



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR-DR, OPRM-DR, FFL

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on May 18, 2021 (the “Application”). The Landlord applied as follows:

- For an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated April 02, 2021 (the “Notice”)
- To recover unpaid rent
- To recover the filing fee

The Agents for the Landlord appeared at the hearing. The Tenant appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Tenant confirmed receipt of the hearing package and Landlord’s evidence.

J.D. testified that the Landlord did not receive evidence from the Tenant.

The Tenant testified that their evidence was served on the Landlord and pointed to documentary evidence of service submitted including a photo of the package with Tracking Number 1 on it. J.D. confirmed that the address on the package is the Landlord’s address. I looked Tracking Number 1 up on the Canada Post website which shows the package was sent June 25, 2021, a notice card was left June 30, 2021 and

the package is available for pick-up. J.D. testified that the Landlord did not receive a notice card.

I was satisfied based on the testimony of the Tenant, documentary evidence of service and Canada Post website information that the Landlord was served with the Tenant's evidence in accordance with section 88(c) of the *Residential Tenancy Act* (the "Act"). I was satisfied based on the Canada Post website information that a notice card was left in relation to the package as I found this evidence reliable. I found the Landlord was deemed to have received the Tenant's evidence June 30, 2021 pursuant to section 90(a) of the *Act*. I found the Tenant complied with rule 3.15 of the Rules in relation to the timing of service.

I note that the Landlord can rebut the deeming provision; however, the Landlord would need to provide compelling evidence disputing the evidence of service and the Canada Post website information. I did not find testimony alone that the Landlord did not receive a notice card sufficient to call into question the Canada Post website information. I did not find that the Landlord had provided sufficient evidence to rebut the deeming provision.

Given the above, I told the parties I would admit the Tenant's evidence.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the Notice?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to recover the filing fee?

### Background and Evidence

A written tenancy agreement was submitted as evidence. The tenancy is a month-to-month tenancy. Rent is \$680.00 per month due on the 15<sup>th</sup> day of each month. The Tenant paid a \$250.00 security deposit. The agreement is signed by the parties.

There is an addendum to the tenancy agreement stating the following. The tenancy started May 01, 2016 between the Tenant and J.H. J.H. sold the rental unit to the Landlord and S.M. on June 20, 2019 and they became the landlords. The last rent increase was June 30, 2019 so the new rent is \$340.00 bi-weekly payable on the 1<sup>st</sup> and 15<sup>th</sup> of each month. The addendum is signed by the parties.

J.D. testified that the rent was increased in September of 2020 to \$425.00 bi-weekly and that this carried on until February of 2021 when it was determined that this rent increase did not comply with the *Act*.

The Tenant testified that they had a written tenancy agreement with J.H. and rent was \$300.00 due on the 15<sup>th</sup> and 30<sup>th</sup> of each month for a total of \$600.00 per month. The Tenant testified that their tenancy with J.H. was a month-to-month tenancy. The Tenant had not submitted a copy of this tenancy agreement.

The Tenant submitted that the increase in rent from \$600.00 pursuant to their tenancy agreement with J.H. to \$680.00 pursuant to their tenancy agreement with the Landlord was an illegal rent increase and contrary to the *Act*.

The Tenant agreed rent was increased in September of 2020 to \$425.00 bi-weekly and that it was determined in February of 2021 that this was contrary to the *Act*.

The Notice states that the Tenant failed to pay \$340.00 in rent due April 01, 2021.

J.D. testified that the Notice was posted to the door of the rental unit April 02, 2021. The Landlord submitted a Proof of Service signed by a witness confirming service. The Landlord submitted photos of the Notice posted to the door of the rental unit.

The Tenant testified that the Notice was not posted to the door of the rental unit as claimed. The Tenant relied on an email authored by the Tenant in evidence to support their position.

The Tenant said the Notice had been dismissed by the RTB and that they had received notification of this May 17, 2021. The Tenant had not submitted this notification. The Tenant could not find the notification during the hearing and therefore could not read out what it said, provide a file number or provide any further information about the notification.

J.D. denied that the Notice had previously been dismissed. J.D. advised that a different 10 Day Notice had been dismissed.

This matter started as a direct request proceeding and an Interim Decision was issued June 08, 2021 adjourning the matter to a participatory hearing. The participatory hearing is what occurred before me July 09, 2021. I explained this to the Tenant and the Tenant said this is likely what they were referring to when they said the Notice had been dismissed by the RTB. As explained to the Tenant at the hearing, the Notice was not dismissed, the matter was adjourned to a participatory hearing.

The Tenant testified that they disputed the Notice and a hearing has been set for October. The Tenant provided File Number 760. I have looked File Number 760 up in the RTB system and see it was filed June 05, 2021.

J.D. testified that the Tenant failed to pay \$340.00 of rent by April 01, 2021. J.D. testified that no rent has been paid since the Notice was issued. J.D. acknowledged the Tenant overpaid rent between September and February. However, J.D. testified that the overpayment was \$935.00 as of February 01, 2021 and that this amount was deducted from rent February 15, 2021, March 01, 2021 and March 15, 2021. J.D. testified that the Tenant paid \$85.00 March 25, 2021. J.D. testified that, as of April 01, 2021, the overpayments of rent had been deducted from rent and the Tenant did not pay rent. J.D. testified that \$2,380.00 in rent is currently outstanding.

