



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      FFL, MNRL

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on September 08, 2020 (the “Application”). The Landlord applied to recover unpaid rent and the filing fee.

The Landlord and Tenants appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Tenant K.M. provided the correct spelling of their full legal name which is reflected in the style of cause.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Tenants confirmed receipt of the hearing package. The Tenants testified that they received a painting receipt by email six days before the hearing. The Tenants testified that they did not receive any further evidence from the Landlord.

The Landlord testified that they sent their evidence to the Tenants by regular mail on September 21, 2020 to the rental unit address because they did not have a forwarding address for the Tenants. The Landlord relied on the RTB receipt as evidence of service.

The parties agreed the Tenants vacated the rental unit August 31, 2020.

Pursuant to rule 3.14 of the Rules of Procedure (the “Rules”), the Landlord was required to serve all evidence on the Tenants. Pursuant to rule 3.5 of the Rules, the Landlord

has the onus to prove service. When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met their onus of proof.

I was not satisfied the Tenants were served with the Landlord's evidence in accordance with the *Residential Tenancy Act* (the "*Act*") and Rules. The evidence had to be served in accordance with section 88 of the *Act* which states in part:

88 All documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways...

(c) by sending a copy by ordinary mail or registered mail **to the address at which the person resides** or, if the person is a landlord...

(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail **to a forwarding address provided** by the tenant...

(emphasis added)

There are two issues with service here.

First, the parties gave conflicting testimony about whether the Landlord's evidence was served on the Tenants. The Landlord bears the onus of proof. The Landlord could not point to evidence to support their testimony. The RTB receipt does not support that evidence was served on the Tenants. I acknowledge that section 88 of the *Act* allows parties to serve evidence by regular mail. However, when service is disputed, the serving party must provide sufficient evidence of service. The Landlord's testimony alone is not sufficient evidence of service because it is disputed by the Tenants. In the absence of further evidence, the Landlord has failed to prove service of the evidence.

Second, the Landlord testified that they sent the evidence to the rental unit address on September 21, 2020. The rental unit address was neither the Tenants' residence on September 21, 2020 nor a forwarding address provided by the Tenants. Therefore, the evidence was not served in accordance with section 88 of the *Act*. I acknowledge that the Landlord did not have a forwarding address for the Tenants; however, this did not entitle the Landlord to serve the Tenants at the rental unit.

I told the parties during the hearing that I was not satisfied of service and would consider rule 3.17 of the Rules which states:

Evidence not provided to the other party...in accordance with the Act or Rules...3.14...may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

I heard the parties on whether the Landlord's evidence should be admitted or excluded. The Tenants acknowledged there is no issue with admission of the tenancy agreement and painting receipt. The Tenants submitted that the remaining evidence should be excluded because they have never seen it. The Landlord submitted that the evidence should be admitted because they complied with the *Act*, the Tenants have the emails and RTB-14 form, and the Tenants would be aware of what the rental unit looked like as shown in the photos. The Landlord submitted that there is no unfairness to the Tenants in admitting the evidence.

I note that the RTB-14 form is not in evidence before me.

Pursuant to rule 3.17 of the Rules, I exclude the Landlord's evidence, other than the tenancy agreement and painting receipt. I find it would be unfair to the Tenants to consider evidence they have not seen and could not address during the hearing. I am not satisfied the Landlord complied with the *Act* as explained above. Further, I do not find it relevant that the Tenants have the emails. Parties are entitled to know what the other party is relying on at the hearing so they can adequately address it. The Tenants could not have known what emails the Landlord was going to rely on at the hearing in the absence of service.

The Landlord testified that they received the Tenants' evidence on the Thursday before the hearing and stated that they were not taking issue with the timing of service.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all testimony provided and reviewed all admissible documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

I note the following about the hearing.

The parties were reminded at the outset that this was a legal proceeding and were told not to interrupt each other. The Tenants interrupted the Landlord twice and were told both times not to interrupt again.

The Landlord asked for the Tenants' address for service at the end of the hearing and the Tenants refused to provide this.

I asked both parties at the end of the hearing about how the decision could be sent to them. The Landlord confirmed the decision could be sent by email and the email address is noted on the front page of this decision. Tenant K.M. confirmed the decision could be sent by email and the email address is noted on the front page of this decision.

#### Issues to be Decided

1. Is the Landlord entitled to recover unpaid rent?
2. Is the Landlord entitled to reimbursement for the filing fee?

#### Background and Evidence

Although the Application is for unpaid rent, it is clear from the written Application for Dispute Resolution that the Landlord sought the following compensation:

Item	Description	Amount
1	Unpaid rent	\$2,040.00
2	September rent	\$1,700.00
3	Painting	\$1,000.00
4	Filing fee	\$100.00
	<b>TOTAL</b>	<b>\$4,840.00</b>

A written tenancy agreement was submitted and the parties agreed it is accurate. The tenancy started December 31, 2019 and was for a fixed term ending December 31, 2020. No security deposit was paid. Rent was \$1,700.00 per month due on the first day of each month.

