



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CHARTELL PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPL-4M FFL

Introduction

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

- an Order of Possession, pursuant to sections 49 and 55 of the *Act*, and
- recovery of the filing fee from the tenant 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. The tenant attended, assisted by D.M. The landlord's agent attended on behalf of the landlord, assisted by L.N.

Preliminary Issue – Difficulty Hearing Landlord's Agent Due to Overseas Call

The landlord's agent telephone audio quality was very poor, resulting in all participants to the teleconference having difficulty hearing the landlord's agent's testimony. At the beginning of the hearing, I made several requests to the landlord's agent to try to fix the problem. The landlord's agent explained that he was calling from overseas. As the landlord's agent was unable to resolve the audio issue, the assistant to the landlord's agent, L.N., had to respond on behalf of the landlord's agent or repeat the landlord's agent's testimony in order to ensure the parties could hear the responses.

Preliminary Issue – Service of Landlord's Notice of Hearing Documents

The landlord's agent testified that the tenant was served with the notice of this hearing and the landlord's evidence by Canada Post registered mail on October 19, 2018, and submitted into documentary evidence the registered mail receipt tracking number

(recorded on the cover sheet of this Decision) and the tracking report. The landlord's assistant L.N. confirmed that the package was returned as "unclaimed" by the tenant. The landlord's assistant L.N. testified that the tenant was also sent the notice of this hearing by email on October 19, 2018.

Section 89 of the *Act* sets out "special rules" for the service of certain documents. Section 89(1) of the *Act* requires that a notice of hearing be served to the other party in person, by registered mail, or as ordered by the Residential Tenancy Branch director.

Section 89(2) of the *Act* allows for an exception to the above-noted rules when a landlord is serving a tenant with a notice of hearing solely for an Order of Possession. In such cases, the landlord may also serve the notice to the tenant by attaching it to the tenant's door or other conspicuous place at the address where the tenant resides, in addition to the permissible methods listed in section 89(1) of the *Act*.

Email is not a permissible method of service available to a landlord for service of a document to a tenant.

Section 90 of the *Act* sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received on the fifth day after mailing if it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

...

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done.

...

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received...It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

The decision whether to make an order that a document has been sufficiently served in accordance with the Legislation or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation is a decision for the arbitrator to make on the basis of all the evidence before them.

In this matter, the tenant has rebutted the deemed receipt presumption on the basis that she did not have access to her Canada Post mail box to retrieve the notice of this hearing. The tenant testified that she had lost her mail box key several months prior and had informed both the building manager and Canada Post of the issue. The tenant assumed that the building manager would make arrangements for a replacement key through contact with the landlord's agent. The landlord's agent denied being contacted by the building manager about the need for a replacement mail box key and further denied any knowledge of the fact that the tenant lost her mail box key.

As the tenant attended the hearing and submitted evidence in advance of the hearing, there is no dispute that at some point the tenant was made aware of the time and date of the hearing, as well as the teleconference access codes and process for submitting evidence. Therefore, I must determine when the tenant was deemed served with the notice of this hearing.

The tenant acknowledged that she received an automatically-generated reminder email sent out by the Residential Tenancy Branch (RTB) a couple of weeks prior to the hearing. The tenant further testified that as a result of this email, she contacted the RTB and was provided with the time, date and access codes for this hearing and the process for submitting evidence.

Section 71(1) of the *Act* authorizes the RTB Director to make any of the following orders:

- (a) that a document must be served in a manner the director considers necessary, despite sections 88 [*how to give or serve documents generally*] and 89 [*special rules for certain documents*];
- (b) that a document has been sufficiently served for the purposes of this *Act* on a date the director specifies;
- (c) that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this *Act*.

Therefore, pursuant to my authority under section 71(1)(b) of the *Act*, I find that the tenant was sufficiently served with the notice of this hearing on November 13, 2018, which is two weeks prior to the hearing date.

