



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      FFL, MNU-DR, OPU-DR

### Introduction

The Landlord applies for an order of possession pursuant to s. 55 of the *Residential Tenancy Act* (the “*Act*”) after issuing a 10-Day Notice to End Tenancy signed August 3, 2021 (the “10-Day Notice”). The Landlord also seeks an order for unpaid rent and utilities pursuant to s. 67 of the *Act* and for return of their filing fee pursuant to s. 72.

N.W., P.K.W., and M.Y. appeared as Landlords. The Tenant did not appear at the hearing nor did anyone appear on their behalf. As the Tenant failed to attend the hearing, it was conducted in her absence pursuant to Rule 7.3 of the Rules of Procedure.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Landlords advised that the 10-Day Notice was served on the Tenant by posting it to the Tenant’s door on August 3, 2021. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act*. Pursuant to s. 90 of the *Act*, I deem the Tenant to have been served with the 10-Day Notice on August 6, 2021.

The Landlords’ application was originally made by way of direct request and the Notice of Dispute Resolution for the participatory hearing was provided to the Landlord on October 12, 2021. The Landlord advised having served the Notice of Dispute Resolution and their evidence on the Tenant by way of registered mail sent on October 15, 2021. I find that the updated Notice of Dispute Resolution and evidence was served in accordance with s. 89 of the *Act*. Pursuant to s. 90 of the *Act*, I deem the Tenant to

have been served with the application materials for the participatory hearing on October 20, 2021.

Issue(s) to be Decided

- 1) Whether the Landlord should be granted an order of possession?
- 2) Is the Landlord entitled to an order for unpaid rent and utilities and, if so, in what amount?
- 3) Is the Landlord entitled to return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

N.W. advised that the tenancy began on June 1, 2017 and that rent was initially \$650.00 due on the first day of each month. N.W. confirmed the Landlords hold a security deposit of \$325.00 and a pet damage deposit of \$325.00 in trust for the Tenant. A copy of the written tenancy agreement was provided by the Landlords.

In a written addendum to the tenancy agreement, the parties had agreed that the Tenant would pay a portion of the utilities, which would be determined by splitting the utilities between the three rental units within the residential property and the number of occupants per unit.

On September 25, 2018, the Landlord's issued a Notice of Rent Increase, which increased rent to \$679.25 on January 1, 2019. N.W. advised that she had informed the Tenant before issuing the notice that rent would be increased and that she would notify her of the amount of the increase after calculating it online. When the written notice was provided to the Tenant, N.W. indicated that she had the Tenant sign the notice as an acknowledgement that the form was received. The Tenant has been paying the increased rent of \$679.25 since January 1, 2019.

The 10-Day Notice was issued on August 3, 2021 after the Tenant had failed to pay rent and utilities on August 1, 2021. The 10-Day Notice states that total rent owed was \$679.25 and the Tenant's portion of utilities was \$7.71.

N.W. advised that they received a payment of \$500.00 for the unpaid amounts on August 8, 2021 but have receive no payments from the Tenant since that time. The Landlord claims the following amounts:

Month	Item	Amount	Month Total
August 2021	Rent	\$179.25	\$186.96
	Utilities	\$7.71	
September 2021	Rent	\$679.25	\$754.61
	Utilities	\$75.36	
October 2021	Rent	\$679.25	\$692.48
	Utilities	\$13.23	
November 2021	Rent	\$679.25	\$768.00
	Utilities	\$88.75	
<b>TOTAL AMOUNT CLAIMED</b>			<b>\$2,402.05</b>

The amounts above are set out in an email sent by N.W. to the Tenant on October 12, 2021 as well as the updated rent and utilities for November 2021 as advised by N.W. at the hearing.

The Tenant continues to reside within the rental unit.

### Analysis

The Landlord seeks an order of possession and an order for unpaid rent and utilities.

