



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      CNR  
OPU-DR-PP, OPUM-DR-FFL

### **Introduction**

This hearing dealt with an Application for Dispute Resolution (the Application) filed by the Tenants under the Residential Tenancy Act (the Act), seeking:

- Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice).

I note that section 55 of the Act requires that when a tenant submits an Application 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 Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with section 52 of the Act.

This hearing also dealt with a Cross-Application for Dispute Resolution by direct request (the Cross-Application) that was filed by the Landlord under the Act and set as a participatory hearing, seeking:

- An Order of Possession based on the 10 Day Notice;
- A Monetary Order for outstanding rent and/or utilities; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant C.C. and two agents for the Landlord J.D. and L.Z. (the Agents), all of whom provided affirmed testimony. As the parties acknowledged receipt of each other's Applications and documentary evidence, and the Notice of Hearing, the hearing proceeded as scheduled and the documentary evidence before me from both parties was accepted for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), I refer only to the relevant and determinative facts, evidence and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided by them in their respective Applications.

### Preliminary Matters

#### Preliminary Matter #1

At the hearing the Agents stated that the 10 Day Notice had been placed in the Tenants' mailbox on October 5, 2020, and a witnessed and signed proof of service document was submitted in support of this testimony. As the Tenants acknowledged receiving the 10 Day Notice from their mailbox on October 6, 2020, and did not file their Application with the Branch until October 13, 2020, I advised the Tenant that the Application seeking cancellation of the 10 Day Notice had been filed late, outside of the time limit permitted under section 46(4) of the Act. The Tenant stated at the hearing that the Branch staff had advised them that October 13, 2020, was the last day to apply and I requested that the Tenant submit verification of this for my review no later than 11:59 P.M. the following day, January 8, 2020, so that I could assess whether or not the grant the Tenants an extension of the statutory time limit to dispute the 10 Day Notice.

Upon further review, I realized that the 5<sup>th</sup> day after receipt of the 10 Day Notice, October 11, 2020, was a weekend, and that the following business day, October 12, 2020, was a statutory holiday for Thanksgiving. As the office was closed on both October 11, 2020, and October 12, 2020, the last day for disputing the 10 Day Notice was therefore automatically moved to October 13, 2020, pursuant to the Interpretation Act and the Rules of Procedure. As the Tenants filed their Application seeking cancellation of the 10 Day Notice on October 13, 2020, I find that it was filed on time and that no additional documentation was required from the Tenants.

#### Preliminary Matter #2

On November 9, 2020, an Amendment to the Application for Dispute Resolution (the Amendment) was filed by the Landlords, seeking to increase the Monetary Claim

amount from \$21,798.30 to \$28,229.24. A new Monetary Order Worksheet was submitted as follows:

- \$9,600.00 in outstanding unaffected rent (October, November and December 2020);
- \$16,000.00 in affected rent (April – August 2020);
- \$2,529.24.00 in outstanding municipal utilities; and
- \$100.00 for recovery of the filing fee.

The Tenant did not deny receipt of the above noted amendment and Monetary Order Worksheet and as a result, the hearing proceeded based on the increased Monetary Claim amount as set out above.

### Preliminary Matter #3

At the hearing the Landlord sought to include recovery of outstanding January 2021 rent as part of their Application. Rule 4.2 of the Rules of Procedure states that 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.

The Application was therefore amended pursuant to rule 4.2 of the Rules of Procedure to include \$3,200.00 in outstanding rent for January 2021, bringing the total value of the Landlord's Monetary Claim up to \$31,429.24.00

Although the Landlord indicated in their Application that they were also seeking \$75.00 in NSF fees, this claim is not set out in the original Monetary Order Worksheet or the Monetary Order Worksheet submitted with the above noted Amendment. During the hearing none of the parties provided any testimony in relation to this claim amount. As a result, I have not considered this amount as part of the Landlord's claim. The Landlord remains at liberty to reapply for recovery of this amount from the Tenants in a subsequent Application for Dispute Resolution, should they wish to do so.

### Issue(s) to be Decided

Are the Tenants entitled to cancellation of the 10 Day Notice?

If the Tenants' Application seeking cancellation of the 10 Day Notice is dismissed or the 10 Day Notice is upheld, is the Landlord entitled to an Order of Possession pursuant to section 55 of the Act?

Is the Landlord entitled to a Monetary Order for unpaid rent and/or utilities?

Is the Landlord entitled to recovery of the \$100.00 filing fee?

