# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNSD, FF

Introduction

The tenant applies to recover a security deposit, doubled pursuant to s.38 of the *Residential Tenancy Act* (the "*Act*").

The tenant made his application on November 3, 2014 and served the landlords by registered mail sent at the end of November, received by the landlords December 5, 2014. This late service is not in compliance with s. 59(3) of the *Act* requiring an applicant to served a respondent within three days after making the application. The landlords declined to waive the effect of s. 59(3).

Issue(s) to be Decided

As a preliminary matter, can the proceeding continue where an applicant has failed to comply with s. 59(3)?

Background and Evidence

The essential facts relating to the preliminary matter are as set out above.

Analysis

The requirement to serve the Notice of Hearing package within three days after making the application is a requirement imposed by Rule 3.1 of the Rules of Procedure. Normally, non-compliance with procedural rules does not render an act invalid and an adjudicator has some discretion to relieve from the effect of non-compliance. Rule 17.2 specifically states that non-compliance with the Rules does not stop or nullify a proceeding.

However, the three-day service rule originates in the *Residential Tenancy Act* itself. Section 59 (3) of the *Act* provides;

> (3) Except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

Failure to serve the originating documentation is not simply a breach of the Rules of Procedure. It is a breach of the statute.

Section 59 (3) says that an applicant "must" serve the respondent with the origination documents within three days of making it. The *Interpretation Act*, RSBC 1996, c. 29; provides that in any enactment use of the term "must" is to be construed as imperative. That means compliance is "mandatory."

But it appears that "must" doesn't always mean "must." Despite the apparently conclusive definition of "must" in the *Interpretation Act*, courts have held that in some circumstances the use of the "must" in an enactment is "directory" only and its effect can be avoided where no prejudice has resulted from the breach of it.

In *Hyland Homes Ltd.* v *Thomas Pickering* et al, 2000 BCSC, 524, a case involving a manufactured home park and the application of a provision of the *Residential Tenancy Act*, RSBC 1996, c. 406, Madame Justice Downs reviewed the relevant law and held that despite the definition of "must" in the *Interpretation Act*, the common law allowed a less strict interpretation of the word "must" where it was related to the performance of a public duty (in that case the duty of the statutorily constituted Dispute Resolution Committee to give a notice within a certain time) and where serious general inconvenience or injustice would result to persons who had no control over those entrusted with the duty.

In this case there is no "public duty" involved. The duty was one "entrusted" to a party to the proceeding; the applicant. The applicant had control over compliance with that duty. I find that I am not at liberty to interpret the word "must" otherwise that as a mandatory direction to the applicant.

Can an arbitrator extend that three-day time limit? Arbitrators are given a general power to extend time limits in exceptional circumstances. Section 66 (1) of the Act states:

> 66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, **other than as provided by section 59 (3) [starting proceedings]** or 81 (4) [decision on application for review].
>
> (*emphasis added*)

As can be seen from the portion of the extract emphasized in bold, the three-day service period imposed by s. 59 (3) is a specifically excluded from the arbitrator's general power (delegated by

the director) to extend time limits. I conclude that I cannot extend the three day time limit to encompass service effected after its expiry.

Can an arbitrator, having been delegated the powers of the director, specify a different period within which to serve the originating documentation?

Section 59 (3) states that the director may specify a period other than the three day period in which an applicant must served the originating documentation. In my view the word "specified" is indicative of a prospective action. That is, if a different period for service is to be allowed, it must be authorized at the time the application is being made or at least before service has been effected, and not after. Had the subsection meant to indicate that the director could extend the time for service of the origination documentation after expiry of the three day period or even after service of the originating documents, as a matter of simple consistency, the drafters of the legislation would have used the phrase "extend a time limit," as used elsewhere in the *Act.* I conclude that I cannot specify a different service period at this stage of the dispute.

The *Act* does not say what happens when an applicant breaches s. 59 (3); when service is effected after the expiry of the three day period. The *Act* does not provide for any penalty for non-compliance

The "Landlord and Tenant Fact Sheet" RTB 114, designed as public information regarding "The Dispute Resolution Process" indicates that non-compliance with the three-day service requirement may lead to dismissal of the application. It states:

**Serving notices for dispute resolution**

Each named respondent must receive a Hearing Package in order to prepare for the dispute resolution proceeding.

Within **three (3) days**, the applicant must serve the Hearing Package on each of the respondents. This means that if the applicant is serving the Hearing Package by registered mail, it must be postmarked within **three days** of the date that the Hearing Package is available and the registered mail receipts from Canada Post should be submitted to the Residential Tenancy Branch as evidence for the file. If an applicant does not pick up the Hearing Package within three days of the date the Hearing Package is available, the application may be considered abandoned and the hearing may be cancelled.

If the applicant does not serve the Hearing Package within three days, the arbitrator may dismiss the application with leave to reapply.

The fact sheet is not a statement of the law but, at best, an information sheet prepared by administrators of the law. In my view it has limited value in helping determine the meaning or effect of the three-day service requirement in s. 59 (3).

After consideration of the *Act* as a whole, I conclude that the purpose of s. 59 (3), requiring timely service of an application for dispute resolution and the notice of hearing letter, is to ensured that a respondent has early knowledge of the proceeding and is afforded a fair opportunity to preserve evidence and to prepare. The *Act* does not contain any other provision to ensure such timeliness at the start of a proceeding. Although Rules of Procedure created under the statute impose specific time requirements for evidence to be traded before a hearing, only section 59 (3) ensures that a respondent receives the originating documents in a timely manner. It is likely that s. 59 (3) was drafted with the expectation that hearings would be set for only a few weeks after the application was made. That is in keeping with the broad intention of the *Act* to provide a speedy and inexpensive dispute resolution mechanism for landlords and tenants in British Columbia. In such a case, it is vital that the origination documentation reach the respondent in very short order so that evidence, for example, evidence of the state of the premises, can be preserved and so that a response to the claim can be prepared. Section 59 (3) would appear to be directed at that purpose.

I conclude that a breach of s. 59 (3) of the *Act*; failure to serve a respondent within the three day period prescribed, is a failure to comply with a mandatory statutory requirement essential to the dispute resolution process and is a failure from which I have no power to grant relief. Breach of s. 59 (3) may serve to nullify a proceeding unless reliance on it is waived by the respondent.

Conclusion

The tenant's application is dismissed with leave to re-apply.

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: January 02, 2015

Residential Tenancy Branch