The parties agreed the Tenants vacated the rental unit August 31, 2020.

**#1 Unpaid rent \$2,040.00**

The Landlord testified as follows. The Tenants failed to pay the following rent:

- \$400.00 in May;
- \$240.00 in June; and
- \$1,400.00 in July.

The Landlord received a \$300.00 rent subsidy for the Tenants which was applied to May to July rent. The Tenants admitted to an error in relation to the rent subsidy as they thought it was \$500.00 but it was \$300.00. The Tenants' email dated March 24, 2020 is important as it shows the Tenants could not pay rent.

The Tenants testified as follows. There is no rent outstanding. The Tenants paid their rent in cash to "R.", the building manager. The Tenants paid rent to R. by money order from the start of the tenancy. Banks closed due to the pandemic and the Tenants could no longer pay by money order. R. told the Tenants to pay rent by cash. The Tenants received an email from the Landlord about not paying rent. The Landlord admitted that R. has stolen from the Landlord in the past. R. never gave the Tenants receipts for the rent payments. R. stole the rent payments. The Tenants filed a police report in relation to this.

The Tenants referred to email #37 and #49. The Tenants relied on text messages from R. in evidence to show that R. picked up their rent. The Tenants relied on an email authored by them and a letter of demand to show they reported the theft by R. to the police.

The Tenants testified that they got cash out at a gas station ATM each month. The Tenants had not submitted receipts from the ATM showing this. Nor had the Tenants submitted bank statements showing this.

The Landlord testified as follows in reply. R. said he did not receive rent from the Tenants. The Tenants were required to call R. as a witness and have not done so. The Landlord does not believe the Tenants paid rent in cash to R. R. has stolen laundry money from the Landlord in the past. The Landlord does not deal in cash and has procedures in place if tenants want to pay cash. The Tenants did not previously pay by money order but by cheque. The *Act* requires that a receipt be provided for cash payments. Banks have been open during the pandemic. The Landlord does not believe R. stole the rent money. R. did collect rent cheques from the Tenants during the first part of the tenancy. The Tenants have not provided copies of money orders, bank accounts or further documentary evidence. The Tenants are not telling the truth.

**#2 September rent \$1,700.00**

The Landlord testified as follows. The Tenants did not give proper notice ending the tenancy pursuant to section 52 of the *Act*. The Landlord received proper notice ending the tenancy on August 19, 2020. Signs indicating the rental unit was for rent were put up August 15, 2020. A new tenancy agreement was signed at the end of August for October 01, 2020.

The Tenants testified as follows. The Tenants let the Landlord know they were looking for a new place in email #51. The Landlord said the notice ending the tenancy was not in writing so not proper notice. The Landlord put a sign up on the lawn August 20, 2020 about the rental unit being available. The Landlord found new tenants before October. The Tenants were aware new tenants were moving into the rental unit in October.

The Tenants could not say when written notice was provided to the Landlord but agreed it could not have been before August 19, 2020 given their emails about this.

**#3 Painting \$1,000.00**

The Landlord testified as follows. The Landlord is seeking \$1,000.00 for painting the rental unit which includes the painting receipt for \$725.00 which is for labour and the cost of materials which is not reflected in the receipt. The tenancy agreement says the Tenants could not paint the rental unit without authorization. The Tenants painted the rental unit pink and green without permission contrary to the tenancy agreement.

The Tenants testified as follows. The rental unit was two colors when the Tenants moved in, pink and beige. The Tenants asked R. if they could paint the rental unit and R. said they could. The only painting the Tenants did were stripes in the same pink

color already used in the rental unit. The painting receipt from the Landlord does not match the amount sought.

In reply, the Landlord disagreed with the Tenants' statement about what they painted in the rental unit.

The admissible evidence before me includes:

- A painting receipt for \$725.00;
- The tenancy agreement; and
- A 52 page PDF submitted by the Tenants which includes emails, text messages and photos between the Landlord, Tenants and R.

### Analysis

Section 7 of the *Act* states:

7 (1) If a...tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying...tenant must compensate the [landlord] for damage or loss that results.

(2) A landlord...who claims compensation for damage or loss that results from the [tenant's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Pursuant to rule 6.6 of the Rules, it is the Landlord as applicant who has the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed. As already stated, when one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

**#1 Unpaid rent \$2,040.00**

Section 26 of the *Act* states:

26 (1) 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.