### Background and Evidence

The tenancy agreement in the documentary evidence before me, signed by the parties on November 16, 2019, states that the one year fixed term of the tenancy commenced on December 1, 2019, and that the tenancy was to continue on a periodic (month to month) basis after the end of the fixed term on November 30, 2020. The tenancy agreement states that rent in the amount of \$3,200.00 is due on the first day of each month and that only free laundry, parking for one vehicle and a refrigerator, a dishwasher, and a stove and oven are included in the cost of rent. The tenancy agreement also states that the Tenants will be responsible for the municipal water bill for the rental unit. Finally, the tenancy agreement states that both a security deposit and a pet damage deposit were to be paid, in the amount of \$1,600.00 each.

At the hearing the parties agreed that these are the correct terms for the tenancy agreement, and that both the security deposit and the pet damage deposit were paid by the Tenants in the amount of \$1,600.00 each.

The Agents stated that a repayment agreement dated August 29, 2020, that met the requirements of the COVID-19 Regulation, was given to the Tenants on August 29, 2020, by placing a copy in the mailbox for the rental unit. The Agent stated that they received a text that day from the Tenants acknowledging receipt, however, a copy of this text was not provided for my review and consideration. The Tenant acknowledged receipt of the above noted repayment plan from their mailbox but denied receiving it the same date. Instead the Tenant stated that they believe it was received the following day or the day after (either August 30, 2020, or August 31, 2020).

The repayment plan dated August 29, 2020, in the documentary evidence before me states that \$3,200.00 in outstanding affected rent is owed each month for April, May, June, July and August of 2020, totalling \$16,000.00. The repayment plan sets out 10 equal payment plan amounts of \$1,600.00 each, and states that they are due on the first day of each month, beginning October 1, 2020, and ending July 1, 2020.

The Agents stated that when the Tenants failed to pay the \$3,200.00 in rent and the first \$1,600.00 repayment plan installment amount as required on October 1, 2020, they

served the Tenants with a 10 Day Notice for both amounts on October 5, 2020, by placing a copy in the mailbox for the rental unit. In the hearing the Tenant acknowledged receipt the following day, October 6, 2020.

The 10 Day Notice in the documentary evidence before me signed and dated October 5, 2020, has an effective date of October 10, 2020, and states that as of October 1, 2020, the Tenants owed \$4,800.00; \$3,200.00 in rent for October and \$1,600.00 for a repayment plan installment.

Everyone agreed at the hearing that the Landlord had been provided with post-dated cheques for the duration of the fixed term of the tenancy agreement by the Tenants, including a cheque in the amount of \$3,200 for October 2020. They also agreed that numerous cheques written by the Tenants to the Landlords had bounced or been cancelled by the Tenants due to insufficient funds on the part of the Tenants. Despite this history of cancelled and NSF cheques, the Tenant argued that there were sufficient funds on October 1, 2020, for the rent cheque to be cashed and that despite repeated requests that the Landlord or their agents cash the cheque, no attempts were made the Landlord or their Agents to do so.

The Agents acknowledged making no attempts to cash the October 2020 rent cheque or a subsequent cheque for November 2020, but argued that they had reasonable grounds for refusing to do so as the Landlord had been warned about the high number of NSF cheques cashed in the name of the Tenants, which was causing hardship for them at the bank, and because the Tenants had explicitly directed them by text message not to cash them as they did not have sufficient funds for them to clear. Although the texts allegedly received from the Tenants were read aloud to me by one of the Agents during the hearing, copies of the texts were not provided for my review or consideration.

The Tenant denied sending any such text messages and reiterated that they had requested numerous times that the Landlord or their agents cash the cheques for both October 2020 and November 2020, as they had sufficient funds and overdraft protection for them to be cashed.

All parties agreed that no attempts were made by the Tenants to pay October or November 2020 rent in any other manner and that no attempts had been made by the Tenants to pay rent for December 2020 or January 2021, as the Landlord did not already have post-dated cheques in their possession for either December 2020 or January 2021.

The Tenant acknowledged that the \$1,600.00 repayment plan installment amount set out in the above noted repayment plan was not paid to the Landlord on October 1, 2020, or on any date thereafter, as they did not agree with the amount. The Tenant stated that they instead proposed a counteroffer to the Landlord of \$400.00 per month, which the Landlord did not accept.

The tenancy agreement states that the Tenants are responsible for the municipal utility bills and at the hearing the Landlord sought recovery of \$2,529.24 in outstanding municipal utilities. The Landlord submitted copies of the utility bills and a One Month Notice to End Tenancy indicating that there were outstanding utilities owed in support of this claim. Although the Tenant did not deny that they are responsible to pay the municipal utility bills, the Tenant stated that prior to receipt of the Landlord's documentary evidence in relation to this hearing, they had not received copies of the utility bills from the Landlord, which is why they had not paid them. The Tenant also argued that two months worth of utilities owed by previous occupants of the property are being claimed by the Landlord in their Application, and that they should not be responsible for this amount.

