



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, FF

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; 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. The landlord elected to call one witness, GS. GS is a tenant of a different rental unit on the residential property.

The landlord admitted service of the tenant's dispute resolution package. On the basis of this evidence, I am satisfied that the landlord was served with the dispute resolution package pursuant to section 89 of the Act.

The landlord testified that she served the evidence to the tenant by posting the package to the tenant's door on 28 January 2015. The tenant admitted receipt of the landlord's evidence. On the basis of this evidence, I am satisfied that the tenant was deemed served with the evidence on 31 January 2015 pursuant to sections 88 and 90 of the Act.

The tenant submitted evidence to the Residential Tenancy Branch on 29 January 2015.

At the hearing the landlord made an oral request for an order of possession in the event that I dismissed the tenant's application to cancel the 10 Day Notice.

*Preliminary Issue – Late Evidence*

Both the tenant and landlord submitted late evidence.

The tenant's late evidence contains:

- hydro bills dated:
  - 23 September 2014;
  - 23 October 2014;
  - 24 November 2014; and
  - 22 December 2014;
- a letter to the tenant from the landlord dated 14 December 2014; and
- a receipt dated 25 January 2015.

The landlord's late evidence contains:

- a witness statement from DD;
- a two page typed timeline prepared by the landlord;
- three pages of photographs showing text messages purportedly between the tenant and landlord;
- a letter to the tenant from the landlord dated 14 December 2014;
- hydro bills dated:
  - 23 September 2014;
  - 23 October 2014;
  - 24 November 2014; and
  - 22 December 2014;
- a letter to the tenant from the landlord dated 22 December 2014; and
- a copy of the 10 Day Notice.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be received by the respondent not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words “not less than”, the last day for the tenant to file and serve additional evidence in support of his application was 18 January 2015.

The tenant filed his evidence 29 January 2015.

Rule 3.15 of the Rules sets out that a respondent must be received by the applicant not less than 7 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the landlord to file and serve additional evidence in reply to the tenant’s application was 25 January 2015.

The landlord testified that she served the tenant with the landlord’s package of evidence on 28 January 2015 by posting it to the tenant’s door. This evidence was deemed served on the tenant 31 January 2015.

This neither the tenant’s evidence nor the landlord’s evidence were served within the timelines prescribed by rules 3.14 or 3.15 of the *Residential Tenancy Branch Rules of Procedure* (the Rules). Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, all of the tenant’s evidence was evidence that the landlord had in her possession. Accordingly, there is no undue prejudice to the landlord in my consideration of this evidence. I admit all of the tenant’s late-filed evidence.

The landlord’s evidence contains several documents that were included by the tenant in his evidence, as such, I admit the following evidence as there is no undue prejudice to the tenant in doing so:

- a letter to the tenant from the landlord dated 14 December 2014;
- hydro bills dated:
  - 23 September 2014;
  - 23, October 2014;
  - 24 November 2014; and
  - 22 December 2014; and
- a copy of the 10 Day Notice.

The tenant did not have an opportunity to cross-examine the statements of DD contained within DD's letter. Accordingly, I refused to admit DD's letter into evidence as it would be highly prejudicial to the tenant.

The tenant alleges that the text messages in the landlord's evidence (both within the landlord's timeline and the photographs) are manufactured. While I make no finding as to the authenticity of these photographs or the copy-typed texts, I decline to admit the photographs and the timeline into evidence as the tenant did not have adequate opportunity to respond to this evidence and it would be unduly prejudicial to the tenant to admit these text messages as evidence.

The tenant did not deny that he had received the landlord's letter dated 22 December 2014. As the tenant had this letter sufficiently in advance of this hearing, there is no undue prejudice to the tenant in my considering this letter. The 22 December 2014 letter is admitted into evidence.

#### Issue(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 recover the filing fee for this application from the landlord?

#### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The landlord testified that there is no written tenancy agreement for this tenancy. This tenancy began in approximately August 2014. The landlord testified that monthly rent of \$500.00 was due on the first.

The landlord testified that the rental unit is a detached suite. The tenant testified that the rental unit is a garage that does not have plumbing and is supplied with electricity by way of an extension cord that runs from the main house. The tenant testified that at the beginning of the tenancy the landlord told the tenant that the garage was going to be upgraded to a laneway home. The tenant testified that he shares kitchen and bathroom facilities with the main house.

