# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

**Dispute Codes** **MNRL-S, MNDL-S, OPN, FFL**

**Introduction**

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- an order of possession pursuant to section 55;
- a monetary order for unpaid rent & utilities and for damage to the unit in the amount of $5,953.87 pursuant to section 67;
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Both landlords attended the hearing. They were assisted by their son ("**NV**"). Tenant LB attended the hearing on behalf of both tenants. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

**Preliminary Issue – Service**

NV testified, and Tenant LB confirmed, that the landlord served the tenants with the notice of dispute resolution form and supporting evidence package more than 14 days prior to the hearing. The landlords also submitted additional evidence (relating to a flood in the residential property) to the Residential Tenancy Branch on June 10, 2020. NV testified that he sent a text message to the tenants advising him of the contents of this evidence on June 5, 2020. However, he never actually sent them the documents.

Rule of Procedure 3.14 requires that an applicant's evidence be served on the respondent no later than 14 days prior to the hearing. Rule 3.17 gives an arbitrator the discretion to admit documents into evidence if the evidence is new and relevant. The landlord has not made any claim for damages in connection to a flood. The basis on which the landlord seeks an order of possession is not related, in any way, to the flood. As such, this evidence is not relevant, and I decline to admit it into evidence.

**Preliminary Issue – Amendment to Tenants' Names**

Tenant LB testified that her last name was spelled incorrectly on the application. The correct spelling is recorded on the cover of this decision. Tenant LB testified that the landlords wrote the incorrect last name of the other tenant named on the application. LB testified that, while the other tenant is LB's daughter, they do not share a last name. The other tenant's correct last name is recorded on the cover of this decision. I will refer to this tenant as "NC" in the rest of this decision.

I order that the application be amended to the correct spelling of the tenants' names.

**Preliminary Issue – Amendment to Increase Amount Claimed**

At the hearing the landlords sought to further amend the application to include a claim for June 2020 rent which remains outstanding.

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
>
> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
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> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case, the landlords are seeking compensation for unpaid rent that has increased since the application for dispute resolution was made. The increase in the landlords' monetary claim should have been reasonably anticipated by the tenants. Therefore, pursuant to Rule 4.2, I order that the landlords' application be amended to include a claim for June 2020 rent ($2,200).

**Preliminary Issue – Landlords' Claim for Compensation for Damage to the Rental Unit**

The landlords claim $1,100 in compensation for damage to the walls of the rental unit. In support of this amount they submitted some photographs of the damage. They did not submit any documentary evidence in support the amount claimed. They claimed an amount equal to the security deposit. NV testified that, due to the ongoing COVID pandemic, the landlords have not been able to gain access to the rental unit to repair or inspect the damage.

NV stated that this portion of the landlord's claim was brought prematurely. He agreed that it should be dismissed with leave to reapply after the tenancy has ended or the landlords are able to enter the rental unit to inspect the damage and repair it or get an estimate on the cost of the repair.

I dismiss the landlords' claim for compensation for damage to the rental unit, with leave to reapply.

**Issues to be Decided**

Are the landlords entitled to:

1) an order of possession;
2) a monetary order for unpaid rent and utilities of $7,053.87;
3) recover their filing fee; and
4) retain the security deposit in partial satisfaction of the monetary orders made?

**Background and Evidence**

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

Tenant LB and the landlord AV entered into a written, fixed term tenancy agreement starting July 14, 2019 and ending July 31, 2020. Monthly rent is $2,200 plus utilities and is payable on the first of each month. LB paid the landlords a security deposit of $1,100, which the landlords continue to hold.

The rental unit is the upper floor of a two-floor single detached home. At the start of the tenancy both tenants resided in the rental unit.

On January 15, 2020, LB served the landlords with written notice to end tenancy effective February 1, 2020 (the "**Notice**").

At the hearing, there was some confusion as to what happened next. NV and PV initially gave conflicting testimony until PV realized he was confusing tenant LB with her daughter, tenant NC. However, once this was realized, NV and PV's testimony was in accord. They agreed that, after LB served the Notice, the landlords met with the tenants. At this meeting, the parties agreed that NC would take over the fixed-term tenancy agreement from LB, and that the security deposit would be transferred to her as well (to be kept in trust by the landlords for NC). LB would move out of the rental unit and NC's boyfriend ("**JGB**") would move into the rental unit with NC. LB agreed this was correct.

LB moved out of the rental unit shortly thereafter, and JGB moved in. JGB's stay was brief, however. In March 2020, he made an application against the landlords seeking an

order of possession, as NC had changed the locks to the rental unit. The presiding arbitrator dismissed his application and found that he was not a tenant under the Act. The presiding arbitrator made no mention of the Notice or the assignment of the tenancy agreement from LB to NC. Neither LB or NC appeared at the March 2020 hearing, so I am unsure if these facts were before the presiding arbitrator or if the presiding arbitrator did not include them in the decision as she did not find them to be relevant.

