tenancy issued in November 2012 be upheld or cancelled?

### Background and Evidence

The tenancy commenced March 7, 2009 for a fixed term set to expire March 31, 2010. The monthly rent was set at \$1,375.00 with cable, internet and hydro to be included in rent "for one year". The tenancy agreement provides that at the end of the fixed term "the tenancy may continue on a month-to-month basis or another fixed length of time". This agreement has been referred to as "the original tenancy agreement".

The parties signed a document entitled "Lease Renewal Agreement" in January 2010. The document indicates the lease was renewed for a further period of one year. The monthly rent would be \$1,450.00 and "all other terms of Original Lease Agreement shall remain binding and enforceable throughout the renewal period".

The parties signed a document entitled "Lease Renewal" in January 2011 to renew the lease for a term of April 1, 2011 to September 30, 2011. The rent would be \$1,550.00 per month plus it was specified that the tenant would be responsible for cable, gas, hydro and internet. The document indicated that if the landlord did not sell the property the above terms would continue until March 31, 2012. The document indicates that the equivalent of "two month's rent" had been deposited for "rental security". Finally, the document indicates that all other terms of the "original Lease" would remain binding and enforceable.

The above described "Lease Renewal" documents have been referred to as the "renewal agreements".

Both parties provided consistent testimony that other than the two "renewal agreements" described above, the landlord did not sign any further lease renewal documents. Rather, the tenant was presented with subsequent renewal documents to sign, which he did, and returned them to the landlord. Pursuant to the lease renewals signed by the tenant only, the monthly rent increased to \$1,650.00 for the period of April 2012 to September 2012 and then to \$1,700.00 per month starting October 2012.

The parties provided consistent testimony that the tenant has not paid rent starting October 2012 onwards. The tenant is of the position he has overpaid rent and intends

to remain in the rental unit, without paying rent, until such time he has recovered the overpaid rent.

The landlord issued two 10 Day Notices to End Tenancy for Unpaid Rent. The 10 Day Notice dated November 17, 2012 indicates that the tenant failed to pay rent of \$3,400.00 as of November 16, 2012 and the 10 Day Notice dated November 22, 2012 indicates the tenant failed to pay rent of \$1,700.00 on October 1, 2012.

The landlord explained that the first 10 Day Notice was improperly served so she withdrew the Notice and served the tenant with the second 10 day Notice. The tenant did not recall the landlord stating the first 10 Day Notice was withdrawn and was of the position that both 10 Day Notices are invalid as he is permitted to withhold overpaid rent.

When I asked the landlord how much she had collected for a security deposit she seemed very confused and provided testimony that was inconsistent with the amount recorded in the original tenancy agreement or the lease renewal document signed in January 2011.

The parties were in dispute as to a payment of \$3,000.00 made by the tenant via paypal. The landlord provided a document from paypal indicating the payment was made August 23, 2012. The landlord submitted that the paypal document is incorrect and that she received the payment on a different date; although, she did not know which date she actually received the payment.

The parties also provided inconsistent evidence as to whether the landlord was receiving rent payments in US or Canadian dollars.

The tenant submitted that he paid \$175.00 in May 2011 to have a shower handle repaired. The tenant explained that without the repair he was limited to taking baths only. The tenant acknowledged he did not request the landlord make the repair before he undertook the repair himself. The landlord stated she did not give the tenant consent or agree to pay for such a repair.

Finally, the tenant was of the position that he is entitled to another free month of rent since the landlord advised him, via email, that she intends to sell the property and he must vacate the property. I confirmed that the tenant has not been served with a 2 Month Notice to End Tenancy for Landlord's Use of Property.

## Analysis

The Act requires that a tenancy agreement with a fixed term must specify whether the tenancy is to continue at the end of the fixed term or whether it will end and the tenant must vacate. The tenancy agreement signed by the parties indicates that the tenancy would continue after the expiration date of March 31, 2010 and there was no requirement for the tenant to vacate as of March 31, 2010.

Section 44 of the Act provides that if the tenant is not required to vacate at the end of a fixed term it is deemed that the tenancy has continued on a month to month basis.

I have considered whether the execution of the two lease renewal documents brought the original tenancy agreement to an end and created new tenancy agreements. I find that the two fully executed “renewal agreements” did not create new tenancy agreements that replaced the original tenancy agreement, based upon the following considerations:

- The “renewal agreements” indicate the purpose of the document is to renew the original tenancy agreement;
- The definition of “renew” is “to make effective for an additional period”
- The “renewal agreements” are non-compliant with tenancy agreement requirements provided by the Act; and,
- The “renewal agreements” refer to and rely upon the content of original tenancy agreement.

As I have found that new tenancy agreements were not formed by way of the two executed “renewal agreements” I find the original tenancy agreement continued and remained in effect. Accordingly, in order to increase the monthly rent, the landlord was required to comply with the rent increase provisions of the Act. Further, in order to terminate or change the liability for utility payments to the tenant, the landlord was required to do so in a manner that complied with the Act.

## ***Rent Increase***

Rent increases are provided in sections 40 through 43 of the Act and sections 22 and 23 of the Residential Tenancy Regulation. The amount of a rent increase is limited to the amount provided under the Regulations unless the landlord has the tenant’s written consent or authorization of the Director to increase the rent by a greater amount. Whether the landlord increases the rent by an amount equal to or less than the amount permitted by the Regulations, or obtains the tenant’s written consent for a greater

increase, the landlord must issue the tenant a Notice of Rent Increase, in the approved form, at least three full months before the rent increase is to take effect.

