



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding MAINSTREET EQUITY CORP  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNR

### Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking an order cancelling a notice to end tenancy for unpaid rent or utilities.

The tenant and an agent for the landlord attended the hearing and each gave affirmed testimony. The landlord also called 2 witnesses who gave affirmed testimony. The parties were given the opportunity to question each other and the witnesses.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

### Issue(s) to be Decided

Has the landlord established that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities was issued in accordance with the *Residential Tenancy Act*?

### Background and Evidence

**The landlord's agent** testified that this fixed term tenancy began on November 1, 2013 and reverted to a month-to-month tenancy after the first year, and the tenant still resides in the rental unit. Rent in the amount of \$625.00 per month was originally payable under the tenancy agreement but was raised from time-to-time and is currently \$683.60 per month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$312.50 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is an apartment in an apartment complex, and a copy of the tenancy agreement has been provided as evidence for this hearing. Also provided are notices of rent increase.

The tenancy agreement contains 3 Addendums, one of which specifies late payment of rent fees of \$25.00 per late payment. A tenant ledger has also been provided as evidence for this hearing showing that the tenant was charged that \$25.00 fee and paid it on several occasions. The tenant had usually paid rent by way of an automatic debit but the tenant cancelled it at the end of August and has paid rent by debit machine in the landlord's office since September, 2017.

In January, 2016 the rental amount was \$640.63, however on January 11, 2016 the tenant only paid \$600.00 leaving \$40.63 outstanding as well as the \$25.00 late fee. It took the tenant 2 years to fully pay it. The landlord applies payments firstly to arrears and then the balance gets carried over to the current month. A number of reminder letters were provided to the tenant about the arrears and copies have been provided for this hearing.

The landlord's agent further testified that another employee of the landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on January 5, 2018 by posting it to the door of the rental unit. A copy has been provided and it is dated January 5, 2018 and contains an effective date of vacancy of January 15, 2018 for unpaid rent in the amount of \$15.93 that was due on January 1, 2018. That amount was still owed at the time.

On February 3, 2018 the tenant paid February's rent as well as an additional \$15.93 outstanding for January, 2016, for which the landlord gave a receipt indicating that the money was being accepted for use and occupancy only.

The landlord's agent further testified that the landlord obtained an Order of Possession in a previous hearing. The tenant applied for a Review Hearing, which was denied, and now the matter is before the Supreme Court of British Columbia.

**The landlord's first witness** (CM) testified that she is one of the managers of the complex, and prepared a letter to the tenant in an attempt to collect \$65.63 owed to the landlord. A copy of the letter has been provided as evidence for this hearing, as well as another reminder letter of rent owed dated May 19, 2016. The witness was in the office when the tenant promised to pay it in 2 partial payments in writing referred to as an Acknowledgement. The tenant paid \$30.00 in July, 2016 and another reminder was sent for the balance of \$35.63. In March, 2017 the tenant paid \$20.00, leaving a balance of \$15.63, but shorted the payment due by 30 cents in November, 2017.

**The landlord's second witness** (ML) testified that the witness is also a resident manager of the rental complex, who served the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by posting it to the door of the rental unit on January 5, 2018.

**The tenant** testified that on April 27, 2017 a notice to end the tenancy for cause was issued, and part of that is included in a Supreme Court action to be heard on May 14, 2018. The tenant had applied for a Review of the Decision, but the Decision was upheld.

The tenant further testified that he told the landlord in November, 2015 that rent would be late for December and told the landlord not to process that payment, but the landlord did, and it was marked NSF. The bank charged the tenant a fee for the landlord's error, and the landlord charged the tenant a fee as well. The tenant testified that the tenant cannot cancel an automatic payment; only the landlord can do so.

**Submissions of the landlord:** A tenant has to sign a form to allow automatic debits and another to stop automatic debits. The tenant could also have placed a Stop Payment on the automatic debit. There should be no question of what is owed; the tenant was making the payments but stopped doing so. What's before the Supreme Court is not relevant, in that the hearing was to deal with a notice to end the tenancy for cause, not a notice to end the tenancy for unpaid rent.

**Submissions of the tenant:** The signature on the Acknowledgement is not the signature of the tenant and does not match the tenant's signature on the Tenant's Application for Dispute Resolution or any other documents that the tenant has provided. *Res Judicata* applies; the parties had been to arbitration in 2017 which is now before the Appeal Court and now amounts to an abuse of process by the landlord.

