



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute codes      OPR MNR FF/ MT CNR

### Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

Landlord:

- an order of possession for failure to pay rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to recover the filing fee for this application pursuant to section 72.

Tenant:

- cancellation of the landlord’s 10 Day Notice to End Tenancy for unpaid rent pursuant to section 46 (the 10 Day Notice);
- more time to make an application to cancel the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66.

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to provide affirmed testimony and present evidence.

The landlord’s application was originally heard by way of a Direct Request Proceeding and on December 10, 2018 an interim decision was issued adjourning the application to be reconvened at a participatory hearing. The tenant filed his own application on December 12, 2018 and the two applications were subsequently scheduled to be heard together.

The tenant testified that he was not able to retrieve the registered mail package containing the landlord’s application from the Canada Post outlet due to a spelling error of his name on the notice card. The tenant testified that he was aware of the hearing

only through his own application that he initiated. The landlord confirmed service of the tenant's application.

I reviewed the registered mail receipt provided as proof of service by the landlord and found there was no spelling error on the tenant's name. The tenant did not submit any evidence in support of his inability to pick up the mail package and whether or not there was any error and if it was due to an error by the landlord or by Canada Post.

Based on the above evidence, I am satisfied that the tenant was deemed served with the Landlord's Application for Dispute Resolution, Notice of Dispute Resolution Hearing and Interim Decision pursuant to sections 89 & 90 of the Act.

The landlord applied for an order of possession based on a 10 Day Notice dated October 24, 2018. The tenant did not apply to dispute this 10 Day Notice but filed to dispute a subsequent 10 Day Notice issued on December 2, 2018. The landlord confirmed that the outstanding rent as per the December 2, 2018 notice was received by the landlord within 5 days of the Notice being served. Accordingly, the tenant's application to cancel the 10 Day Notice dated December 2, 2018 was not necessary as the tenant paid the outstanding rent with the 5 day time period required under the Act.

The hearing proceeded on the merits of the landlord's application pertaining only to the 10 Day Notice dated October 24, 2018.

### Issues

Is the landlord entitled to an order of possession for unpaid rent or should the 10 Day Notice dated October 24, 2018 be cancelled?

Is the landlord entitled to a monetary award for unpaid rent?

Is the landlord entitled to recover the filing fee for this application from the tenants?

### Background and Evidence

The tenancy began on October 1, 2018 with a monthly rent of \$1640.00 payable on the 1<sup>st</sup> day of each month. The tenant paid a security deposit of \$820.00 at the start of the tenancy which the landlord continues to hold.

The property manager R.P. (the "landlord") testified on behalf of the landlord. The landlord testified the tenant failed to pay the \$1640.00 rent payable on October 1, 2018. The landlord testified that on October 24, 2018 he served the tenant with the 10 Day Notice by posting a copy to the door of the rental premises.

The landlord testified that the tenant did not pay the outstanding amount of rent as indicated on the 10 Day Notice within five days of service of the Notice and it still remains unpaid. The landlord testified that the tenant promised to pay the outstanding amount several times but he never did. The landlord testified that he tried to work with the tenant but received no communication from the tenant in regards to paying the outstanding amount. The landlord submits the tenant was late paying December rent and has not paid January rent either.

The tenant acknowledged service of the 10 Day Notice and that he did not pay the full amount of the arrears indicated, within five days, of receiving the Notice. However, the tenant argues that as far as he was aware he had a verbal conversation with the landlord that the October 24, 2018 10 Day Notice was being cancelled. The tenant submits that he had an agreement with the landlord to pay the outstanding October rent in equal installments over the remaining 10 months of the tenancy. The tenant submitted copies of text messages with the landlord by which the landlord agreed to the payment plan. The tenant submits that the landlord changed his mind following a visual inspection of the unit and advised the tenant to not bother with the payment schedule and that the landlord would be pursuing an order of possession.

### Analysis

Section 46 of the Act requires that upon receipt of a 10 Day Notice the tenant must, within five days, either pay the full amount of the arrears indicated on the Notice or dispute the Notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch.

Section 26 of the Act requires that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Based on the evidence submitted by the parties, I find that the parties did have an agreement to waive the October 24, 2018 10 Day Notice in exchange for the tenant paying monthly installments for the outstanding amount over the duration of the tenancy. I make this finding as the text message correspondence submitted by the tenant confirms that the landlord agreed to the tenant's proposal to make monthly payments as of November 30, 2018. The landlord also requested the tenant to put the details of the proposal in writing before November 30, 2018, which the tenant did.

Further, there is no evidence that the landlord accepted the tenant's November 2018 rent payment as "use and occupancy" only. Also, the landlord took no action on the 10 Day Notice until filing an application via Direct Request on December 4, 2018. I find the landlord originally agreed to cancel the 10 Day Notice dated October 24, 2018 and accepted the tenant's payment proposal but later had a change of mind.

The 10 Day Notice dated October 24, 2018 is hereby cancelled and of no force or effect and the landlord's application for an order of possession based on this Notice is dismissed without leave to reapply. The landlord's application for a monetary award for unpaid October 2018 rent is dismissed with leave to reapply as I have found the landlord agreed to a payment schedule with the tenant.

As the landlord was not successful in this application, I find that the landlord is not entitled to recover the filing fee paid for this application.

### Conclusion

The 10 Day Notice dated October 24, 2018 is hereby cancelled and of no force or effect and the landlord's application for an order of possession based on this Notice is dismissed without leave to reapply. The landlord's application for a monetary award for unpaid October 2018 rent is dismissed with leave to reapply as I have found the landlord agreed to a payment schedule with the tenant.

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 22, 2019

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Residential Tenancy Branch