Based on the above the Landlord sought an Order of Possession for the rental unit on the basis of the 10 Day Notice as soon as possible, and monetary compensation in the amount of \$31,429.24.00: \$28,800.00 for recovery of unpaid rent (\$16,000.00 in affected rent for April - August, 2020, and \$12,800.00 in unaffected rent for October 2020 – January 2021), \$2,529.24 in outstanding utilities, and \$100.00 for recovery of the filing fee.

In contrast the Tenants sought cancellation of the 10 Day Notice on the basis that the Tenants do not agree with the repayment terms set out by the Landlord in the repayment plan dated August 29, 2020, and that October 2020 rent remains unpaid only because the Landlord has refused to cash the October rent cheque, which they had in their possession before October 1, 2020. The Tenants also disputed that the full amounts of rent and utilities sought by the Landlord are owed. Although the Tenant acknowledged at the hearing that the \$16,000.00 in affected rent is owed, they argued that it should not be due in full to the Landlord at this time, as the 10 Day Notice should be cancelled and therefore the tenancy should continue, in which case, repayment plan requirements apply. They also argued that no rent is due for October or November of 2020 as the Landlord has rent cheques in their possession for those months, which they may simply cash. However, the Tenants did acknowledge that no rent has been paid for

either December of 2020 or January of 2021, and that no utility payment has been made to the Landlord.

Both parties submitted significant documentary evidence in support of their Applications, including but not limited to, written submissions, copies of bank records and statements, copies of paystubs and work records, copies of rent cheques, copies of cancelled and bounced cheques, copies of utility bills, two repayment plans (one dated August 24, 2020, and one dated August 29, 2020), the 10 Day Notice, a copy of a One Month Notice, copies of registered mail receipts, and the tenancy agreement.

### Analysis

Section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent. The tenancy agreement in the documentary evidence before me states that rent in the amount of \$3,200.00 is due on the first day of each month and at the hearing the parties agreed that this is correct. As a result, I find that rent in the amount of \$3,200.00 is due on the first day of each month under the tenancy agreement.

Based on the undisputed documentary evidence and affirmed testimony before me from the parties, I am satisfied that the Tenants were served with the 10 Day Notice on October 6, 2020, stating that \$3,200.00 in outstanding rent for October 2020 a \$1,600.00 repayment plan installment amount were due and outstanding as of October 1, 2020.

The parties were in agreement that at the time rent was due for October, 2020, the Landlord or the Landlord's agents had in their possession a cheque from the Tenants for the full amount of rent owed for October 2020. Although the Agents stated that they had been advised by the Tenants not to cash the cheque as there were not sufficient funds in the account for the cheque to clear, the Tenant denied this in the hearing stating that they had repeatedly requested that the cheque be cashed. Although the Landlord's Agents argued that they had another basis for failing to cash the cheques, a previous history of bounced cheques during the affected rent period, I disagree. The Tenants stated during the hearing that they had communicated all along with the Landlord and the Landlord's Agents regarding their financial situation during the affected period, and that despite any previous bounced or cancelled cheques, there

were sufficient funds available or a sufficient amount of overdraft protection available at the time October rent was due for the October rent cheque to be cashed.

Based on the above, and as the Landlord or their agents did not submit any documentary evidence which satisfied me on a balance of probabilities that they were explicitly directed by the Tenants not to cash the October 2020 rent cheque, I find that the Landlord did not have grounds to issue the One Month Notice on the basis that rent for October 2020 was not paid as required, as by their own admission, the Landlord or their agents had a cheque from the Tenants for the full amount of October rent which they have not yet attempted to cash.

Having made this finding, I will now turn my mind to the matter of the repayment plan and whether the Landlord had cause to serve the 10 Day Notice due to a failure on the part of the Tenants to pay a \$1,600.00 repayment plan installment amount on October 1, 2020.

Policy Guideline #52 states that if a tenant fails to pay one or more installments as required by a valid repayment plan or valid prior agreement, the landlord may end the tenancy by giving the tenant a 10 Day Notice to End Tenancy for Unpaid Rent.

Section 4(1) and 4(2) of the COVID-19 Tenancy Regulation sets out the requirement for valid repayment plans as follows

4(1) The following are terms of each repayment plan:

- (a) the repayment period starts on the date the repayment plan is given by the landlord to the tenant and ends on July 10, 2021;
- (b) the payment of the overdue rent must be in equal instalments;
- (c) each instalment must be paid on the same date that rent is due under the tenancy agreement;
- (d) the date the first instalment must be paid must be at least 30 days after the date the repayment plan is given by the landlord to the tenant.