(2) A landlord must provide a tenant with a receipt for rent paid in cash...

I am satisfied R. handled tenancy matters for the Landlord and previously collected rent for the Landlord based on the following. The Landlord's testimony that R. has stolen laundry money from the Landlord in the past which indicates that R. dealt with the laundry money for the Landlord. The Landlord's acknowledgement that R. collected rent cheques from the Tenants during the first part of the tenancy. The text messages and emails in evidence which support that R. handled tenancy matters for the Landlord.

Given the above, I am satisfied the Tenants were entitled to pay rent to R. unless directed otherwise. This is particularly so given the Landlord acknowledged R. collected rent from the Tenants at the start of the tenancy. I am not satisfied based on the evidence provided that the Tenants were directed not to pay rent to R. on or before July 01, 2020 as the documentary evidence from prior dates does not indicate that the Tenants were directed not to pay rent to R. Directing the Tenants not to pay rent to R. after July 01, 2020 was not sufficient in relation to payments for May to June rent.

I am satisfied the Tenants paid R. rent in the amount of \$1,200.00 for each of April, May and June based on the following. The text message in evidence dated May 01, 2020 from R. to the Tenants stating they could pay R. cash. The text message in evidence from June 04, 2020 showing the Tenants told R. they had cash for the rent. The email dated July 24, 2020 from the Landlord stating R. had forwarded \$1,160.00 from the Tenants for rent which supports the Tenants' position that they had paid rent to R. The



fact that the text messages in evidence between the Tenants and R. about this issue do not show that R. denied receiving rent payments from the Tenants, which I would expect R. to have done had R. not received rent payments from the Tenants.

I am not satisfied the Tenants paid rent to R. for July as none of the documentary evidence states this and all of the documentary evidence, including the letter from the Tenants dated July 23, 2020, states that the Tenants paid rent to R. for April, May and June. I do not accept that the Tenants would have made further payments to R. after July 06, 2020 when it became clear there was an issue with their payments getting from R. to the Landlord.

It is clear from the text messages in evidence from R. that R. did not provide receipts to the Tenants for rent payments. Therefore, the absence of receipts does not cause me to question the documentary evidence supporting the Tenants' position about paying \$1,200.00 in rent for each of April, May and June to R.

Given the above, I am satisfied the Tenants have provided sufficient documentary evidence to support that they paid rent in cash to R. for April, May and June. The Landlord has not provided sufficient evidence to show otherwise. The Tenants did not bear the onus to call R. as a witness. This is the Landlord's Application and the Landlord bears the onus to prove the Tenants failed to pay rent. It was clear from the correspondence between the parties that the Tenants took the position that they paid rent in cash to R. for April, May and June. If the Landlord wanted evidence from R. presented, the Landlord was required to submit evidence from R. or call R. as a witness.

The documentary evidence shows the Tenants transferred \$1,400.00 to the Landlord July 09, 2020 and I am satisfied the Tenants did so.

I am satisfied based on the evidence provided including emails from the Tenants, Landlord and BC Temporary Rental Supplement Program that the Landlord received a \$300.00 rent subsidy for April, May, June, July and August.

I note the email in evidence dated July 24, 2020 in which the Tenants acknowledge they owe the Landlord \$600.00 due to the rent subsidy being \$300.00 instead of \$500.00. I am not satisfied based on the evidence that the Tenants paid this \$600.00 sometime after July 24, 2020 as this is not supported in the documentary evidence. I do acknowledge that the Tenants did pay August rent.

I have read and considered the March 24, 2020 email from the Tenants to the Landlord and do not find it sufficient to prove that the Tenants did not pay rent for May to July.

Given the above, I am satisfied the Tenants paid rent as required for April, May and June. The issue of rent not being transferred from R. to the Landlord is an issue the Landlord must deal with.

Given the above, I am satisfied that the following rent payments were made from April to August:

- \$1,200.00 from the Tenants to R. for April;
- \$1,200.00 from the Tenants to R. for May;
- \$1,200.00 from the Tenants to R. for June;
- \$300.00 subsidy for April;
- \$300.00 subsidy for May;
- \$300.00 subsidy for June;
- \$300.00 subsidy for July;
- \$1,400.00 on July 09, 2020 transferred from the Tenants to the Landlord; and
- \$1,700.00 for August (\$1,400.00 from the Tenants and \$300 rent subsidy).

Given the above, I am satisfied the Tenants paid \$7,900.00 in rent for April to August. Given rent was \$1,700.00 per month, the Landlord was owed \$8,500.00. Therefore, I am satisfied the Tenants owe the Landlord \$600.00. This amount accords with the Tenants' email dated July 24, 2020.

