



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNSD, MNDC, 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 and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's 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 tenant, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 10 minutes. The landlord's agent, GD attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord provided a signed, written letter authorizing his agent to speak on his behalf at this hearing.

The landlord's agent testified that the tenant was served with the landlord's application for dispute resolution hearing package ("Application") on January 16, 2016 by way of registered mail. The landlord provided a Canada Post receipt and tracking number with his Application. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on January 21, 2016, five days after its registered mailing.

The landlord's agent testified that the tenant was served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated January 6, 2016 ("10 Day

Notice”), on the same date, by way of posting to his rental unit door. The landlord’s agent testified that he witnessed the landlord post the notice to the door. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord’s 10 Day Notice on January 9, 2016, three days after its posting.

### Issues 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 and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain 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

The landlord’s agent testified that this month-to-month tenancy began approximately twelve years ago, but he could not recall the exact date. The landlord’s agent stated that monthly rent in the amount of \$830.00 is payable on the first day of each month and a security deposit of \$400.00 was paid by the tenant and the landlord continues to retain this deposit. The landlord’s agent confirmed that the tenant continues to reside in the rental unit. The landlord’s agent explained that no written tenancy agreement governs this tenancy, as it was only a verbal agreement.

The landlord issued the 10 Day Notice for unpaid rent of \$830.00 due on January 1, 2016. The notice indicates an effective move-out date of January 19, 2016. The landlord’s agent confirmed that the tenant paid rent of \$830.00 on January 20, 2016 and a receipt for “use and occupancy only” was issued to the tenant for this payment.

The landlord seeks a monetary order of \$1,660.00 total for unpaid rent from February to March 2016 inclusive. The landlord’s agent claimed that the tenant did not pay any rent for the above two months. The landlord is also seeking to recover the \$100.00 filing fee for this Application from the tenant.

## Analysis

The landlord and his agent provided undisputed evidence at this hearing, as the tenant did not attend. The tenant failed to pay the full rent due on January 1, 2016, within five days of being deemed to have received the 10 Day Notice. The tenant did not make an application pursuant to section 46(4) of the Act within five days of being deemed to have received the 10 Day Notice. However, the tenant paid the full rent due on January 20, 2016, after the effective date of the notice of January 19, 2016.

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:

*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 after the effective date on the 10 Day Notice, I do not find this to be a waiver of the 10 Day Notice. The landlord did not withdraw his Application to enforce the 10 Day Notice, at any time prior to this hearing. The landlord's agent testified that the landlord issued a receipt for "use and occupancy only" to the tenant for the January 2016 rent payment. This is recent evidence of the landlord's intention to pursue the 10 Day Notice and obtain an order of possession against the tenant.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive his rights to pursue the 10 Day Notice and did not waive the 10 Day Notice expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting a rent payment after the effective date of the 10 Day Notice.

In accordance with section 46(5) of the *Act*, the failure of the tenant to pay the full rent or file an application for dispute resolution within five days led to the end of this tenancy on January 19, 2016, the effective date on the 10 Day Notice. In this case, this required the tenant and anyone on the premises to vacate the premises by January 19, 2016. As this has not occurred, I find that the landlord is entitled to a 2 day Order of Possession.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

The landlord provided undisputed evidence that the tenant failed to pay rent totalling \$830.00 for February 2016. Therefore, I find that the landlord is entitled to \$830.00 in rental arrears for the above period.

As the date for this hearing occurred on March 1, 2016, and the tenant has until the end of the day on March 1, 2016 to pay the rent due, I find that the landlord has made a premature application for March 2016 rent. Therefore, I dismiss the landlord's application with leave to reapply for unpaid rent of \$830.00 for March 2016. As the landlord was mainly successful in this Application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for the Application.

The landlord continues to hold the tenant's security deposit of \$400.00. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenant's security deposit of \$400.00 in partial satisfaction of the monetary award. No interest is payable over this period.

### Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant 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 issue a monetary order in the landlord's favour in the amount of \$530.00 against the tenant. The tenant must be served with this Order as soon as possible. Should the tenant 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.

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: March 01, 2016

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Residential Tenancy Branch