4(2) A repayment plan must be in writing and include all of the following:

- (a) the date the repayment period starts as determined under subsection (1) (a);
- (b) the total amount of the affected rent that is overdue;
- (c) the date on which each instalment must be paid;
- (d) the amount that must be paid in each instalment.

At the hearing the Landlord stated that they gave the repayment plan dated August 29, 2020, to the Tenants by placing it in the mailbox of the rental unit on August 29, 2020, and at the hearing the Tenant acknowledged receipt the following day or the day after



(either August 30, 2020, or August 31, 2020). Although the method of service used by the Landlord to give the repayment plan does not comply with section 89(1) of the Act, as the Tenant acknowledged receipt the following day or the day after, I therefore find that it was sufficiently given on August 29, 2020, for the purposes of the Act and the COVID-19 Tenancy Regulation pursuant to sections 71(2)(b) and 71(2)(c) of the Act.

Based on the above, I find that the Tenants were required to pay \$1,600.00 to the Landlord on or before October 1, 2020, in compliance with the repayment plan. As the Tenants acknowledged in the hearing that they did not pay that amount, I find that the Landlord had cause pursuant to section 46 of the Act to issue the 10 Day Notice for this purpose. As the Tenant acknowledged at the hearing that no repayment plan payments have been made to the Landlord since the issuance of the repayment plan dated August 29, 2020, I am satisfied that the Tenants did not pay the required \$1,600.00 within 5 days after they received the 10 day Notice on October 6, 2020. As a result, I dismiss the Tenant's Application seeking cancellation of the 10 day Notice without leave to reapply. As the 10 day Notice complies with section 52 of the Act, and the corrected effective date of the 10 Day Notice, October 16, 2020, has passed, I find that the Landlord is therefore entitled to an Order of Possession for the rental unit effective two days after service of the Order of Possession, pursuant to sections 46(5) and 55 of the Act.

Having addressed the matter of validity of the 10 Day Notice and possession of the rental unit, I will now turn to the Landlord's claim for unpaid rent and utilities. At the hearing the Tenant acknowledged that they owed the full \$16,000.00 of affected rent for April 2020 – August 2020, shown on the repayment plan. They also acknowledged that no rent has been paid for October, November or December of 2020, or January of 2021. As a result, I am satisfied that the Tenants owe \$28,800.00 in outstanding rent: \$16,000.00 of affected rent for April 2020 – August 2020, and \$12,800.00 in unaffected rent for October 2020 – January 2021. As I have ended the tenancy as a result of the 10 Day Notice as set out above, I find that all outstanding rent is immediately due and payable to the Landlord by the Tenants, including the \$16,000.00 in affected rent shown on the repayment plan.

Although the parties agreed that the Tenants are responsible for paying the municipal utility bills for the rental unit during the tenancy, and the Landlord sought \$2,529.24 in outstanding utilities, the Tenants denied receipt of these utility bills and a proper demand letter for payment of this amount. As the Landlord did not provide documentary or other evidence that satisfies me that the Tenants were properly provided with copies of these utility bills and a proper demand to pay, I therefore find this position of the

Landlord's Application premature and I therefore dismiss it with leave to reapply. The Landlord must serve the Tenants with a copy of the utility bill(s) and a demand letter for payment of them, if they wish to consider it as unpaid rent or to seek recovery of these amounts from the Tenants.

As the Landlord was successful in the majority of their Application, I grant them recovery of the \$100.00 filing fee pursuant to section 72(1) of the Act. Pursuant to section 72(2)(b) of the Act, I authorize the Landlord to withhold the \$1,600.00 security deposit and the \$1,600.00 pet damage deposit in partial recovery of the above owed amounts.

Pursuant to section 67 of the Act, I therefore grant the Landlord a Monetary Order in the amount of \$25,700.00; \$28,800.00 in outstanding rent, plus \$100.00 for recovery of the filing fee, less the \$3,200.00 in deposits withheld. Despite this Monetary Order, the parties agreed at the hearing that the Landlord or their agents held, at the time of the hearing, rent cheques for October 2020, and November 2020, in the amount of \$3,200.00 each, neither of which had been cashed. If these cheques have since been cashed and have cleared, the Landlord remains entitled to serve the above noted Monetary Order; However, only the balance remaining owed after the deduction of any rent payments made after the date and time of the hearing, including but not limited to cashing the above noted cheques, will be enforceable against the Tenants.

### Conclusion

The Landlord's claim for \$2,529.24 in outstanding utilities is dismissed with leave to reapply.

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective **two (2) days after service of this Order** on the Tenants. The Landlord is provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$25,700.00**. 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 in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: February 2, 2021

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Residential Tenancy Branch