I am satisfied the Tenants owe the Landlord \$600.00 in rent. I am not satisfied the Tenants had authority under the *Act* to withhold this amount as the Tenants did not submit that they did. The Tenants submitted that they paid rent in full.

The Landlord is entitled to recover \$600.00 in unpaid rent.

## **#2 September rent \$1,700.00**

This was a fixed term tenancy ending December 31, 2020. The parties agreed the Tenants ended the tenancy and vacated August 31, 2020, prior to December 31, 2020.

Section 45 of the *Act* states:

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

**(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and**

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

(emphasis added)

The Tenants were not permitted to end the tenancy prior to December 31, 2020, except in accordance with section 45(3) of the *Act*. There is insufficient evidence before me showing section 45(3) of the *Act* applies and I am not satisfied it does.

The Tenants breached the tenancy agreement and section 45 of the *Act* by ending the tenancy early.

I am satisfied based on the testimony of the parties that the rental unit was not re-rented until October 01, 2020. The Landlord stated this. The Tenants acknowledged knowing new tenants were moving into the rental unit in October. I am satisfied the Landlord lost September rent due to the Tenants' breach.

I am satisfied the Landlord put a sign up advertising the rental unit for rent around August 20, 2020 as the documentary evidence shows this. I am satisfied the Landlord

took reasonable steps to mitigate the loss. I am satisfied the Tenants did not provide proper notice to the Landlord until August 19, 2020 given the documentary evidence which supports this. Therefore, the Landlord could not have been expected to re-rent the unit for September given the timing of the Tenants' notice. I note that the Landlord was not required to attempt to re-rent the rental unit until proper notice was received. The emails sent to the Landlord about ending the tenancy are not proper notice as they do not comply with section 52 of the *Act*.

I am satisfied the Landlord is entitled to \$1,700.00 as loss of rent for September.

### **#3 Painting \$1,000.00**

Section 37 of the *Act* states:

(2) When a tenant vacates a rental unit, the tenant must

(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear...

Term 16 of the tenancy agreement states that painting "shall be done only with the prior written consent of the Landlord."

The parties disagreed about whether the Tenants had permission to paint and disagreed about what the Tenants painted.

I am not satisfied the Tenants had written consent to paint as required by the tenancy agreement as the Tenants acknowledged they received verbal permission. Further, I am not satisfied the Tenants received verbal permission as this is not supported in the documentary evidence. I am satisfied the Tenants breached the tenancy agreement by not obtaining written consent to paint the rental unit.

The Tenants acknowledged they painted part of the rental unit and therefore I am satisfied the Landlord was entitled to re-paint this at the end of the tenancy given I am satisfied the painting was done in breach of the tenancy agreement. I am satisfied the Landlord suffered some financial loss in relation to re-painting the rental unit.

However, I am not satisfied the Landlord has proven the amount of loss as being \$1,000.00. The parties disagreed about what parts of the rental unit were painted by the Tenants. The Landlord has not provided sufficient admissible evidence to support

his testimony on this point. In the absence of further evidence, I am not satisfied the Tenants painted areas other than the area they acknowledged painting. I am not satisfied based on the evidence provided that re-painting this area cost \$1,000.00 or that this would be a reasonable amount. I understand from the Landlord's testimony that the receipt in evidence is for painting additional areas of the rental unit and therefore I am not satisfied it represents the cost of re-painting the portion of the rental unit the Tenants acknowledged painting. I also note that the painting receipt is completely lacking in any detail that would allow me to determine what was painted, how long the painting took, whether the painter charged per hour or per job or how long the painting took. Further, the Landlord did not provide receipts showing the cost of painting materials. Nor does the receipt in evidence show that it is only for labour.

In the circumstances, the Landlord has failed to prove they are entitled to \$1,000.00 for painting.

Policy Guideline 16 states:

- "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

Given the Landlord has proven a breach, but failed to prove the loss claimed of \$1,000.00, I award the Landlord nominal damages of \$100.00 for the painting.

#### **#4 Filing Fee \$100.00**

Given the Landlord was partially successful in the Application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

#### **Summary**

In summary, the Landlord is entitled to the following:

Item	Description	Amount
1	Unpaid rent	\$600.00
2	September rent	\$1,700.00
3	Painting	\$100.00
4	Filing fee	\$100.00
	<b>TOTAL</b>	<b>\$2,500.00</b>

The Landlord is entitled to \$2,500.00 and is issued a monetary order for this amount pursuant to section 67 of the *Act*.

Conclusion

The Landlord is entitled to \$2,500.00 and is issued a Monetary Order for this amount. This Order must be served on the Tenants. If the Tenants fail to comply with this Order, it 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 *Act*.

Dated: January 14, 2020

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Residential Tenancy Branch