While it may be argued the tenant consented to a rent increase greater than the amount permitted by the Regulations by signing the "lease renewal" documents I was not provided any evidence that the landlord served the tenant with Notices of Rent Increase. In the absence of Notices of Rent Increase, I find the rent has not been legally increased and that the monthly rent the landlord was entitled to collect remained at \$1,375.00 based upon the original tenancy agreement. Any amounts paid by the tenant in excess of \$1,375.00 per month constitute rent overpayments.

### ***10 Day Notices to End Tenancy for Unpaid Rent***

Where a tenant overpays rent, or a security deposit, or both, the Act provides that the tenant is entitled to withhold rent to recover the overpayments from the landlord.

Having heard the tenant has been paying more than \$1,375.00 per month since April 2010. I am satisfied the tenant has very likely overpaid rent in excess of the \$1,700.00 or \$3,400.00 indicated on the 10 Day Notices to End Tenancy issued by the landlord November 17 and 22, 2012. Therefore, I cancel those 10 Day Notices with the effect that this tenancy continues at this time.

### ***Security Deposit***

The Act limits the type and amount of deposits a landlord may collect. Security deposits are limited to one-half of a month's rent and may only be collected at the beginning of the tenancy. In this case, I find the security deposit was limited to \$687.50. Based upon the evidence before me, I find it is uncertain as to whether the tenant paid a security deposit in excess of \$687.50 but if he did then any amount in excess of \$687.50 is recoverable by the tenant.

### ***Rent reduction***

To assist the parties, I provide the following formula as a guide to calculating the overpayment of rent and/or security deposit by the tenant and the tenant's entitlement to withhold future rent payable.

Sum (rent actually paid - \$1,375.00 per month)

Plus:

Amounts collected/paid to the landlord for deposits - \$687.50

For each future month the tenant does not pay rent the overpayment calculated above shall continue to be reduced by \$1,375.00, unless the rent is legally increased which would require a reduction for the new monthly rent.

Should the tenancy end before the overpayment is recovered, the tenant may file another Application for Dispute Resolution seeking a Monetary Order for the balance remaining. I strongly caution the tenant that he will bear the burden to show the amounts he paid to the landlord for rent and deposits during the tenancy.

### ***Utilities***

Termination of services or facilities included in rent is to be accompanied by 30 days of written notice, in the approved form, and an equivalent reduction in rent. It appears from the documentary evidence before me, that the tenant may have started paying for utilities that were previously included in rent. Where a tenant becomes responsible for paying for services that were previously included in rent, this may be considered a rent increase. In the absence of a Notice terminating the services previously included in rent, in the approved form, or Notices of Rent Increase accounting for the increase in rent that results from paying for the utilities, I find the tenant is in a position to seek compensation for services he began paying for that were originally included in rent.

Without evidence pointing to the tenant's amount of damages or loss related to payments he has made for services previously included in rent, I make no finding as to the amount the tenant is entitled to recover from the landlord. Therefore, I encourage the parties to resolve this issue themselves and if the parties cannot resolve it the tenant is at liberty to file another Application for Dispute Resolution and provide evidence in support of his losses.

### ***Repairs***

Where a tenant requires repairs to the rental unit, the tenant is expected to notify the landlord so the landlord can make the necessary repair. A tenant may proceed to make emergency repairs and recover the cost for doing so in very limited circumstances. Emergency repairs are defined by the Act to mean urgent repairs necessary for health, safety or preservation of the property and require the tenant to make at least two attempts to contact the landlord before proceeding to make the repair. In this case, I find the shower handle repair does not meet the definition of an emergency repair. Nor did the tenant contact the landlord to request the repair or obtain the landlord's agreement that the landlord would compensate the tenant for doing so. Therefore, I find no basis under the Act to compensate the tenant for the shower handle repair he undertook himself.

***One Month's compensation***

Under the Act, a tenant who receives a 2 Month Notice to end Tenancy for Landlord's Use is entitled to compensation equivalent to one month's rent under section 51 of the Act. A 2 Month Notice may not be issued merely because the landlord is selling or is intending to sell the property as tenancies run with the land. Selling a property does not automatically end a tenancy. I encourage both parties to familiarize themselves with circumstances where a 2 Month Notice may be issued. In the absence of a 2 Month Notice being served upon the tenant I find the tenant is not entitled to receive compensation under this part of the Act at this time and I deny that portion of the tenant's application.

***Filing fee***

I find both parties contributed to this dispute and each party shall absorb the cost of the filing fee they paid for their respective applications. .

**Conclusion**

The 10 Day Notices to end Tenancy for Unpaid Rent issued in November 2012 are cancelled and the tenancy continues.

The tenant's request for recovery of repair costs and tenant's compensation under section 51 of the Act are dismissed.

The rent is set at \$1,375.00 per month until such time it is legally increased. The tenant is entitled to recover rent paid in excess of \$1,375.00 per month during this tenancy. The tenant is entitled to recover deposits paid in excess of \$687.50. The tenant is authorized to reduce rent to recover overpaid rent and/or security deposit. The tenant is at liberty to file another Application for Dispute Resolution seeking a Monetary Order for the balance of the overpayments remaining should the tenancy end before the overpayments are recovered; however, the tenant is cautioned that he shall bear the burden to prove the rent and/or deposit payments he made to the landlord.

Should the parties remain in dispute as to the sum of the overpayments, the parties may file another Application for Dispute Resolution to seek further remedy.

The tenant is at liberty to file another Application for Dispute Resolution seeking compensation for cable, internet, hydro and gas he may have paid during this tenancy and contrary to the requirements of the Act. The tenant shall bear the burden to prove the amounts he paid.



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: February 1, 2013

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Residential Tenancy Branch