Preliminary Issue – Service of Four Month Notice to End Tenancy

The landlord's agent testified that the tenant was served with the landlord's Four Month Notice to End Tenancy (Four Month Notice) by Canada Post registered mail on July 24, 2018 and submitted into documentary evidence the registered mail receipt tracking number (recorded on the cover sheet of this Decision) and the tracking report. The landlord's assistant L.N. confirmed that the package was returned as "unclaimed" by the tenant. The landlord's assistant L.N. testified that the tenant was also sent the Four Month Notice by email on July 23, 2018, with copy to the tenant's friend. The landlord submitted into documentary evidence an email response received from the tenant's friend acknowledging receipt of the landlord's July 23, 2018 email.

The tenant disputed being served with the Four Month Notice, because, as explained earlier in this Decision, the tenant claimed that she lost her key to her mail box and was unable to retrieve her registered mail.

I accept that the tenant's friend, and the tenant's assistant in the matter D.M., have all received electronic copies of the Four Month Notice sent by the landlord via email, however, the tenant has disputed ever being provided with a copy of the Four Month Notice for her review. The tenant has testified that she failed to receive the emails sent by the landlord due to technological problems with her computer and email service.

The Four Month Notice form provides the recipient of the notice with specific instructions regarding the process and time limits for disputing the notice. Although I accept that the tenant has been aware since mid-October 2018 that the Four Month Notice exists, I do not find that the landlord has provided sufficient evidence to prove that the tenant has ever directly received an actual copy of the Four Month Notice to review, given that the tenant has disputed the deemed receipt provisions as explained earlier in this Decision. As the landlord's registered mail packages were returned "unclaimed" by the tenant, and she did not personally respond to the landlord's emails to confirm receipt of an electronic version of the Four Month Notice, I find this raises sufficient doubt that the tenant has had the opportunity to review the actual Four Month Notice and understand the process and time limits provided by the *Act* to dispute such a notice. I find that tenant's lack of ability to review the Four Month Notice may have contributed to the tenant's lack of understanding of the options available to her to

dispute the notice, since the tenant had still not filed an Application for Dispute Resolution as of the date of the hearing.

The tenant's assistant D.M. confirmed that he was in possession of an electronic version of the Four Month Notice, and that he was able to print out a hard copy of the notice and provide it to the tenant after the hearing, so that the tenant would be served with the Four Month Notice on the date of the hearing, November 27, 2018.

As such, pursuant to my authority under section 71(1)(b) of the *Act*, I find that the tenant is deemed served and in receipt of the Four Month Notice on November 27, 2018.

Section 49(8)(b) of the *Act* provides that a tenant may dispute a Four Month Notice by making an application for dispute resolution within 30 days after the date the tenant receives the notice.

Preliminary Issue – Landlord's Premature Application for an Order of Possession

Section 55(2) of the *Act* provides that a landlord may make an application for dispute resolution to request an Order of Possession under the following circumstances, noted below in part:

- (a) a notice to end the tenancy has been given by the tenant;
- (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and **the time for making that application has expired**...

[My emphasis added]

In this matter, I have found that the tenant is deemed in receipt of the Four Month Notice on November 27, 2018. As such, pursuant to section 49(8)(b) of the *Act*, the tenant may make an application for dispute resolution to dispute the notice within 30 days from the date of receipt of the notice. The landlord may not apply to request an Order of Possession until "the time for making that application has expired".

As such, I find that the landlord's application for an Order of Possession on the basis of the Four Month Notice is premature and therefore it does not meet the requirements of section 55(2) of the *Act*. The landlord's application is dismissed with leave to reapply once the requirements of section 55(2) of the *Act* are met.

As the landlord was not successful in this application, the landlord must bear the costs of the filing fee for this application.

Conclusion

The tenant is deemed in receipt of the Four Month Notice on November 27, 2018.

The landlord's application for dispute resolution to request an Order of Possession is premature as the time provided to the tenant for making an application to dispute the notice has not yet expired.

As such, the landlord's application for an Order of Possession is dismissed, with liberty to reapply AFTER the time provided to the tenant for making an application to dispute the notice expires.

The landlord's claim to recover the cost of the filing fee for this application from the tenant is dismissed without leave to reapply.

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: December 3, 2018

Residential Tenancy Branch