NV testified, and LB did not dispute, that NC paid no rent for the months of April, May, and June 2020.

NV testified that the tenants have never paid a Fortis BC bill at any point during the tenancy. NV testified that LB owes $283.56 in unpaid Fortis BC bills from July 2019 to January 2, 2020, and that NC owes $122.13 in unpaid Fortis BC bills for January 3 to February 29, 2020. NV also testified that NC owes approximately $50 in Fortis bills since February, but he did not submit any documents corroborating this.

LB did not dispute that she did not pay any of the Fortis BC bills during the tenancy. However, she testified that she had come to an arrangement with the landlords at the start of the tenancy regarding the payment of utilities.

LB testified that when she moved into the rental unit, the lower unit of the residential property was unoccupied. It remained unoccupied until after LB moved out. The residential property had a single air conditioning system for both units. It was not possible to cool the rental unit only. The air conditioning had to be run for the entire house.

Similarly, the residential property has a forced air heating system (powered by natural gas provided by Fortis BC) which heats the entire house. PV testified that the heating ducts leading into the lower floor are blocked off, but did not provide any evidence of this, or testified when these were blocked off. LB disputed this.

LB testified that shortly after the tenancy started, she reached an arrangement with the landlords whereby she would pay the entire electrical bill for the residential property while the lower unit was unoccupied and that the landlords would pay for the entire natural gas bill during this time (the “**Utilities Agreement**”).

LB testified that, in keeping with the Utilities Agreement, the landlords did not provide her with a single Fortis BC bill during most of her tenancy. She testified that it was not until after she served them with the Notice that the landlords demanded payment for the Fortis BC bills.

The landlords denied that the Utilities Agreement existed. They argued that they were entitled to the full amount of the Fortis BC bills for the entire duration of the tenancy. They did not, however, deny that the air conditioner could not be run so as to cool the

rental unit only, nor did they deny that the tenant paid the full amount of the electrical bill despite only occupying half the residential property. The landlords did not deny that the first time they gave the LB a Fortis BC bill was after she served them with the Notice. The landlord provided no explanation as to why they did not provide the Fortis BC bill to LB on a timely basis.

NV testified that the amount claimed by the landlords for unpaid Fortis BC bills for January 3 to February 28, 2020 represents 50% of the Fortis BC bills, as the lower unit has since been rented. LB did not dispute this amount.

LB testified that the rental unit was in very poor condition throughout the tenancy. She testified that one of the bathrooms has no running water, that the electricity in the house has failed, which caused a significant amount of groceries stored in the freezer to spoil, that since the lower unit was rented out NC has been unable to gain access to the laundry room or garage, and that the floor is rotting in some places. She also testified that the electrical system is a fire hazard, and that she was injured while on the exterior patio of the rental unit (due to a lack of railing) and was hospitalized for a month. She provided no documentary evidence to support any these allegations. She testified that neither she nor NC have made an application for the landlords to repair the rental unit.

**Analysis**

1. Order of Possession

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
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> (a) is not earlier than one month after the date the landlord receives the notice,
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> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
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> (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.

As the tenancy agreement was for a fixed term, LB was not permitted to end it prior to the specified end date (July 31, 2020).

Section 53 of the Act functions to automatically correct any date on a notice that do not comply with the statutory requirements. It changes them to the earliest complying date. So, in this case, section 53 changes the effective date of the Notice from February 1, 2020 to July 31, 2020.

Section 44 does allow a fixed term tenancy to be ended in other ways, however. It states that a tenancy may end if “the landlord and tenant agree in writing to end the tenancy” or if “the tenant vacates or abandons the rental unit”.

Based on the testimony of the parties, I do not find that either of these scenarios applies. Rather, I find that the parties agreed to assign the tenancy agreement from LB to NC. Policy Guideline 19 discussed assignments of tenancy agreements:

> Assignment is the act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.
>
> When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment.

Section 34 of the Act allows for an assignment of a tenancy agreement. Section 34 requires that a landlord consent to the assignment in writing. However, given that PV and NV testified that such an assignment occurred, the existence of the assignment is not in dispute. I do not find that the lack of reducing the consent to writing acts to cancel the assignment.

As the tenancy agreement was assigned to NC, she becomes the tenant. As such, the tenancy agreement is not terminated by LB moving out of the rental unit.

I do not find that the assignment acted to withdraw the Notice, however. Policy Guideline 11 states:

> A landlord or tenant cannot unilaterally withdraw a notice to end tenancy.
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> A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given.
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> A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant
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> […]
>
> Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

> Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.
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> […]
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> Intent may also be established by evidence as to:
> - whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
> - whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
> - the conduct of the parties.

