



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding SUPERMEN PROPERTY MANAGEMENT INC  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, FF

### Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the 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 tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 0959 in order to enable the tenant to connect with this teleconference hearing scheduled for 0930. The landlord CM (the landlord) attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was assisted by counsel.

The landlord testified that she served the tenant with the dispute resolution package on 25 September 2015 by registered mail. The landlord provided me with a Canada Post tracking number for the mailing. The landlord testified that the tenant did not retrieve the mailing and that it was returned to the landlord.

*Residential Tenancy Policy Guideline, "12. Service Provisions"* sets out that service cannot be avoided by failing to retrieve the mailing:

Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

In accordance with sections 89(1) and 90 of the Act, the tenant was deemed served with the dispute resolution package on 30 September 2015, the fifth day after its mailing.

The landlord testified that she served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 11 September 2015 by posting the notice to the tenant's door. On the basis of this evidence, I am satisfied that the tenant was deemed served 14 September 2015 with the 10 Day Notice pursuant to sections 88 and 90 of the Act.

#### Preliminary Issue – Landlords' Evidence

The landlord testified that the landlords did not serve their digital evidence to the tenant as the tenant had copies of all of the text messages already.

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.

In this case, the tenant has not received copies of the landlords' evidence. The tenant is entitled to examine the documents provided to me as evidence. As the tenant has not been able to examine the landlords' evidence, I refuse to admit the landlords' digital evidence as to do so would unduly prejudice to the tenant.

The landlords' digital evidence is excluded.

#### Preliminary Issue – Amendment to Landlords' Application

The landlords' original application sought a monetary order in the amount of \$1,250.00. I asked the landlord to explain the current rent arrears to me. The landlord testified that the tenant was current on his rent as of 31 August 2015. The landlord testified that she had not collected any late fees from the tenant in the past.

The landlord testified to the following rent arrears:

Item	Amount
September Rent	\$575.00
September Late Fee	250.00
October Rent	575.00
Payment Rec'd 24 October 2015	-800.00
November Rent	575.00
<b>Total Monetary Order Sought</b>	<b>\$1,175.00</b>

The landlord testified that the tenancy agreement provides for a late fee in the amount of \$250.00.

Subsection 7(1) of the *Residential Tenancy Regulations* (the "Regulations") provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee.

Section 5 of the Act prohibits landlords and tenants from contracting out of the Act or Regulations: terms which purport to do this are of no effect. Because the landlords contravened subsection 7 of the Regulations, the clause of the tenancy agreement that relates to the late fee is of no effect. The result is that there is no clause that provides for a late fee as required by subsection 7(2) and no late fee, of any amount, is collectable. I explained this to the landlord at the hearing.

The landlord asked to amend her application to \$925.00. Paragraph 64(3)(c) allows me to amend an application for dispute resolution. There is no prejudice to the tenant in allowing the landlord to reduce the amount of her application. On this basis, I amended the landlords' application to a total monetary amount of \$925.00.

#### Preliminary Issue – Amendment to 10 Day Notice

The landlord testified that the 10 Day Notice set out rent arrears of \$625.00. The landlord testified that the actual rent arrears at 1 September 2015 were \$575.00. The landlord asked to amend the 10 Day Notice to the correct rent arrears.

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.

In this case, the landlords issued a 10 Day Notice that included amounts other than rent. Subsection 68(2) of the Act allows me to amend a notice given under the Act that does not comply with the Act. In this case, the landlords mistakenly included a late fee in the amount of \$50.00 on the 10 Day Notice. This mistake does not go to the substance of the 10 Day Notice, that is, a 10 Day Notice could have still been validly issued for September's rent on 11 September 2015. For these reasons, I am exercising my discretion to amend the 10 Day Notice to the correct amount of outstanding rent.

#### Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

#### Background and Evidence

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

This tenancy began 31 July 2014. Monthly rent of \$575.00 was due on the first. The landlords continue to hold the tenant's security deposit of \$285.00, which was collected at the beginning of this tenancy.

On 11 September 2015, the landlords issued the 10 Day Notice to the tenant. The 10 Day Notice was dated 11 September 2015 and set out an effective date of 21 September 2015. The amended 10 Day Notice set out that the tenant failed to pay \$575.00 in rent that was due on 1 September 2015.

On 24 October 2015, the tenant paid \$800.00 towards his rental arrears. The landlord testified that the tenant understood that this payment did not reinstate the tenancy and that the landlord was still pursuing this application. .

The landlord testified that she did not know of any reason that the tenant would be entitled to deduct any amount from rent. The landlord testified that other than the late fee she attempted to charge for September, she has never collected a late fee from the tenant. The landlord testified that there are no outstanding orders of this Branch in respect of this tenancy.

The landlords claim for rental arrears totaling \$925.00:

Item	Amount
Unpaid September Rent	\$575.00
Unpaid October Rent	575.00
Payment Received 24 October 2015	-800.00
Unpaid November Rent	575.00
<b>Total Monetary Order Sought</b>	<b>\$925.00</b>

### Analysis

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 tenant failed to pay the outstanding rent within five days of receiving the 10 Day Notice. The tenant has not made application pursuant to subsection 46(4) of the Act within five days of receiving the 10 Day Notice. In accordance with subsection 46(5) of the Act, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice. In this case, this required the tenant to vacate the premises by 24 September 2015, the corrected effective date of the notice. As that has not occurred, I find that the landlords are entitled to a two-day order of possession.

The landlord has provided sworn and uncontested testimony that the tenant has unpaid rental arrears totaling \$925.00. I find that the landlords have proven their entitlement to the rent arrears. The landlord is entitled to a monetary order for the unpaid rent.

The landlord applied to keep the tenant's security deposit. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlords were successful in this application, I find that the landlords are entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

I issue a monetary order in the landlords' favour in the amount of \$690.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Unpaid September Rent	\$575.00
Unpaid October Rent	575.00
Payment Received 24 October 2015	-800.00
Unpaid November Rent	575.00
Recover Filing Fee	50.00
Less Security Deposit	-285.00
<b>Total Monetary Order Sought</b>	<b>\$690.00</b>

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: November 26, 2015

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Residential Tenancy Branch

