



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      Tenant: LRE, LAT, CNC, CNR, OLC, FFT  
Landlord: OPR-DR, MNR-DR, FFL

### Introduction

This was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46;
- cancellation of the One Month Notice to End Tenancy, pursuant to section 47;
- an Order to restrict or suspend the landlord's right to enter, pursuant to section 70;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62;
- authorization to change the locks, pursuant to section 31; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

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

- an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The tenants and landlord agents L.S., B.C., and C.H. (the "agents") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

### Preliminary Issue- Service

The tenants testified that they dropped their application for dispute resolution off at agent C.H.'s door on July 30, 2021. No proof of service documents were entered into evidence. The agents testified that they did not receive the tenants' application for dispute resolution.

Rule 3.5 of the Residential Tenancy Branch Rules of Procedure states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

I find that the tenants have not proved on a balance of probabilities, that the landlord or landlord's agent were served with the tenants' application for dispute resolution. I therefore dismiss the tenants' application for dispute resolution with leave to reapply. I also note that section 89 of the *Act* sets out how applications for dispute resolution must be served on the respondent and that posting or leaving a copy of the application for dispute resolution on or at the door is not an approved method of service.

B.C. testified that the tenants were each served with a copy of the landlord's application for dispute resolution and evidence via registered mail on August 13, 2021. The landlord entered into evidence Canada Post registered mail customer receipts for registered mail packages sent to each tenant. The packages were each sent to the subject rental property. The tenants testified that they did not receive the landlord's application for dispute resolution.

The Canada Post website states that the notice card was left at the subject rental property indicating where and when the items were available to be picked up. The Canada Post website states that the packages were available for pick up at the local

post office on August 17, 2021 and that the packages were not picked up and eventually returned to sender

The tenants testified that they do not check their mail often.

Residential Tenancy Policy Guideline #12 (PG #12) states that where a document is served by registered mail the refusal of the party to accept or pick up the item, does not override the deeming provision. Based on the registered mail receipts entered into evidence and the Canada Post website, I find that the landlords served the tenants with their application for dispute resolution and evidence in accordance with sections 89 and 88 of the *Act*. Based on the testimony of both parties, I find that the tenants failed to pick up their registered mail. Pursuant to PG #12 I find that the tenants' failure to pick up their mail does not override the deeming provision in section 90 of the *Act*. I find that the tenants were deemed served with the landlords' application for dispute resolution and evidence on August 18, 2021, five days after their mailing, in accordance with section 90 of the *Act*.

#### Preliminary Issue- Amendment

Section 64(3)(c) of the *Act* states that subject to the rules of procedure established under section 9 (3) [director's powers and duties], the director may amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 4.2 of the Residential Tenancy Branch Rules of Procedure (the "Rules") 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. 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.

The landlord's original application claimed unpaid rent in the amount of \$1,150.00. Since filing for dispute resolution, B.C. testified that the amount of rent owed by the tenants has increased to \$5,750.00.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent, not just the amount outstanding on the date the landlord filed the application, should have been reasonably anticipated by the tenants. Therefore,

pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlord's application to include a monetary claim for all outstanding rent in the amount of \$5,750.00.

### Issues to be Decided

1. Is the landlord entitled to an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55 of the *Act*?
2. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?

### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. Monthly rent in the amount of \$1,150.00 is payable on the first day of each month. A security deposit of \$575.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

B.C. testified that the tenants did not pay July 2021's rent on time. C.H. testified that she posted a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") on the tenants' door on July 8, 2021. The landlord entered into evidence a witnessed proof of service document stating same. The tenants filed with the Residential Tenancy Branch to dispute the Notice on July 10, 2021. The tenants' application for dispute resolution states that the Notice delivery date is July 9, 2021 and that the Notice was posted on the door. The tenants testified that they did not receive the Notice until September 9, 2021.

Both parties agree that the tenants have not paid any rent for July, August, September, October or November 2021.

The tenants testified that the landlord refused to accept rent. When asked to explain this further, the tenants testified that they did not believe they should have to pay July 2021's rent because their buzzer did not work and due to other repair issues the tenants have with the subject rental property. The tenants testified that the landlord did not agree with their assertion that July 2021's rent was not owed. B.C. testified that rent was never refused from the tenants.

### Analysis

Based on the testimony of C.H. and the witnessed proof of service document, I find that the Notice was posted on the tenants' door on July 8, 2019 in accordance with section 88 of the *Act* and that the tenants were deemed served pursuant to section 90 of the *Act*. I find the tenants' testimony that they did not receive the Notice until September 2021 to be wholly unbelievable and not credible given that they failed to dispute the Notice on July 10, 2021. If the tenants had not received the Notice until September 2021, they would not have applied to dispute it in July 2021. Based on the date of the tenants' application for dispute resolution, I find that the tenants received the Notice by July 10, 2021. I accept the testimony of B.C. that rent was never refused over the tenants' contrary testimony as the tenants' testimony is not credible.

Section 46(1) of the *Act* states that 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.

Section 46(4) of the *Act* states that 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.

Section 55(2)(a) of the *Act* states:

- (2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:
  - (a) a notice to end the tenancy has been given by the tenant;

Based on the testimony of both parties I find that the tenants did not pay their outstanding rent within five days of receiving the 10 Day Notice and pursuant to section 46 and 55 of the *Act*, the landlord is entitled to a two-day Order of Possession.

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 this *Act*. The tenants are not entitled to withhold rent, even if the landlord has not done requested repairs. Pursuant to section 26(1) of the *Act*, I find that the tenants were obligated to pay the monthly rent in the amount of \$1,150.00 on the first day of each month. Based on the testimony of both parties, I find that the tenants did not pay rent in accordance with section 26(1) of the *Act* and owe the landlord money for unpaid rent.

Residential Tenancy Guideline #3 states:

Compensation for overholding under section 57 of the RTA (section 50 of the MHPTA) is not considered rent since overholding only occurs after a tenancy has ended....

If a tenant has not vacated or abandoned the unit, or the conclusive presumption does not apply, (in other words the right of possession of the rental unit or manufactured home site is in issue at the dispute resolution hearing), the director will usually rely on section 68(2) of the RTA (section 61(2) of the MHPTA) to order that the date the tenancy ends is the date of the dispute resolution hearing, rather than the effective date shown on the notice to end tenancy. If the director is satisfied upon reviewing submitted materials and hearing evidence as to an amount of unpaid rent owing, including rent owing since the time the notice to end tenancy was issued, the director must grant an order to the landlord for the amount of unpaid rent found to be owing.

I order that the tenancy ends today, November 9, 2021 and that the landlord is entitled to lost rent from July 2021 to November 9, 2021. If the landlord suffers further loss due to the tenants overholding, they landlords are at liberty to file an application for dispute resolution seeking damages for overholding. I find that the landlord is entitled to rent from July to October 2021 in the amount of \$4,600.00 and per diem rent for November 2021 pursuant to the following calculation:

$$\begin{aligned} \$1,150.00 \text{ (rent)} / 30(\text{days in November}) &= \$38.33 * 9 \text{ (days tenancy ongoing in} \\ \text{November)} &= \$344.97. \end{aligned}$$

As the landlords were successful in their application, I find that they are entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit due to the tenant. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of \$575.00 in part satisfaction of their monetary claim.

### Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Unpaid rent	\$4,944.97
Filing fee	\$100.00
Less security deposit	-\$575.00
<b>TOTAL</b>	<b>\$4,469.97</b>

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 Small Claims Division of the Provincial Court and enforced as an Order of that Court.

Pursuant to sections 46 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenants**. Should the tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: November 09, 2021

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Residential Tenancy Branch