The conduct of the parties does not suggest that the landlord agreed to allow LB to withdraw the Notice. Rather, I find that by consenting to the assignment of the tenancy agreement, the landlords and LB acknowledge that the tenancy cannot be ended until the end of the fixed term and agree that, rather than the rental unit sitting vacant after LB moves out, and her be liable to continue paying rent (subject to the landlords locating new tenants), the landlords agreed that NC could take over LB's obligations until the end of the fixed term. I have no evidence before me which suggests that the parties intended the tenancy to continue past July 31, 2020. As such, I do not find any basis to infer that the landlords impliedly waived their right to rely on the Notice.

In summary, I find that:

1) the Notice does not have the effect of ending the tenancy on February 1, 2020, rather its effective end date is automatically corrected to July 31, 2020;
2) the tenancy agreement was assigned to NC;
3) the tenancy is not terminated by virtue of LB moving out of the rental unit; and
4) the landlords did not waive their right to rely on the Notice as a basis for the tenancy being ended.

Accordingly, the landlords are entitled to an order of possession effect July 31, 2020 at 1:00 pm.

2. Rental Arrears

The parties agreed that NC did not pay rent for April, May, or June 2020 in the amount of $6,600.

Section 26(1) 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.

As such, the allegations of LB that the rental unit is in a substantial state of disrepair which has caused the tenants injury, damage, or monetary loss is not a valid reason for NC to have withheld monthly rent payments. If the tenants believe they are entitled to compensation as a result of the landlords' breach of the Act, they may make an application to the Residential Tenancy Branch seeking the appropriate relief.

Accordingly, I order NC to pay the landlords $6,600, representing payment of rental arrears for April, May, and June 2020.

3. Utilities

The tenancy agreement states that the utilities are not included in monthly rent. I understand this to mean utilities for the rental unit only, and not the entire residential property. I accept LB's undisputed evidence that:

1) she paid the electrical bill for the entire residential property during the time that the lower unit was unoccupied;
2) the air conditioning system could not be restricted to cool the rental unit only; and
3) the landlords never gave her Fortis BC bill until after she served them the Notice.

The parties disagree as to the existence of the Utilities Agreement. Upon considering their testimony, including LB's undisputed evidence, I find that it is more likely than not the Utilities Agreement existed. The landlords offered no reasonable explanation as to why they failed to deliver any Fortis BC bill to LB prior to her serving the Notice, or why she was paying for the air conditioning system to cool the entire residential property, rather than just the rental unit. I find the most likely explanation to be that LB and the landlords agreed for LB to pay the entire electrical bill while the landlords would pay the entire Fortis BC bill during the time the lower unit was unoccupied.

While I do not have an exact date, I accept NV's evidence that the landlords rented out the lower unit in January 2020. The Utilities Agreement stopped applying once this happened. NC (as assignee of the tenancy agreement) is required to pay 50% of the electrical bill and 50% of the Fortis BC bill for the residential property now that the lower unit is rented out.

I accept the landlords' undisputed evidence that NC has not paid any portion of the Fortis BC bill since the lower unit was rented out. I accept the landlords' undisputed calculation that 50% of the Fortis BC bill from January 3 to February 29, 2020 is $122.13. The landlords did not provide any documentary evidence supporting additional utilities charges that NC failed to pay following February 29, 2020. As such, I decline to order that she pay any amount with regard to that portion of the landlords' claim.

I find that NC must pay the landlord $122.13 as compensation for her portion (50%) of unpaid Fortis BC bills for the residential property between January 3 and February 29, 2020.

4. Filing Fee and Security Deposit

As LB assigned the tenancy agreement to NC, and as all the monetary orders made arise out of the period of time following the assignment, and as LB is no longer a tenant, I dismiss the landlords' application against LB.

Pursuant to section 72(1) of the Act, as the landlords has been successful in the application against NC, they may recover their filing fee from NC.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

## Conclusion

Pursuant to sections 67 and 72 of the Act, I order that NC pay the landlord $5,722.13, representing the following:

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|---|---|
| Rental arrears | $6,600.00 |
| Unpaid utilities | $122.13 |
| Filing fee | $100.00 |
| Security deposit | **-$1,100.00** |
| **Total** | **$5,722.13** |

Pursuant to section 55 of the Act, I order that NC deliver vacant possession of the rental unit to the landlords by July 31, 2020 at 1:00 pm.

*Residential Tenancy (COVID-19) Order*, MO 73/2020 (*Emergency Program Act*) made March 30, 2020 (the "**Emergency Order**") permits an arbitrator to issue an order of possession if the notice to end tenancy the order of possession is based upon was issued prior to March 30, 2020 (as per section 3(2) of the Emergency Order).

However, per section 4(3) of the Emergency Order, a landlord may not file an order of possession at the Supreme Court of BC unless it was granted pursuant to sections 56 (early end to tenancy) or 56.1 of the Act (tenancy frustrated).

The order of possession granted above is not issued pursuant to either section 56 or 56.1 of the Act. As such, it may not be filed in the Supreme Court of BC until the state of emergency declared March 18, 2020 ends (as per section 1 of the Emergency Order).

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: June 11, 2020

Residential Tenancy Branch