The Tenant testified that they had overpaid rent and therefore did not pay April rent. The Tenant calculated the overpayment of rent on the basis that the increased rent of \$680.00 on the written tenancy agreement between the Tenant and Landlord was contrary to the *Act* given rent was previously \$600.00 pursuant to the tenancy agreement between the Tenant and J.H. as well as on the basis of the illegal rent increase from September to February. The Tenant agreed that, if I found the increased rent of \$680.00 on the written tenancy agreement between the Tenant and Landlord in compliance with the *Act*, there was an overpayment of \$935.00 as of February 01, 2021. The Tenant agreed \$85.00 in rent was paid March 25, 2021 and that no further rent payments were made. The Tenant agreed \$2,380.00 in rent is currently outstanding if I find the increased rent of \$680.00 on the written tenancy agreement between the Tenant and Landlord to comply with the *Act*.

J.D. sought an Order of Possession effective at the end of July.

### Analysis

In relation to the increased rent of \$680.00 on the written tenancy agreement between the Tenant and Landlord, I am not satisfied this was contrary to the *Act*. I find the Tenant entered into a new tenancy agreement with the Landlord. It was open to the parties to enter into a new tenancy agreement and agree on any rent amount they wished. I do acknowledge that there are limits on when a landlord can increase rent on a new tenancy agreement with a tenant; however, I find the limits are set out in Policy Guideline 30 which states:

#### H. RENT INCREASES AND FIXED TERM TENANCIES

A rent increase **between fixed term tenancy agreements** with the same tenant for the same unit is subject to the rent increase provisions of the Legislation, including requirements for timing and notice. To raise the rent above the maximum annual allowable amount, the landlord must have either the tenant's written agreement or an order from an arbitrator. If the tenant agrees to an additional rent increase, the landlord must issue a Notice of Rent Increase along with a copy of the tenant's signed agreement to the additional amount. The tenant must be given three full months' notice of the increase.

I do not find that the above applies here for two reasons. First, the parties to the tenancy changed from J.H. and the Tenant to the Landlord, Co-landlord (S.M.) and the Tenant. Second, neither the tenancy between J.H. and the Tenant, nor the tenancy between the Landlord, Co-landlord (S.M.) and the Tenant were fixed term tenancies. Given this, I find Policy Guideline 30 does not apply.

Given the above, I find the Tenant entered into a new tenancy agreement with the Landlord and Co-landlord and do not find that this was a rent increase as contemplated by Part 3 of the *Act*. I find the parties were permitted to agree to whatever rent amount they wished to agree to. I find the parties agreed to rent being \$680.00 payable in installments of \$340.00 on the 1<sup>st</sup> and 15<sup>th</sup> of each month.

Section 26(1) of the *Act* requires a tenant to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy when a tenant fails to pay rent. The relevant portions of section 46 state:

- 46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52...
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from 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...

As stated, I find based on the written tenancy agreement that rent is \$680.00 payable in installments of \$340.00 on the 1<sup>st</sup> and 15<sup>th</sup> of each month.

Based on the testimony of the parties, I accept that there was a rent overpayment of \$935.00 as of February 01, 2021. Based on the testimony of the parties, I accept that the rent overpayment was used towards rent February 15, 2021, March 01, 2021 and March 15, 2021. Based on the testimony of the parties, I accept that the Tenant paid \$85.00 for the remainder of March rent. Given this, I accept that the Tenant was required to pay \$340.00 in rent April 01, 2021.

Based on the testimony of the parties, I accept that the Tenant did not pay \$340.00 in rent by April 01, 2021. Given this, the Landlord was entitled to serve the Tenant with the Notice pursuant to section 46(1) of the *Act*.

I am satisfied based on the testimony of J.D., Proof of Service and photos that the Notice was posted to the door of the rental unit April 02, 2021. I find the Tenant was served with the Notice in accordance with section 88(g) of the *Act*. Pursuant to section 90(c) of the *Act*, the Tenant is deemed to have received the Notice April 05, 2021.

I do not accept the testimony of the Tenant that the Notice was not posted to the door of the rental unit because the Landlord has provided compelling evidence, including a photo, showing the Notice was posted to the door of the rental unit. I do not find that the Tenant's own testimony and email overcome the compelling evidence of the Landlord about service.

I have reviewed the Notice and find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*.

The Tenant had five days from receipt of the Notice on April 05, 2021 to pay the outstanding rent of \$340.00 or dispute the Notice pursuant to section 46(4) of the *Act*.

Based on the testimony of the parties, I accept that the Tenant did not pay the outstanding rent.

I accept that the Tenant disputed the Notice June 05, 2021; however, this was well past the five-day deadline. Further, the Tenant has not provided a valid basis for disputing the Notice as the Tenant's dispute was based on the position that the increased rent of \$680.00 on the written tenancy agreement between the Tenant and Landlord was an illegal rent increase, which I have not accepted.

Given the Tenant did not pay the outstanding rent or dispute the Notice within five days of April 05, 2021, I find pursuant to section 46(5)(a) of the *Act* that the Tenant is conclusively presumed to have accepted that the tenancy ended April 15, 2021, the corrected effective date of the Notice. The Tenant was required pursuant to section 46(5)(b) of the *Act* to vacate the rental unit by April 15, 2021.

The Landlord is entitled to an Order of Possession. Pursuant to section 55 of the *Act*, I issue the Landlord an Order of Possession effective at 1:00 p.m. on July 31, 2021.

Based on the testimony of the parties, I accept that \$2,380.00 in rent is currently outstanding. The Landlord is entitled to recover this amount.

Given the Landlord was successful in the Application, the Landlord is entitled to recover the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

I issue the Landlord a Monetary Order for \$2,480.00 pursuant to section 67 of the *Act*.

### Conclusion

The Landlord is entitled to an Order of Possession effective at 1:00 p.m. on July 31, 2021. This Order must be served on the Tenant and, if the Tenant does not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord is entitled to recover \$2,480.00. The Landlord is issued a Monetary Order in this amount. This Order must be served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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: July 14, 2021

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Residential Tenancy Branch