



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      FFT, CNR, OLC, RP, PSF

### Introduction

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

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the "**Notice**") pursuant to section 46;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order that the landlord make repairs to the rental unit pursuant to section 32;
- an order that the landlord provide services or facilities required by law pursuant to section 65;
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 11:50 a.m. in order to enable the tenant to call into this teleconference hearing scheduled for 11:00 a.m.

The landlord attended the hearing with an interpreter and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord confirmed that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord submitted no written or documentary evidence to file and provided affirmed oral testimony only. He testified the only document served to the tenants was the 10-Day Notice, the basis for the tenants' application. I find all parties were served with the required documents in accordance with the Act.

The landlord was advised that pursuant to rule 6.11 of the Residential Tenancy Branch Rules of Procedure (the "**Rules of Procedure**"), persons are prohibited from recording dispute resolution hearings, except as allowed by rule 6.12. As the landlord neither requested nor was granted authorization to hire an accredited Court reporter as

allowable under rule 6.12, I confirmed with the landlord and the interpreter that they were not recording the hearing. The landlord was provided the opportunity to present his evidence orally and in written and documentary form, and to make submissions at the hearing.

### **Preliminary Issue-Application Dismissed**

Rule 7.1 of the Rules of Procedure [the “**Rules**”] stipulates that the hearing will commence at the scheduled time unless otherwise decided by the Arbitrator. The Arbitrator may conduct the hearing in the absence of a party and may decide or dismiss the Application, with or without leave to re-apply.

#### **Rule 7- During the Hearing**

##### **7.1 Commencement of the dispute resolution hearing**

*The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.*

##### **7.3 Consequences of not attending the hearing**

*If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party or dismiss the application, with or without leave to re-apply.*

Further, Rule 7.4 states:

##### **Rule 7.4 Evidence must be presented**

*Evidence must be presented by the party who submitted it, or by the party’s agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.*

I decided the hearing would proceed in the absence of the tenants. Accordingly, in the absence of any attendance at this hearing by the applicants (tenants) I order the tenants’ application dismissed in its entirety, without leave to reapply.

### **Issues to be Decided**

Is the landlord entitled to:

- 1) an order of possession based on a 10 Day Notice;
- 2) a monetary order for \$983.00;
- 3) retain the security deposit in partial/full satisfaction of the monetary orders made?

### **Background and Evidence**

While I have considered the documentary evidence and the testimony of the landlord, not all details of his oral testimony and arguments are reproduced here. The relevant and important aspects of the landlord’s claims and my findings are set out below.

The parties entered into a written month to month tenancy agreement starting June 1, 2020. Monthly rent is \$1200.00 and is payable on the first of each month. The tenant is also responsible to pay 40% of the hydro and gas, also due on the 1<sup>st</sup> of each month. The tenants paid the landlord a security deposit of \$600.00 and a pet damage deposit of \$600.00. The landlord still retains these deposits.

The tenants rent the basement level of the house. The suite is self-contained and has a separate entrance. The upper level is also tenanted.

According to the landlord's undisputed testimony, prior to issuing the 10-Day Notice, the tenants rarely paid their rent and gas/hydro bill on time. The landlord testified that since issuing the 10- Day Notice, the tenants pay their rent on time.

The landlord provided oral testimony of the dates and amounts of the payments made by the tenants from November 2020 through September 2021. The following table details those dates and amounts.

Date	\$	Additional Information
November 01, 2020	<b>\$1075.00</b>	October 1, 2020 rent pmt
November 13, 2020	\$ 300.00	Partial pmt for Oct/Nov
November 20, 2020	\$ 900.00	
November 28, 2020	\$ 600.00	
December 15, 2020	\$ 600.00	
December 17, 2020	\$ 300.00	
January 01, 2021	\$ 400.00	
January 15, 2021	\$ 200.00	
January 19, 2021	\$ 600.00	
January 29, 2021	\$1200.00	
February 12, 2021	\$ 350.00	
February 27, 2021	\$1000.00	
March 02, 2021	\$ 200.00	
March 31, 2021	\$1200.00	
April 30, 2021	\$ 400.00	
May 02, 2021	\$ 400.00	
May 20, 2021	\$ 800.00	
May 29, 2021	\$1200.00	
June 18, 2021	\$ 100.00	
July 03, 2021	\$ 800.00	
July 15, 2021	\$ 400.00	
July 30, 2021	\$1200.00	
August 13, 2021	\$ 800.00	
<b>September 03, 2021</b>	<b>\$ 225.00</b>	
<b>September 15, 2021,</b>	<b>\$ 975.00</b>	Paid w/in the 5 days of Notice
	<b>\$15,150.00</b>	Total \$ Paid to LL- Nov 2020- September 2021 excluding \$1075.00 rent owed for October 2020.

