



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      FF MNDC MND MNSD MNR OPR

### Introduction

This hearing dealt with an Application for Dispute Resolution by Direct Request (the “Application”) that was adjourned to a participatory hearing. The Landlord filed under the *Residential Tenancy Act* (the “Act”), for a Monetary Order for unpaid rent and for an Order of Possession.

On November 1, 2017, an Amendment to an Application for Dispute Resolution (the “Amendment”) was received, increasing the amount of the Landlord’s monetary claim from \$1,119.00 to \$3,198.36, and amending the Application to include recovery of the filing fee, a monetary claim for damage to the rental unit, money owed or compensation for damage or loss under the *Act*, regulation, or tenancy, and retention of the security deposit to offset the money owed by the Tenants to the Landlord. The Agent testified that the Amendment and related evidence was sent to the Tenants by registered mail on November 3, 2017, and provided the registered mail receipt. As the Tenants confirmed receipt of the Amendment and related evidence by registered mail, and the Amendment was served on the Tenants and filed with the Branch more than 14 days before the date of the hearing in accordance with section 4.6 of the Rules of Procedure, the Application was amended.

The hearing was convened by telephone conference call and was attended by the agent for the Landlord (the “Agent”), and the Tenants, all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although the Tenants confirmed receipt of the Landlord’s documentary evidence, the Agent stated that neither they nor the Landlord had received any documentary evidence from the Tenants. The Tenants testified that their evidence was sent by registered mail on November 8, 2017, to the address listed on the tenancy agreement as the address for service for the Landlord’s agent and provided me with the registered mail tracking number. I confirmed with the Agent that the address for service listed on the tenancy agreement is correct, and with the agreement of both parties, I logged onto the Canada

Post website and verified that the registered mail was sent as described by the Tenants. Although the Canada Post Website indicated that the registered mail had been sent, the Agent argued that they never received it and requested that the Tenant provide proof that the address used for the registered mail was in fact the address for service for the Agent as listed in the tenancy agreement.

As the Tenants testified that they had this verification, I requested that they submit it to the Residential Tenancy Branch (the "Branch") by 4:30 pm on the date of the hearing for my consideration. I also advised they Tenants to exchange a copy with the Agent. The Tenants submitted a copy of the registered mail receipt and the registered mail address label matching both the tracking number provided in the hearing and the address for service for the Agent listed in the tenancy agreement. As a result, I find that the Agent was deemed served with the Tenants' evidence on September 13, 2017, five days after it was sent by registered mail. The evidence was therefore accepted by me for consideration.

I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer only to the relevant facts and issues in this decision.

### Preliminary Matters

At the outset of the hearing the Respondent R.Y. identified that their spouse, S.H., who was also present in the hearing, speaks limited English. As a result, R.Y. stated that they would provide the majority of the testimony on behalf of the Respondents.

During the Direct Request process, there was some question regarding whether R.Y. was in fact a Tenant. Although R.Y. is not listed on the tenancy agreement, they are listed on the application for tenancy submitted by the Landlord. In addition to this, the Tenant testified that they are the spouse of S.H., who is listed as the Tenant on the tenancy agreement, and that they have resided in the rental unit since the start of the tenancy. The Agent agreed with this testimony. As a result, I find that R.Y. is a Tenant under the *Act*.

Although the Landlord applied for a Monetary Order for damage to the rental unit and money owed or compensation for damage or loss under the *Act*, regulation, or tenancy agreement, the Tenants still reside in the rental unit and an end of tenancy condition inspection has not occurred. As a result, I find the Landlord's claim for these damages is premature and they are therefore dismissed with leave to reapply.

Issue(s) to be Decided

Is the Landlord entitled to a Monetary Order for unpaid rent and to retain all, or part of the security deposit paid by the Tenants pursuant to sections 67 and 72 of the *Act*?

Is the Landlord entitled to an Order of Possession for unpaid rent, pursuant to section 55 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that the month to month tenancy began August 1, 2011, at a monthly rent of \$1,000.00, and that rent is due on the last day of each month. The addendum to the tenancy agreement also stipulates that the Landlord may charge a late fee of \$25.00 the first day rent is late, and \$3.00 each day thereafter until the rent is paid. In the hearing the parties confirmed that there have been several rent increases since the beginning of the tenancy, and that the current rent is \$1,097.00 per month. In support of these rent increases, the Landlord submitted several Notice of Rent Increase forms.

