



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding AMACON PROPERTY MANAGEMENT SERVICES INC.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

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

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The landlord's agent, JP ("landlord") and the two tenants, tenant BO ("tenant") and "tenant CO," attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord confirmed that she is the property manager for the rental building and that she had authority to represent the landlord company named in this application, as an agent at this hearing. Tenant CO confirmed that her husband, tenant BO, had permission to speak on her behalf as an agent at this hearing.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing package ("Application"). In accordance with sections 89 and 90 of the *Act*, I find that both tenants were duly served with the landlord's Application.

The landlord confirmed receipt of the tenants' two-page written evidence package and confirmed that she had reviewed it and was prepared to proceed with this hearing on the basis of that evidence. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's written evidence.

The tenant confirmed receipt of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated September 2, 2015 ("10 Day Notice") around the same date. In

accordance with section 88 of the Act, I find that the tenants were duly served with the landlord's 10 Day Notice on September 2, 2015.

At the outset of the hearing, the landlord confirmed that all outstanding rent had been paid by the tenants. The landlord testified that she wished to withdraw the landlord's application for a monetary order for unpaid rent and to offset the tenants' security deposit against this monetary award. Accordingly, the landlord's application for a monetary award for unpaid rent is withdrawn.

### Issues to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to recover the filing fee for this application from the tenants?

### Background and Evidence

Both parties agreed that this tenancy began on July 1, 2010. Monthly rent in the current amount of \$1,075.00 is payable on the first day of each month. The tenants agreed that they were provided with a legal notice of rent increase which raised the monthly rent from the initial tenancy agreement amount of \$1,050.00 to the current amount of \$1,075.00 effective on May 1, 2015. A security deposit of \$525.00 was paid by the tenants and the landlord continues to retain this deposit. The tenants continue to reside in the rental unit.

The landlord issued the 10 Day Notice, indicating that rent in the amount of \$1,075.00 was due on September 1, 2015. The notice indicates an effective move-out date of September 12, 2015. Both parties agreed that the tenants have paid rent in full until November 30, 2015. The tenants agreed that they paid rent late on September 11, 2015 and October 8, 2015, and were issued receipts from the landlord on those dates indicating "use and occupancy only." The tenants agreed that they were issued a receipt from the landlord on October 31, 2015 for "use and occupancy only" for payment of November 2015 rent.

The tenants agreed that they received 10 Day Notices each month from January to September 2015 and that they have paid rent late frequently during this tenancy, usually on the 20<sup>th</sup> day of each month. The landlord stated that the 10 Day Notices were not enforced against the tenants prior to September 2015, because the landlord was trying

to arrange an agreement for the tenants to pay rent on time and because the tenants have two children and the landlord did not want to cause undue hardship for them.

The landlord seeks an order of possession based on the 10 Day Notice. The tenants dispute this, stating that their rent is now paid in full, that they paid November 2015 rent early, and they submitted proof of employment showing that their rent will be paid on time in the future. The landlord also seeks to recover the \$50.00 filing fee for this Application from the tenants.

### Analysis

Both parties agreed that the tenants failed to pay the full rent due on September 1, 2015, within five days of receiving the 10 Day Notice. The tenants received the notice on September 2, 2015 and paid their rent on September 11, 2015. The tenants have not made an application pursuant to section 46(4) of the Act within five days of receiving the 10 Day Notice.

Although the tenants paid rent late and received a number of 10 Day Notices dating back to January 2015, and the landlord accepted this rent, this does not waive the landlord's right to issue a 10 Day Notice in September 2015. I have found that the landlord established that the tenants paid rent late most recently in September 2015. The landlord issued the 10 Day Notice on September 2, 2015, after the last late rent payment. Therefore, the landlord has provided recent evidence of the tenants' late rent payments and communicated to the tenants that this late rent is not acceptable.

Accordingly, I find that the landlord's latest 10 Day Notice was issued for a valid reason. The next issue is whether the landlord waived its right to pursue the 10 Day Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

*A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.*

*If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:*

- whether the receipt shows the money was received for use and occupation only.*
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- the conduct of the parties.*

*There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.*

Although the landlord accepted rent payments for October and November 2015 from the tenants after the effective date on the 10 Day Notice of September 12, 2015, I do not find this to be a waiver of the 10 Day Notice. The landlord issued two rent receipts indicating “use and occupancy only” for these months. The landlord did not withdraw its Application for an order of possession based on the 10 Day Notice, at any time prior to this hearing. The tenants submitted written evidence for disputing the 10 Day Notice and showing proof of employment to confirm their intention to pay rent on time. This evidence was received by the Residential Tenancy Branch (“RTB”) on November 12, 2015, the day before this hearing. This is recent evidence of both parties’ intention to attend this hearing to determine whether this tenancy would end, pursuant to the landlord’s 10 Day Notice. Both parties attended the hearing and made submissions regarding the 10 Day Notice.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive its rights to pursue the 10 Day Notice and it did not waive the 10 Day Notice, whether expressly or impliedly. I find that the landlord did not intend to reinstate this

tenancy, despite accepting rent payments after the effective date stated on the 10 Day Notice.

In accordance with section 46(5) of the *Act*, the failure of the tenants to pay the full rent or file an application within five days of receiving the 10 Day Notice led to the end of this tenancy on September 12, 2015, the effective date on the 10 Day Notice. In this case, this required the tenants and anyone on the premises to vacate the premises by September 12, 2015. As this has not occurred, I find that the landlord is entitled to an **Order of Possession effective at 1:00 p.m. on February 1, 2016**. The landlord suggested this date during the hearing in order to allow the tenants more time to vacate the rental unit.

As the landlord was successful in this Application, I find that it is entitled to recover the \$50.00 filing fee paid for this Application.

#### Conclusion

I grant an Order of Possession to the landlord effective **at 1:00 p.m. on February 1, 2016**. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I order the landlord to retain \$50.00 from the tenants' security deposit in full satisfaction of the monetary award. The remainder of the tenants' security deposit in the amount of \$475.00 is to be dealt with at the end of this tenancy in accordance with section 38 of the *Act*. The landlord's application for a monetary order for unpaid rent is withdrawn.

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: November 13, 2015

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Residential Tenancy Branch

