



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MND, MNSD, FF, MT, CNC, CNR, MNDC, OLC, RP

### Introduction

This hearing dealt with applications pursuant to the *Residential Tenancy Act* (the *Act*) from Landlord's agents SY and JRB (the agents), and the tenant naming Landlord LY (the landlord) as the respondent. The agents applied for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent and for damage to the unit 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 the filing fee for their application from the tenant pursuant to section 72.

The tenant applied for:

- more time to make an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66;
- cancellation of the landlord's 10 Day Notice pursuant to section 46;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; 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, to call witnesses and to cross-examine one another.

Preliminary Issues - Service of Documents

The tenant confirmed that he received a copy of the landlord's 10 Day Notice posted on his door on March 10, 2014. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the 10 Day Notice on March 13, 2014, the third day after its posting on his door. Under these circumstances, the tenant's application to cancel the 10 Day Notice was submitted on March 17, 2014, within 5 days of his deemed receipt of that Notice. As such, there was no need to consider the tenant's application for an extension of time to file for dispute resolution to cancel the 10 Day Notice. As per the request of the tenant at this hearing, the tenant's application for more time to apply to cancel the 10 Day Notice is hereby withdrawn.

At the commencement of the hearing, I checked with the parties to determine whether the landlord had issued a 1 Month Notice, as the tenant had applied to cancel a 1 Month Notice as well as a 10 Day Notice. Neither party had any knowledge of a 1 Month Notice issued by the landlord. As the tenant appeared to have erred in his inclusion of a request to cancel a 1 Month Notice in his application, the tenant's application to cancel a 1 Month Notice is also withdrawn by the tenant.

The tenant gave sworn testimony that he sent the landlord a copy of his dispute resolution hearing package by registered mail on March 19, 2014. He provided the Canada Post Tracking Number to confirm this registered mailing. Landlord agent SY testified that she was uncertain as to whether or not the landlord had received the tenant's dispute resolution hearing package. Based on the tenant's undisputed sworn testimony and in accordance with sections 89 and 90 of the *Act*, I find that the tenant's dispute resolution hearing package was deemed served to the landlord on March 24, 2014, the fifth day after its registered mailing by the tenant.

Landlord agent SY testified that she sent the tenant a copy of the landlords' agents' dispute resolution hearing package by regular mail on April 6, 2014.

Section 89 of the *Act* establishes the following Special rules for certain documents, which include an application for dispute resolution for a monetary award (s.89(1) of the *Act*) and an Order of Possession (s. 89(2) of the *Act*):

*89(1) An application for dispute resolution,...when required to be given to one party by another, must be given in one of the following ways:*

- (a) by leaving a copy with the person;*
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;*

- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;*
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;*
- (e) as ordered by the director under section 71(1) [director's orders: delivery and service of document]...*

*(2) An application by a landlord under section 55 [order of possession for the landlord],... must be given to the tenant in one of the following ways:*

- (a) by leaving a copy with the tenant;*
- (b) by sending a copy by registered mail to the address at which the tenant resides;*
- (c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;*
- (d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;...*

The landlord cannot serve notices of hearing containing the landlords' application for dispute resolution by sending them by regular mail. As I find that the landlords have not served the tenant in a manner required by section 89(1) or 89(2) of the Act, I dismiss the landlords' application for dispute resolution with leave to reapply.

Landlord agent SY made an oral request for the issuance of an Order of Possession in the event that the tenant's application to cancel the 10 Day Notice were dismissed.

#### Issues(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to a monetary award for a loss in the value of his tenancy? Should any orders be issued to the landlord arising out of the tenant's application? Is the tenant entitled to recover the filing fee for this application from the landlord?

#### Background and Evidence

The tenant gave undisputed sworn testimony that this tenancy for the upper rental unit of a two unit non-smoking rental building began on September 1, 2013, by way of a written two-year fixed term Residential Tenancy Agreement. Monthly rent is set at

\$2,500.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$1,250.00 security deposit paid on or about August 24, 2013.

The tenant gave undisputed sworn testimony that the Agreement was for a non-smoking unit in a non-smoking rental building. Although the tenant has not seen the Agreement between the basement tenant and the landlord, he gave undisputed sworn testimony that it too is supposed to be a non-smoking rental unit.

The tenant testified that new tenants moved into the basement rental unit below him, his wife and child on or about December 28, 2013. Although relations with these tenants were initially acceptable, his wife began to notice the smell of cigarette smoke coming up from the basement suite about a week later. When the tenant texted the basement tenants about his families' concerns about second hand smoke, the basement tenant apologized for the actions of a visitor to the basement rental unit. Over time, the smoking increased and each time, tenant texted the basement tenant, copying one of the landlord's agents with his concerns. He said that he and his wife smelled smoke about five times in January 2014 and another five times in February 2014. On one occasion, the cigarette smoke was accompanied with a noisy party by the basement tenants. The tenant said that his wife could not tolerate the second hand smoke in the upper rental unit and decided to move out of the rental unit along with their child.