The matter was originally filed as a direct request but had been adjourned to a participatory hearing on the basis that the rent increase exceeded the maximum increase allowable for 2019. The adjudicator issued written reasons on October 12, 2021 and a clarification of reasons on October 18, 2021. I have reviewed both documents.

The reason the hearing had been adjourned was because the adjudicator had concerns on whether the rent increase complied with the regulations. As made clear in the adjudicator's clarification, the rent increase allowed by the regulations was fixed to the rate of inflation by way of order-in-council approved on September 26, 2018 (Order-in-Council No. 483). This meant the allowable rent increase for 2019 was 2.5%. Prior to the order-in-council, the maximum rent increase allowed under the regulations was inflation plus 2% (4.5%).

The notice of rent increase dated September 25, 2018 increased rent by 4.5%, rather than the 2.5% permitted by the order-in-council. The order-in-council states in schedule 2, (4) that any notice of rent increase using the old formula issued prior to the order coming into effect would have to be reissued using the new formula. That did not occur in the present circumstances. Accordingly, I find that the rent increase set out in the notice of rent increase dated September 25, 2018 is invalid.

Pursuant to s. 43(1)(c) of the *Act*, rent can be increased above the amount set out in the regulations if the increase is agreed to by the tenant in writing. Here the Tenant signed the notice of rent increase. However, I place significant weight on N.W.'s admission that the notice was signed by the Tenant in 2018 as an acknowledgement of receiving the form. I find that the Tenant's signature does not show an agreement to a rent increase above the prescribed limit of 2.5% and is simply an acknowledgment by the Tenant of receiving the form from the Landlords.

Accordingly, the rent increase of \$29.25 effective from January 1, 2019 onwards is invalid and rent should have been paid in the amount of \$650.00 since that time. I find that the Tenant has been overpaying rent in the amount of \$29.25 for each month since January 1, 2019.

I find that the from January 1, 2019 to August 1, 2021 the Tenant overpaid the following amount in rent:

$$\begin{array}{r}
 \$29.25 \text{ (monthly overpayment)} \\
 \times \quad 32 \text{ Months} \\
 \hline
 \mathbf{\$936 \text{ Total Overpayment}}
 \end{array}$$

Pursuant to s. 43(5) of the *Act*, if a landlord collects rent that fails to comply with s. 43, the tenant may deduct the increase from rent. In this instance, the total overpayment of \$936.00 could be deducted from rent by the Tenant pursuant to s. 43(5). Given this, the amount set out in the 10-Day Notice is incorrect. After deducting the Tenant's rent of \$650.00 for August 1, 2021 from the overpayment, the remaining overpayment when the 10-Day Notice was issued on August 3, 2021 as \$286.00.

As the Tenant was allowed to deduct her rent for August 1, 2021, she was not in arrears of rent when the 10-Day Notice was issued on August 3, 2021. Accordingly, I decline to grant the Landlord an order of possession pursuant to the 10-Day Notice as it was not

properly issued. As the 10-Day Notice is invalid, the tenancy shall continue until it is ended in accordance with the *Act*. The Landlord will have to reissue a new Notice to End Tenancy, taking into account the overpayment of rent and the partial payment of \$500.00 on August 8, 2021 should they wish to end the tenancy pursuant to s. 46.

Given that the tenancy continues, I decline to make any monetary orders on the basis that there will very likely be a subsequent claim by the Landlords. For the purposes of simplifying matters at the subsequent application, I dismiss the Landlord's claim for unpaid rent and/or utilities with leave to reapply.

### Conclusion

The Landlord's application for an order of possession pursuant to the 10-Day Notice is dismissed without leave to reapply. The tenancy shall continue until it is ended in accordance with the *Act*.

The Landlord's claim for monetary compensation is dismissed with leave to reapply.

As the Landlord was unsuccessful in their application, their claim for their filing fee is dismissed without leave to reapply.

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 23, 2021

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Residential Tenancy Branch