The Agent testified that when rent was not paid in full as required in the tenancy agreement, a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10 Day Notice") was personally served on the Tenants on September 1, 2017. The Tenants acknowledged receipt of the 10 Day Notice as described above. The 10 Day Notice in the documentary evidence before me, dated September 1, 2017, has an effective vacancy date of September 11, 2017, and states that the Tenants failed to pay \$1,119.00 in rent and late fees owed on August 31, 2017.

The documentary evidence and testimony from the Agent indicates that the tenants owed \$3,431.00 in rent and late fees for September, October, and November, 2017. In the hearing both parties agreed that \$3,345.00 has been paid towards these costs, and the Agent submitted copies of rent receipts for September, October, and November which state "FOR USE AN OCCUPANCY ONLY". The Agent testified that the Landlord is seeking the balance of the rent and late fees owed by the Tenants, in addition to the recovery of the \$100.00 filing fee.

## Analysis

Section 46 (1) of the *Act* outlines the grounds on which to issue a Notice to End Tenancy for non-payment of rent:

### **Landlord's notice: non-payment of rent**

**46** (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

However, section 46(4) and 46(5) of the *Act* also state:

**46** (4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), 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 to which the notice relates by that date.

I have reviewed all relevant documentary evidence and oral testimony and in accordance with section 88 of the *Act*, I find that the Tenants were personally served with the 10 Day Notice on September 1, 2017.

Although the 10 Day Notice states that \$1,119.00 was due on August 31, 2017, this amount includes a \$25.00 late fee. The Residential Tenancy Regulation states, under section 7, that a Landlord may charge an administration fee of not more than \$25.00 for the late payment of rent as long as the tenancy agreement provides for this fee. As the addendum to the tenancy agreement provides for a \$25.00 late fee, I find that the Landlord was entitled to charge the Tenants \$25.00 for the late payment of rent. However, the Landlord was not entitled to charge this fee until the day *after* rent was

due. As a result, I find that only \$1,094.00 was due on August 31, 2017. In any event, as the Tenants owed rent on the date the 10 Day Notice was issued, I find that the 10 Day Notice is valid.

Although the parties agreed that the Tenants paid \$1,100.00 towards the rent and late fees owed September, the evidence and testimony of the Agent indicates this amount was not paid until September 21, 2017. As a result, there is no evidence before me that the Tenants paid the rent in full as outlined above within the five days granted under section 46(4) of the *Act* or that they disputed the 10 Day Notice within that five day period. Based on the foregoing, I find that the Tenants are conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the effective date of the 10 Day Notice, September 11, 2017, and the Landlord is therefore entitled to an Order of Possession. As the effective date of the 10 Day Notice has passed, and the Tenants have paid rent for use and occupancy of the rental unit for November, 2017, the Order of Possession will be effective November 30, 2017, at 1:00 P.M.

Although the Landlord and Agent claimed that the Tenants owed \$3,431.00 in rent and late fees for September, October, and November, 2017, this amount took into consideration a monthly late fee in excess of the \$25.00 maximum allowable under the *Act* and regulation. Under the *Act* the Landlord may charge a late fee of \$25.00 if it is in the tenancy agreement, however, they cannot charge more than this or a daily fee. As a result, I find that the Tenants only owed \$3,366.00 for September, October, and November, 2017; \$1,097.00 a month in rent, plus \$25.00 a month in late fees. As the parties agreed in the hearing that \$3,345.00 has been paid by the Tenants for rent and late fees owed for the above noted time period, I find that the Landlord is only entitled to \$21.00 in outstanding rent and late fees. I also find that the Landlord is entitled to the recovery of the \$100.00 filing fee, pursuant to section 72 of the *Act*.

As a result of the foregoing, and pursuant to section 72 of the *Act*, I therefore find that the Landlord is entitled to retain \$121.00 of the security deposit paid by the Tenants in recovery of the above notes costs. The balance of the security deposit is to be dealt with in accordance with the *Act*.

As explained above, the Landlord should be aware that a landlord may only charge fees in accordance with the *Act* and the regulation. As a result, I caution the Landlord that the \$3.00 a day late payment fee, which is charged in addition to the \$25.00 late fee, is unlawful and unenforceable as it contravenes section 7 of the regulation.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective at **1:00 P.M. on November 30, 2017, after service of this Order** on the Tenants. The Landlord is provided with this Order in the above terms and the Tenants must be served with **this Order** as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 72 of the *Act*, the Landlord is entitled to retain \$121.00 from the security deposit paid by the Tenants. At the end of the Tenancy, the balance of the security deposit must be dealt with in accordance with the *Act*.

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 24, 2017

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Residential Tenancy Branch