



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

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

### **Introduction**

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

- an order of possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent in the amount of \$3,276 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

This matter was brought by way of an *ex parte*, direct request application. The adjudicator presiding over that application issued an interim decision and determined that a participatory hearing was necessary to adjudicate the matter and adjourned the application to this hearing.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was assisted by his son ("**DJ**"). The tenant called her son as a witness ("**DA**").

The landlord testified, and the tenant confirmed, that the landlord served the tenant with the interim decision, notice of dispute resolution package, and supporting evidence package.

The tenant provided three pages of bank records to the landlord. She submitted three pages of e-transfer receipts showing rent paid to the RTB. The documents provided to the RTB show transfers going back to October 2018. The documents provided to the landlord show transfers going back to January 2019. With the consent of the landlord, I accept the records provided to the RTB into evidence and will consider the payments made.

### **Preliminary Issue – Conduct of Parties**

At the outset of the hearing, I set out expectations for both parties regarding conduct, which included not yelling and not interrupting. For the most part, the parties complied with this, but as the hearing progressed, the parties strayed from these guidelines and I had to provide verbal cautions to them on two occasions. On the second occasion I muted the parties and explained why I had done so. Following the muting, the parties

complied with the conduct expectations and the hearing continued in a respectful manner.

### **Issues to be Decided**

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for \$3,176; and
- 3) recover the filing fee?

### **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.

The parties entered into a written tenancy agreement starting April 1, 2016. Monthly rent was \$1,200 at the start of the tenancy but was raised to \$1,248 on May 1, 2018. Rent is due on the first of each month. The tenant paid the landlord a security deposit of \$600. The landlord still retains this deposit.

The parties each provided evidence that the tenant has a long history of paying rent on dates after it is due. The landlord obtained an order of possession against the tenant on June 22, 2017, but, to date, has not enforced it. He takes the position that it is still enforceable (I make no finding on this point). He did not say why he has applied for another order of possession rather than enforce the one he currently has.

In any event, the landlord issued a 10 Day Notice to End Tenancy for Non-Payment of Rent (the "**Notice**") on March 20, 2020. He served it by registered mail to the tenant and provided a copy of the Canada Post Tracking Number, reproduced on the cover of this decision. The package tracking shows that the Notice was delivered on March 24, 2020. The tenant denied receiving the Notice.

The Notice states that the tenant owes \$3,176 in arrears as of March 1, 2020.

The tenant did not dispute the Notice.

The tenant testified that the amount of arrears listed on the Notice was incorrect. In support of this, she provides e-transfer receipts of rent payment from October 2018 until March 1, 2020.

In his materials, the landlord provided receipts for rent received from September 2019 until October 22, 2020. Where the parties' materials overlapped, they were in agreement for the most part, with the exception being the date some of the payments were made being off by a day or two. Nothing turns on this discrepancy.

The landlord was unable to tell me how much, if any arrears were owing as of October 1, 2018. The landlord testified that he accepted the figures contained on the tenant's e-transfer receipts as accurate.

I have reviewed the materials provided by the parties, and have complied the information contained therein into the chart attached to this decision at **Appendix A**. When creating the chart, I have determined that, as of September 30, 2018, the tenant did not have any rental arrears (given that the landlord was unable to provide me with documentary or oral evidence that this was the case). As of March 1, 2020, the tenant was \$2,088 in rental arrears.

The landlord testified that the tenant continued to be sporadic in her rent payments following the issuance of the Notice. He provided receipts of the rent payments made by the tenant from April 1, 2020 to October 22, 2020. I have complied these receipts into a chart attached to the is decision as **Appendix B**. A monetary claim for these arrears does not form part of the present claim, but I list them as the payments made by the tenant may be relevant to the monetary order I make in this decision.

Between April 1 and August 1, 2020 (the "specified period" as defined in *COVID-19 (No. 2) Regulation* during which a notice to end tenancy for non-payment of rent could not be issued), the tenant paid the landlord \$5,024. The rent owing for this period was \$6,240.

I note that Appendix B shows that for the period between September 1, 2020 and October 31, 2020, the tenant has paid \$1,000 more than the rent owing in this period. It appears that she has prepaid some of November 2020 rent. However, I have no documentary evidence relating to the payment of November or December 2020 rent. As this rent is not the subject of this application, I will not address the issue further

On May 5, 2020, the tenant made her first monetary payment to the landlord since February 21, 2020. She paid the landlord's son (who accepted it on behalf of the landlord) \$2,000. She testified that this payment was meant to be applied to the arrears due by March 1, 2020. The landlord testified that he applied this payment, and subsequent payments made between April 1 and August 1, 2020, to rent that was owing during this period. He issued a repayment plan for the arrears of rent owing during this time (the "affected rent" as defined in *COVID-19 (No. 2) Regulation*) on this basis.