The dollar amount in the table reflects a combination of rent and hydro/gas payments made to the landlord. The landlord did not provide invoices or gas/hydro bills or a breakdown of the monthly payments separating the \$1200.00 rent payments from the gas/hydro payments.

The landlord testified that the total hydro/gas costs from November 2020 through August 31, 2021, equaled \$4694.32. As mentioned previously the basement suite (tenants) is responsible for 40% of the associated hydro/gas costs equaling \$1877.72. The landlord testified that the tenants owe an outstanding amount of \$983.00 in gas/hydro, the amount recorded on the 10-Day Notice, and which has not been paid to date. The hydro/gas bills were not submitted into evidence.

The landlord advised the 10-Day Notice was served to the tenants, in person, on September 10, 2021. Initially, the landlord tried to serve notice on September 5, 2021, but the tenants did not answer the door. The landlord then modified the “date signed” to September 10, 2021, and returned with a witness, hand delivering the notice on September 10, 2021. The “must move out date” was also dated September 10, 2021.

### **Analysis**

Based on the documentary evidence and testimony before me, I am satisfied that a tenancy in accordance with the *Act* exists between the parties, that rent in the amount of \$1200.00 and 40% of the gas/hydro costs are due on the first day of each month under the tenancy agreement, and that the landlord still holds the tenant’s security deposit and pet damage deposit totaling \$1200.00 in trust.

As specified in “Preliminary Issues”, I dismissed the tenant’s application in its entirety, without leave to reapply. Section 55 of the *Act* requires that I must decide if the landlord is entitled to an Order of Possession. Section 55(1.1) of the *Act* states that if a tenant’s application seeking cancellation of a 10-Day Notice is either dismissed or the 10-Day Notice is upheld, and the 10-Day Notice complies with s. 52 of the *Act*, the director must grant an order requiring the payment of the unpaid rent.

I will first turn my mind to whether or not the 10-Day Notice complies with s. 52 of the *Act*. The 10-Day Notice provides an effective date of September 10, 2021. Noting the date the 10-Day Notice was served, September 10, 2021, and the date upon which rent is due under the tenancy agreement, I find that this date does not comply with the minimum notice period required under s. 46(1) of the *Act*. As a result, I find that the effective date of the 10-Day Notice is automatically corrected to September 20, 2021, pursuant to section 53 of the *Act*.

The 10-Day Notice provides the tenant with the following options upon receiving the notice. The notice reads in part, “You have **5 days** to pay rent and/or utilities to the landlord” or dispute the notice, in keeping with s. 46(4) of the *Act*.

“Rent” is defined in the *Act* as follows:

“**rent**” means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97(2)(k) [*regulation in relation to fees*];

“**Service or facility**” includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:

- (a) appliances and furnishings;
- (b) utilities and related services;
- (c) cleaning and maintenance services;
- (d) parking spaces and related facilities;
- (e) cablevision facilities;
- (f) laundry facilities;
- (g) storage facilities;
- (h) elevator;
- (i) common recreational facilities;
- (j) intercom systems;
- (k) garbage facilities and related services;
- (l) heating facilities or services;
- (m) housekeeping services; [emphasis added]

I note the landlord’s evidence states the tenant paid an additional \$975.00 on September 10, 2021, within 5 days after being served with the 10 Day Notice but did not pay for any alleged outstanding gas/hydro.