The landlord testified that she and the tenant reached an oral agreement that the tenant would be responsible for one-third of the electricity bill. The landlord testified that the tenant owes \$183.50 in utilities. I was provided with bills from the utility company that form the basis of this claim. The tenant GS testified that his electricity cost is part of his rent. The tenant testified that he understood that he would not be charged for utilities until the garage was hooked up to a separate meter. The tenant testified that he never agreed that he would pay one-third of the utilities bill.

The landlord served the 10 Day Notice on 6 January 2015 by posting the notice to the tenant's door. The 10 Day Notice set out that the tenant failed to pay \$700.00 in rent that was due on 1 December 2014 as well as \$184.00 in utilities that were due 14 December 2014. The 10 Day Notice set an effective date of 19 January 2014.

The landlord testified that, since 1 December 2014 the tenant made the following payments toward rent:

- 5 December 2014 \$300.00;
- 6 January 2015 \$200.00; and
- 25 January 2015 \$500.00.

The landlord's letter, dated 14 December 2014, sets out that she had received \$300.00 as partial payment for December's rent. The landlord's letter, dated 22 December 2014, sets out that as at that date the tenant still had rental arrears of \$200.00 for December.

The landlord testified that the tenant understood that, in accepting the three payments, the 10 Day Notice was not withdrawn. The landlord testified that the tenant has not paid February's rent. The landlord testifies that she always gives receipts the same day she receives payment from tenants.

The landlord lives next door to the tenant. The landlord testified that sometimes she comes to get the rent from the tenant and sometimes he brings the rent to her. The landlord submitted that it is up to the tenant to pay his rent and not up to the landlord to collect it.

The landlord testified that the tenant has not submitted any receipts to the landlord for emergency repairs. The landlord testified that there are no orders of the Residential Tenancy Branch that would allow the tenant to reduce rent.

The tenant testified that he has had his rent available for the landlord. The tenant testified that he has been keeping the rent under his mattress and waiting for the landlord to come and collect the rent. The tenant testified that he paid the rent on 25 January 2015 under “duress”. When I asked the tenant to explain what he meant by “duress” the tenant testified that he was physically threatened by S, who accompanied the landlord to pick up the rent. The tenant characterised the landlord’s claim for unpaid rent and utilities as “extortion”.

The tenant alleges that the landlord has harassed the tenant since November 2014.

### Analysis

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant did not provide evidence that he was entitled to deduct amounts for emergency repairs that he had conducted (pursuant to subsection 33(3)) or as a result of a prior order from the Residential Tenancy Branch. The landlord’s alleged conduct is not relevant for the purpose of determining the tenant’s obligation to pay rent.

Section 26 does not put the obligation on the landlord to collect rent. It is irrelevant when the landlord came to the tenant to demand rent be paid, the tenant had an obligation to ensure that his rent was paid when it was due. Furthermore, the tenant did not pay January’s rent when he paid the remainder of December’s rent on 6 January 2015. I do not consider the tenant’s submissions regarding when the landlord came to collect rent relevant or persuasive.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The landlord testified that the tenant did not pay rent until 25 January 2015. The tenant admits that he did not pay January’s rent until 25 January 2015.

As the tenant has failed to pay his rent in full when due and did not pay his rent within five days of the issuance of the 10 Day Notice, I find that the 10 Day Notice issued 6 January 2015 is valid and dismiss the tenant’s application to cancel the 10 Day Notice without leave to reapply.

I decline to consider the amount, if any, of outstanding utilities as it is not necessary for me to do so in order to dispense with this application.

Pursuant to section 55 of the Act, where an arbitrator dismisses a tenant's application or upholds the landlord's notice and the landlord makes an oral request for an order of possession at the hearing, an arbitrator must grant the landlord an order for possession.

As the tenant's application is dismissed and the landlord has made an oral request for an order of possession, I am obligated by the Act to grant the landlord an order of possession. This order of possession is effective two days after it is served upon the tenant(s). This order may be served on the tenant(s), filed with the Supreme Court of British Columbia and enforced as an order of that court.

### Conclusion

The tenant's application is dismissed without leave to reapply.

The landlord is provided with a formal copy of an order of possession. Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: February 02, 2015

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Residential Tenancy Branch