The tenant testified that he informed the landlord that he would no longer pay rent for this rental unit due to the landlord's failure to address his concerns about smoking. He maintained that the rental unit is no longer habitable because of the second hand smoke.

The tenant's application for a monetary award of \$7,200.00 was to recover what he maintained was a loss in value of his tenancy resulting from the landlord's failure to provide him with the non-smoking rental unit he expected to receive when he signed his Agreement. At the hearing, the tenant testified that he has not paid his monthly rent for March, April or May 2014.

Landlord's agent SY testified that she has never smelled any evidence of smoke in the rental unit. Landlord's agent JRB said that he has visited the basement suite on four occasions following text messages he received from the tenant about smoking in the basement suite. He said that sometimes he was able to get to the rental unit as soon as 20 minutes after the tenant sent his text message. On other occasions, he said it took him one-half day to get to the rental property and access the basement rental unit. On each occasion when he inspected the basement rental unit, the basement tenants denied that any smoking had occurred in the basement suite and the landlord's agent could not detect any trace of cigarette smoke.

### Analysis

The tenant failed to pay the \$2,500.00 identified as owing in the landlord's 10 Day Notice in full within five days of receiving the 10 Day Notice. Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent."

Section 28 of the *Act* establishes a tenant's right to quiet enjoyment of the rental unit which entitles the tenant to "freedom from unreasonable disturbance." Section 65(1)(f) of the *Act* allows me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

In this case, the only evidence the tenant provided to support his claim for entitlement to a monetary award of \$7,200.00 was his sworn testimony that he and his family have been disturbed by cigarette smoke originating in the basement suite below them. The tenant did not provide any written statements from anyone to support his claim. He provided no photographs, digital evidence, documents from health care professionals or anything else in support of his application. He called no witnesses and entered no written evidence other than the few sentences he included in the Details of the Dispute in his application for dispute resolution. By his own admission, the smell of cigarette smoke was only noticeable approximately once per week during January and February 2014, after which the tenant refrained from paying any rent to the landlord.

The landlord's agent JRB gave undisputed sworn testimony that he has attended the basement rental unit on four occasions following his receipt of text messages from the tenant about the smell of cigarette smoke in this rental unit. On each occasion, he discovered no evidence of cigarette smoke or smoking in the basement rental unit.

Under these circumstances and based on a balance of probabilities, I find that the tenant's application for a monetary award falls far short of establishing any entitlement to a monetary award for the loss in value of this tenancy. I find that the landlord's agent (JRB) has followed up on the complaints submitted by the tenant but has discovered no reason to take any further action with the basement tenant(s). The burden of proof for a monetary claim rests with the applicant. In this case, I find that the tenant has not met that burden of proving any entitlement to a monetary award. I dismiss the tenant's application for a monetary award without leave to reapply and issue no orders of any kind against the landlord resulting from the tenant's application.

As I am not satisfied that the tenant had any legitimate reason or authority under the *Act* to withhold paying any portion of his rent, I find that the tenant has not complied with the requirement under section 26(1) of the *Act* to pay his rent on time and in accordance with the Agreement. I dismiss the tenant's application to cancel the 10 Day Notice without leave to reapply.

In this case and in accordance with section 46(5) of the *Act*, the tenant's failure to pay the rent identified as owing in the landlord's 10 Day Notice in full within five days led to the end of his tenancy on the corrected effective date of the notice. In this case, this required the tenant to vacate the premises by March 23, 2014.

Section 55(1) of the *Act* reads as follows:

**55** (1) *If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,*

*(a) the landlord makes an oral request for an order of possession, and*

*(b) the director dismisses the tenant's application or upholds the landlord's notice.*

In accordance with section 55(1) of the *Act*, I find that the landlord is entitled to a 2 day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

As the tenant has been unsuccessful in all elements of his application, the tenant bears the responsibility for his filing fee for this application.

### Conclusion

The landlords' application for dispute resolution is dismissed with leave to reapply.

The tenant's application for an extension of time to apply to cancel the 10 Day Notice is withdrawn. The tenant's application to cancel a 1 Month Notice is also withdrawn.

The tenant's application to cancel the 10 Day Notice is dismissed without leave to reapply. At the hearing, one of the landlord's agents requested an Order of Possession

if the tenant's application for cancellation of the Notice to End Tenancy were dismissed. In accordance with section 55(1) of the Act, I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

As this tenancy is ending shortly, I dismiss the tenant's application for the issuance of orders against the landlord without leave to reapply.

I dismiss the tenant's application for a monetary Order without leave to reapply. I also dismiss the tenant's application to recover his filing fee from the landlord.

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: May 05, 2014

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Residential Tenancy Branch

