



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding RE/MAX of Nanaimo Property  
Management and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      **OPRM-DR, FFL**

### **Introduction**

On January 23, 2020, an Adjudicator appointed pursuant to the *Residential Tenancy Act* (the *Act*) adjourned the landlord's application for dispute resolution for the following items to a participatory hearing. She did so on the basis of an *ex parte* hearing using the Residential Tenancy Branch's direct request process. The adjudicator adjourned the direct request for the following reasons:

*On the first page of the Proof of Service Notice to End Tenancy forms, the landlord has indicated they posted the 10 Day Notice to the tenants' door on November 7, 2019. However, on the second page of the Proof of Service Notice to End Tenancy forms, the witness states they observed the 10 Day Notice being served on November 4, 2019.*

*As I am not able to confirm the date of service of the 10 Day Notice to the tenants, which is a requirement of the Direct Request proceeding, I find that a hearing is necessary to address this issue.*

I have been delegated authority under the *Act* to consider the landlord's application for:

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 11:25 a.m. in order to enable the tenants to call into this teleconference hearing scheduled for 11:00 a.m. The landlord attended the hearing, represented by property manager, LO and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord testified that she served each of the tenants with the Notice of Dispute Resolution Proceedings by registered mail on January 24, 2020 and provided tracking numbers for the mailings which have been recorded on the cover page of this decision. I deem the tenants to have been served in accordance with the adjudicator's order which states: . **The applicant must serve the Notice of Reconvened Hearing, the interim decision, and all other required documents, upon each of the tenants within three (3) days of receiving this decision in accordance with section 89 of the Act.**

#### Preliminary Issue

Rule 4 of the *Rules of Procedure* allows for the amendment of an application at the hearing in circumstances that can reasonably be anticipated; if sought at the hearing, such an amendment need not be submitted or served. Section 64(3) allows the director to amend an application or permit an application to be amended.

In consideration of the evidence filed and the testimony of the landlord, further to Rule 4, I find the tenants could reasonably have anticipated that the landlord would claim a monetary order for outstanding rent which accrued following the service of the Ten-Day Notice. I accordingly allow the landlord to amend the application as sought.

#### Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?

Is the landlord entitled to monetary compensation for unpaid rent pursuant to section 67 of the *Act*?

Is the landlord entitled to recover the filing fee for this application pursuant to section 72 of the *Act*?

#### Background and Evidence

The landlord submitted the following relevant evidentiary material:

- A copy of a residential tenancy agreement which was signed by the landlord and the tenants, indicating a monthly rent of \$895.00, due on the first day of each month for a tenancy commencing on June 1, 2015;
- A copy of three Notice of Rent Increase forms showing the rent being increased from \$895.00 to the monthly rent amount of \$977.00;

- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) dated November 6, 2019, for \$1,906.00 in unpaid rent. The 10 Day Notice provides that the tenant had five days from the date of service to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the stated effective vacancy date of November 16, 2019;
- A copy of two Proof of Service Notice to End Tenancy forms which indicates that the 10 Day Notice was posted to the tenants' door; and
- A Direct Request Worksheet showing the rent owing and paid during the relevant portion of this tenancy.

The landlord gave the following undisputed testimony. She is the person who drafted the Proof of Service Notice to End Tenancy forms produced as evidence for the direct request proceedings. She made an error when drafting the forms and indicated the witness observed the Notice being served on November 4<sup>th</sup> instead of November 7<sup>th</sup>. The person serving the documents and the witness were presented with the forms for signature and signed it without noticing the error.

The landlord called a witness GL to the hearing, who gave the following affirmed testimony. He served the tenants with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated November 6, 2019 by posting a copy to the tenants' door on November 7, 2019.

The landlord testified the tenants have not filed for dispute resolution or paid the outstanding arrears in rent within five days of being served with the Notice. The landlord testified that since being served with the Notice, payments towards rent have been made, although more arrears were accruing. On December 27, \$975.00 was received and a receipt noting '*payment on account*' was made. On February 10, the tenants paid \$1,500.00 and on the receipt, the landlord noted the money was for '*use and occupancy only*'. The tenants paid a further \$1,000.00 on February 21, and the receipt for this payment also noted '*for use and occupancy only*'.

During the hearing, the landlord acknowledged that the notices of rent increase indicated the landlord increased the rent three times, two of which were in contravention of the *Act*. The first rent increase, dated February 22, 2018 raised the rent from \$895.00 to \$930.00 commencing June 1, 2018. The second rent increase, dated September 27, 2018 seeks a further rent increase from \$930.00 to \$953.00

commencing January 1, 2019, only six months after the first rent increase. The last increase was not dated and is therefore invalid.

### Analysis

I find the tenants were deemed served with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on November 10, 2019, three days after being posted to the tenants' door in accordance with sections 89 and 90 of the *Act*.

Sections 46(4) and (5) of the *Act* state:

- (4) Within 5 days after receiving a notice under this section, the tenant may
  - a. pay the overdue rent, in which case the notice has no effect, or
  - b. dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
  - a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
  - b) must vacate the rental unit to which the notice relates by that date.

Based on the landlord's evidence and the Notice before me, I find that the tenants were served with an effective Notice and did not pay the overdue rent or file an application to dispute it within the 5 days. In accordance with section 46(5) of the *Act*, the tenants' failure to take either of these actions within five days ended the tenancy on the effective date of the Notice. In this case, this required the tenant to vacate the premises by November 16<sup>th</sup>, automatically changed to November 20, 2020, 10 days after the Notice was deemed served in accordance with section 53 of the *Act*. As the tenant has not yet vacated the premises, I find that the landlord is entitled to an Order of Possession effective 2 days after service.

Section 42(1) of the *Act* states

A landlord must not impose a rent increase for at **least 12 months after** whichever of the following applies:

- a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;
- b) if the tenant's rent has previously been increased, **the effective date of the last rent increase made in accordance with this *Act***. (emphasis added)

The landlord has provided evidence that there was an increase in rent on June 1, 2019 followed by another rent increase commencing January 1, 2020, six months later. As the second rent increase contravenes section 42(1) of the *Act*, the landlord is not entitled to recover arrears greater than the amount of rent set by the first Notice of rent increase that took effect on June 1, 2019. The landlord is entitled to arrears in rent of \$930.00 per month for the six months from October 2019 to March 2020. [6 x \$930.00 = \$5,580.00].

The landlord has testified the tenants have made payments towards arrears totalling \$3,475.00. In accordance with section 67 of the *Act*, I deduct this amount from the compensation for arrears in rent awarded to the landlord [\$5,580.00 - \$3,475.00 = \$2,105.00]. The landlord is entitled to compensation in the amount of \$2,105.00.

As the landlord's application was successful, the landlord is also entitled to recovery of the \$100.00 filing fee for the cost of this application.

#### Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenants**.

I issue a monetary order in the landlord's favour in the amount of **\$2,205.00**.

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 24, 2020