The receipt issued for this payment contains the annotation "rent arrears for [rental unit] still owing \$3,672. For use and occupancy only." It is silent as to whether this payment was to be applied to the amount owing as of March 1, 2020, or the April and May arrears.

The tenant argued that I should apply the May 5, 2020 payment to the arrears owing as of March 1, 2020, and should therefore only make a monetary order for \$88 of unpaid rent.

The landlord argued that I should apply the May 5, 2020 payment to the arrears incurred during the “specified time” and make a monetary order for the full amount owing as of March 1, 2020.

## **Analysis**

### **1. Order of Possession**

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

#### **Landlord's notice: non-payment of rent**

- (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.

If find that, despite the tenant’s denial that she received it, the Notice is deemed served on the tenant on March 25, 2020, five days after the landlord mailed it, as the tracking information provided by the landlord show that it was delivered.

The tenant did not pay the rental arrears or dispute the Notice within five days of receiving the Notice, or at all.

However, section 52 of the Act states:

#### **Form and content of notice to end tenancy**

- 52** In order to be effective, a notice to end a tenancy must be in writing and must
- [...]
  - (e) when given by a landlord, be in the approved form.

Implicit in this requirement to use the approved form is the requirement that the form be completed correctly. Based on the documentary evidence provided to me by the parties, I find that the Notice was not completed correctly, as it overstated the rental arrears owed by the tenant by more than \$1,000. As such, I find that the Notice is void and of no force or effect. I decline to grant the order of possession sought. The tenancy shall continue.

### **2. Monetary Order**

As of March 1, 2020, the tenant owed the landlord \$2,088. During the “specified period” (April 1 to August 1, 2020) she paid the landlord \$1,216 less than the amount of rent owing.

The COVID-19 pandemic and the measures put in place by the Provincial government are unprecedented. The *COVID-19 (No 2) Regulation* created a distinction between types of rental arrears with there being arrears of “affected rent” (rent payable during the “specified time”) and arrears of “non-affected rent” (rent payable during any time other than the “specified time”). To my knowledge, such a distinction in categories of rent is unique to the COVID-19 response. As such, there is no guidance provided by RTB Policy Guidelines, the Act, or the Regulations as to how to handle payments made during the “specified time” as they related to arrears incurred in the “non-specified time”.

Conceptually, I find that it makes the most sense, absent conclusive proof of the parties’ intention to the contrary, to silo off “specified” and “non-specified” times whenever possible. To that end, I find that payments made during the “specified time” must be applied to rent payable during the specified time (that is, applied to “affected rent”).

There is no conclusive evidence of whether the May 5, 2020 payment was to be attributed to the arrears due as of March 1, 2020, or to arrears owed during the “specified time”. The tenant has testified to one position, the landlord to the other. The only piece of documentary evidence is neutral on the question.

As there is no conclusive evidence one way of the other, I find it appropriate to attribute all payments made during the “specified time” to rent payable during that time.

I note that, at the time the tenant made a payment of \$1,000 on May 22, 2020, the amount paid during the specified time (\$3,000) totaled more than the amount of rent payable during the “specified time” (\$2,495). However, as can be seen at Appendix “A”, the tenant often paid portions of her rent in advance of it coming due. I find that any overpayment of rent on May 22, 2020 should be applied to the rent due on June 1, 2020.

As such, I order that the tenant pay the landlord \$2,088, representing repayment of the arrears owed as of March 1, 2020. I have attached a monetary order to this decision in this amount. I note that, if the tenant has overpaid non-specified rent during the time from September 1, 2020 to the date of this decision the amount that has been should be credited against this monetary order.

For additional clarity, *if* (I explicitly make no finding that this is the case), after October 22, 2020, the tenant has paid the full amount of November and December 2020 rent (\$2,496), then the tenant would be entitled to credit the overpayment of rent (\$1,000, per Appendix “B”) towards the amount payable pursuant to the monetary order.

I also note that the monetary order made in this decision relates only the arrears owing as of March 1, 2020. Nothing in this decision prevents the landlord from bringing an application in the future for rent owing after March 1, 2020.

The tenant has been partially successful in this application. As such, I decline to order that she pay the landlord's filing fee.

### **Conclusion**

Pursuant to section 67 of the Act, I order that the tenant pay the landlord \$2,088, representing the rental arrears owed as of March 1, 2020.

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 18, 2020

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Residential Tenancy Branch