### Analysis

The tenant has raised *Res Judicata* which is a doctrine that prevents the re-hearing of claims already adjudicated and decided upon. The parties agree that a previous hearing resulted in a Decision of the director, and the parties agree that the hearing concerned a notice to end the tenancy for cause, not for unpaid rent or utilities, but no one has provided me with a copy of the Decision. The tenant has provided a copy of an Affidavit filed in the Supreme Court of British Columbia, which mentions the sum of \$15.93, but I am not satisfied that just because an Affidavit mentions the same amount of money the landlord claimed on the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, *res judicata* applies. The *Residential Tenancy Act* states that the Residential Tenancy Branch has exclusive jurisdiction respecting a notice to end a tenancy given by a landlord. I find that the matter of issuing a notice to end the tenancy for cause is not related to an additional notice to end the tenancy for unpaid rent, and the Residential Tenancy Branch has jurisdiction. The tenant also claims an abuse of process on the landlord's part, however I cannot conclude that without a copy of the previous Decision. I also find that since the notices are not related, *res judicata* does not apply.

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*.

The tenant places the blame on the landlord for causing the tenant to suffer NSF fees charged by the tenant's financial institution, and submitted that the landlord ought to have stopped the payment. I do not agree that the landlord has the obligation or the ability to stop the payment of an automatic debit any more than a landlord would have to change the date or increase or decrease the amount of any automatic debit from the tenant's account. The tenant did not dispute the landlord's testimony that the tenant cancelled the automatic debits, and commenced paying by debit machine in the landlord's office since September, 2017. Rent is due when it is due.

The tenant did not dispute the testimony of the landlord's agent that the tenant has paid late fees on several occasions in the past. Although the tenant does not agree that he signed the Acknowledgement, the tenant did not disagree that the amount was owed to the landlord or the date that he paid it.

The tenant also suggested that since the Addendum respecting late fees was not signed, it was not agreed to. However I find that the tenant agreed to those fees by signing the tenancy agreement and initialing the portion that specifies 3 Addendums.

I accept the computerized Tenant Ledger provided by the landlord, which shows that as of December, 2015 the tenant was up-to-date with rent, but only paid \$600.00 of the \$640.63 that was due on January 1, 2016. The landlord added a late fee of \$25.00 bringing the amount due to \$65.63. The tenant paid the full amount of rent for February, 2016 but did not pay the rent or late fees outstanding for January, 2016. That pattern continued until July, 2016 when the tenant paid the current rent and \$30.00 toward the arrears, leaving a balance of \$35.63 outstanding. The landlord applied the payment firstly toward current rent of \$640.63 and to the \$25.00 late fee which was still outstanding. However, the balance due to the landlord was still more than the amount of the late fee charged in January, 2016. That amount remained outstanding until March, 2017 when the tenant paid the current rent and another \$20.00 to the arrears. The landlord issued the notice to end the tenancy on January 5, 2018, which is deemed to have been received 3 days later, or January 8, 2018 and the tenant paid the arrears on February 3, 2018.

The *Residential Tenancy Act* requires a tenant to pay the rent in full within 5 days of receipt of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities or dispute it. The tenant disputed the notice, but acknowledged the debt, paid it, but did not pay the balance due in full within 5 days, and when the tenant did pay the rent, the landlord gave a receipt that indicated that the money was being received for Use and Occupancy only and did not serve to reinstate the tenancy.

In the circumstances, I see no reason to cancel the notice, and the tenant's application is dismissed.

The *Act* also states that where I dismiss a tenant's application to cancel a notice to end a tenancy given by a landlord, I must grant an Order of Possession in favour of the landlord, so long as the notice given is in the approved form. I have reviewed the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and I find that it is in the approved form and contains information required by the *Act*. However, because it was served by posting it to the door of the rental unit, it is deemed to have been served 3 days after posting, and the effective date of vacancy is changed to January 18, 2018. Since that date has passed, I grant the Order of Possession on 2 days notice to the tenant.

### Conclusion

For the reasons set out above, the tenant's application is hereby dismissed.

I hereby grant an Order of Possession in favour of the landlord effective on 2 days notice to the tenant.

This order is final and binding and may be enforced.

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 20, 2018

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Residential Tenancy Branch