



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPL MNDC FF

### Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Landlord on November 5, 2015. The Landlord filed seeking to obtain an Order of Possession for landlord's use and a Monetary Order for money owed or compensation for damage or loss under the *Act*, Regulation, and/or tenancy agreement; and to recover the cost of the filing fee from the Tenant.

The hearing was conducted via teleconference and was attended by the Landlord's Agent, hereinafter referred to as Landlord. No one was in attendance on behalf of the Tenant. The Landlord provided affirmed testimony that the Tenant was served notice of this application and this hearing by registered mail on November 5, 2015. Canada Post tracking information was submitted in the Landlord's evidence.

Residential Policy Guideline 12 (11) provides that 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.

Section 90(a) of the *Residential Tenancy Act* (the "Act") states that a document served by mail is deemed to have been received five days after it is mailed. A party cannot avoid service by failing or neglecting to pick up mail and this reason alone cannot form the basis for a review of this decision.

Based on the undisputed evidence of the Landlord, I find that the Tenant was deemed served notice of this proceeding on November 10, 2015, five days after it was mailed, pursuant to section 90 of the *Act*. The hearing continued to hear the undisputed evidence of the Landlord in absence of the Tenant.

### Issue(s) to be Decided

1. Has the Landlord proven entitlement to possession of the rental unit?
2. Has the Landlord met the burden of proof to be granted a Monetary Order?

### Background and Evidence

The Tenant entered into a fixed term tenancy agreement that began on June 30, 2013 and switched to a month to month tenancy after one year. Rent began at \$2,300.00 and was subsequently increased to \$2,500.00 payable on the first of each month. On June 30, 2013 the Tenant paid \$1,150.00 as the security deposit.

The Landlord testified that the Tenant was served two copies of a 2 Month Notice to end tenancy for landlord's use listing an effective date of October 30, 2015. The first copy of the Notice was personally served upon the Tenant on August 23, 2015 in the presence of a witness and the second copy was sent via registered mail.

The Landlord submitted that the Tenant remains in the rental unit and has not paid rent for October 2015, November 2015, December 2015, or January 2016. The Landlord stated that the October rent was not required to be paid as it was the one month compensation for serving the 2 Month Notice which is why their application was for unpaid rent for November through to January 2016. The Landlord also stated that he thought the September rent payment was returned from the bank.

### Analysis

Given the evidence before me, in the absence of any evidence from the Tenant who did not appear despite being properly served with notice of this proceeding, I accept the undisputed version of events as discussed by the Landlord and corroborated by their evidence.

Section 53 (1) of the Act provides that if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) as applicable.

Subsection (2) of Section 53 states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

Upon review of the 2 Month Notice to End Tenancy issued August 23, 2015, I find that it was served upon the Tenant in a manner that complies with the Act. The effective date listed on the Notice was October 30, 2015 which is not the last day of October and is not the day before rent is payable. Therefore, the effective date is automatically corrected to be **October 31, 2015**, pursuant to section 53(3) of the Act.

Section 49(8) of the Act stipulates that a tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.

In this case the Tenant would have had to file their application for dispute no later than September 7, 2015. At the time the Landlord filed their application for an Order of

Possession on November 5, 2015 the Tenant had not made application to dispute the 2 Month Notice.

Section 49(9) of the Act stipulates that if a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (8), the tenant (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and (b) must vacate the rental unit by that date.

Based on the above, I find the Tenant is conclusively presumed to have accepted that the tenancy ended October 31, 2015. Therefore, I grant the Landlord's request for an Order of Possession.

The Landlord submitted that rent for September 2015 remained unpaid because the Tenant's cheque was returned from the bank. The application for Dispute Resolution was filed on November 5, 2015 and made no mention of the returned cheque from September 2015. Furthermore, there was no documentary evidence before me that would prove the September cheque was returned from the bank. Therefore, I find there was insufficient evidence to prove the request for unpaid rent for September 2015 and the claim is dismissed, without leave to reapply.

As noted above this tenancy ended **October 31, 2015**, in accordance with the 2 Month Notice. Therefore, I find the Landlord are seeking money for use and occupancy of the unit and not rent for November 2015, December 2015 and January 2016.

The Tenant continues to reside in the unit and the Landlords will not regain possession until service of the Order of Possession. The Landlord has the duty to mitigate any losses as soon as possible; therefore, I find the Landlord is entitled to payment for use and occupancy for the period of November 1, 2015 to January 15, 2016, in the amount of **\$6,250.00** (\$2,500.00 + \$2,500.00 + \$1,250.00).

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) [*starting proceedings*] or 79 (3) (b) [*application for review of director's decision*] by one party to a dispute resolution proceeding to another party or to the director.

The Landlord has succeeded with their application; therefore, I award recovery of the **\$100.00** filing fee, pursuant to section 72(1) of the Act.

### Conclusion

The Landlord was successful with their application and was granted an Order of Possession and Monetary compensation for \$6,350.00 (\$6,250.00 + \$100.00).

The Landlord has been issued an Order of Possession effective **Two (2) Days after service upon the Tenant**. In the event that the Tenant does not comply with this Order it may be filed with Supreme Court and enforced as an Order of that Court.

The Landlord has been issued a Monetary Order in the amount of **\$6,350.00**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with Small Claims Court and enforced as an Order of that Court.

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 13, 2016

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Residential Tenancy Branch

