



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNR FFT

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (10 Day Notice), pursuant to section 46 of the *Act*, and
- recovery of the filing fee from the landlord pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Landlord D.N. spoke on behalf of both the landlords.

As both parties were present, service of documents was confirmed. The landlord confirmed receipt of the tenant's application and evidence, and the tenant confirmed receipt of the landlord's evidence. Based on the undisputed testimonies of the parties, I find that both parties were served in accordance with section 89 of the *Act*.

### Preliminary Issue – Amendment to Tenant's Application for Dispute Resolution

At the outset of the hearing, landlord D.N. confirmed the spelling of landlord S.K.'s first name, which was different than the spelling provided on the tenant's Application. Pursuant to my authority under section 64(3)(c) of the *Act*, I corrected the spelling of landlord S.K.'s first name on the tenant's Application.

### Preliminary Issue - Procedural Matters

I explained to the parties that section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the

tenant's Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Further to this, the parties were advised that the standard of proof in a dispute resolution hearing is on a balance of probabilities. Usually the onus to prove the case is on the person making the claim. However, in situations such as in the current matter, where a tenant has applied to cancel a landlord's Notice to End Tenancy, the onus to prove the reasons for ending the tenancy transfers to the landlord as they issued the Notice and are seeking to end the tenancy.

### Issue(s) to be Decided

Should the landlord's 10 Day Notice to End Tenancy be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the cost of the filing fee from the landlord?

### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A written tenancy agreement was submitted into evidence. Both parties confirmed their understanding of the following terms of the tenancy agreement:

- This one-year fixed term tenancy began on December 1, 2017.
- Monthly rent of \$2,500.00 is payable on or before the first of the month.
- A security deposit of \$1,250.00 was paid by the tenant at the beginning of the tenancy and continues to be held by the landlord.

A copy of the 10 Day Notice was submitted into evidence by the parties. The notice is dated August 2, 2018 and states that \$2,500.00 in rent was not paid when due on August 1, 2018. The notice provides an effective vacancy date of August 13, 2018. The tenant confirmed he received the notice on August 2, 2018.

Both parties agreed that the landlord contacted the tenant on August 1, 2018 to advise him that the rent cheque could not be cashed due to a stop payment placed on the cheque by the tenant. The landlord requested that the tenant make his rent payment immediately, however the tenant responded by telling the landlord that he had

previously sent the landlord replacement cheques and that the landlord should let the tenant know when he receives the replacement cheques in the mail. The landlord responded immediately to let the tenant know that he never received any replacement cheques. The tenant responded to say that he would contact his bank to look into the issue. The next day, on August 2, 2018, the landlord emailed the tenant telling him that it was his final notice to pay his rent, and then served the tenant with the 10 Day Notice on that day. A copy of the above-noted email exchange was submitted into documentary evidence by the tenant.

The tenant testified that he had originally provided the landlord with post-dated cheques at the beginning of the tenancy. There had been an error on the July 2018 rent cheque which prevented the landlord from cashing it. The landlord contacted the tenant via email about the problem, the tenant provided a replacement cheque the next day, the landlord returned the defective cheque, and the issue was resolved.

The tenant claimed that, out of concern the other cheques could have errors, he decided to send the landlord replacement cheques at the beginning of July 2018, to cover the months of August onward for six months. The tenant stated that he had then stopped payment on the original rent cheques. The tenant had no proof of this testimony as he mailed the cheques to the landlord using regular mail which does not provide for any delivery tracking or proof of mailing. The landlord disputed the tenant's claim and testified that he never received any replacement cheques, other than the July 2018 replacement cheque.

Both parties agreed that the tenant did not provide the landlord with payment for the rent owed for the month of August 2018 until August 10, 2018. The landlord accepted the payment "for use and occupancy only" by writing this on the cheque received from the tenant.

### Analysis

Section 26 of the *Act* requires that a tenant must pay rent when it is due unless the tenant has a right under the *Act* to deduct all or a portion of rent. If a tenant fails to pay rent when due, section 46 of the *Act* permits a landlord to end the tenancy by issuing proper written notice to end tenancy using a 10 Day Notice to End Tenancy.

A tenant who receives a 10 Day Notice to End Tenancy under section 46 has five days after receipt to either pay rent in full or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

In this case, I find that the tenant was served with a 10 Day Notice on August 2, 2018 and filed his application to dispute the notice on August 7, 2018. Accordingly, the tenant complied with the five-day time limit provided by section 46 of the *Act*.

Where a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 10 Day Notice is based.

In this matter, there was no dispute that the tenant placed a stop payment on the rent cheque originally provided to the landlord, and that the tenant did not pay the rent owing when it was due on August 1, 2018, or within five days of being issued the 10 Day Notice.

The tenant was unable to provide any evidence whatsoever in support of his claims that he had sent the landlord replacement cheques at the beginning of July 2018. It would be reasonable to expect that if the tenant sent the landlord replacement cheques, the tenant would have contacted the landlord to advise him that the original cheques were being replaced, that a stop payment was placed on the original cheques, and to request that the landlord return the original cheques. When the July 2018 rent cheque was replaced by the tenant, the tenant requested that the landlord return the original cheque. I find that the tenant's divergent handling of the August rent replacement cheque situation diminishes the credibility of the tenant's testimony. As well, I find that the tenant's lack of taking reasonable diligence to contact the landlord to confirm whether or not the replacement cheques were received, and to ask for the return of the original cheques, lends credibility to the landlord's testimony.

In weighing the testimony and evidence of both parties, I find that the landlord has proven, on a balance of probabilities, that the tenant failed to pay the \$2,500.00 in rent, as stated on the 10 Day Notice, when it was due or within five days of having received the 10 Day Notice. I make this finding on the basis of the undisputed testimony that the tenant placed the stop payment on the original rent cheque that was in the landlord's possession, and that the tenant did not provide the landlord with a replacement payment for August rent, once it was discovered that the landlord was not in possession of cashable rent cheque, until August 10, 2018.

Therefore, I find that the landlord has proven the grounds for issuing the 10 Day Notice based on unpaid rent. The tenant's application to cancel the 10 Day Notice is dismissed.

When a tenant's application to dispute a landlord's notice to end tenancy is dismissed, section 55 of the *Act* requires me to grant an order of possession if the landlord's notice to end a tenancy complies with section 52 of the *Act*.

After reviewing the 10 Day Notice submitted into evidence by the parties, I find that the notice meets the requirements for form and content as set out in section 52 of the *Act*.

As such, I find that the landlord is entitled to an Order of Possession. As the effective vacancy date of the notice has now passed, the Order of Possession is effective two days after service on the tenant.

The tenant was not successful in his application; therefore, the tenant must bear the cost of the filing fee for this application.

### Conclusion

The tenant's application to cancel the 10 Day Notice and to recover the cost of the filing fee is dismissed without leave to reapply, and the 10 Day Notice is upheld as it meets the requirements of section 52 of the *Act*.

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. The landlord is provided with this Order in the above terms and 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 and enforced as an Order of the Supreme Court of British Columbia.

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: October 1, 2018

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Residential Tenancy Branch