As noted above, “rent” includes “services or facilities” such as “utilities and related services” and “heating facilities or services” (hydro/gas). The landlord testified that the tenancy agreement included a 40% surcharge for hydro/gas in addition to the monthly rent of \$1200.00, payment of which was due in full on the 1<sup>st</sup> day of each month. The tenancy agreement is not on file.

Although the tenants paid the balance (\$975.00) of the \$1200.00 owed for September 01, 2021 rent on September 15, 2021, pursuant to s. 46(4), they did not pay the \$983.00 in alleged outstanding utilities (hydro/gas) listed on the 10-Day Notice. The non-payment of the “utilities” allows the director to uphold the notice and grant an Order of Possession and issue a Monetary Order; however, the onus to prove the alleged short-fall in the 10-Day Notice falls to the landlord.

Relying on M.B.B v. Affordable Housing Charitable Association, 2018 BSCS 2418, the landlord must still prove the grounds to end tenancy when a tenant does not appear to present their application to cancel the notice.

[27] I accept it was open to the arbitrator to proceed with the hearing or dispense with the hearing altogether and decide the matter in the absence of M.B.B., but in doing so, the arbitrator still had to resolve the issue raised by the application on the merits in some way. It was insufficient to dismiss the application solely on the grounds that M.B.B. had not dialed in to the hearing within the first ten minutes as she was supposed to have done.

Further, Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings as follows:

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Although the landlord argued at the hearing that the tenants owed \$983.00 in unpaid gas/utilities costs as recorded in the 10-Day Notice, no documentary/written evidence was before me supporting confirmation of that amount. The landlord did not provide hydro/gas bills or a statement from an accountant, for example. The landlord provided a verbal account of dates and monies paid but provided no evidence of the monies owed each month separating the rent and hydro/gas costs.

The following calculations are based on the information provided by the landlord at the hearing.

\$ PAID TO LL BY T NOV 2020- SEPTEMBER 2021	RENT PAYABLE NOV 2020- SEPTEMBER 2021	GAS/HYDRO NOV 2020- SEPTEMBER 2021 @ 40%
<b>\$15,150.00</b>	<b>\$1200.00 x 11= \$13,200.00</b>	<b>\$4694.32 x 40%=\$1877.73</b>

TOTAL \$ PAID: \$15,150.00  
 TOTAL \$ OWED: \$13,200.00 + \$1877.73 = \$15,077.73  
 DIFFERENCE: \$ 72.27 (excess)

Notwithstanding the above calculations, without documentary/written evidence to support the landlord's testimony that the tenants owe an outstanding balance of \$983.00 for hydro/gas, I find the landlord has provided insufficient evidence upon which to conclude that additional monies are outstanding or in the alternative if additional monies are outstanding as to the exact dollar amount.

The landlord has failed to prove on a balance of probabilities that the facts are as claimed on the 10-Day Notice. As the landlord provided insufficient evidence to determine if any hydro/gas monies are outstanding, I decline to award the landlord an Order of Possession pursuant to s. 55 or a Monetary Order for alleged outstanding hydro/gas pursuant to s. 55(1.1). The landlord remains entitled to seek any unpaid hydro/gas owed by filing an Application for Dispute Resolution seeking this amount from the tenants, should he wish to do so.

Although I dismissed the tenant's application in its entirety pursuant to rule 7.4, the tenants paid the overdue rent, in the amount of \$975.00, on September 15, 2021, within the 5-day requirement and filed an application for dispute resolution thereby rendering the 10-Day Notice of no force and effect.

### **Conclusion**

The tenants are unsuccessful in their application because they failed to attend the hearing. Pursuant to the Rules noted above and section 62 of the *Act*, I dismiss the Tenant's Application wholly without leave to reapply. Notwithstanding the above, the tenants paid the overdue rent on September 15, 2021, within the 5 days pursuant to s. 46(4) thereby rendering the 10-Day Notice of no force and effect.

As per s. 55 and s. 55(1.1) I have considered if the landlord is entitled to an Order of Possession and/or a Monetary Order. I find the landlord has failed to prove the tenants owe an outstanding balance of \$983.00 for unpaid hydro/gas. Consequently, I decline to award the landlord either an Order of Possession or a Monetary Order. The landlord has leave to apply for a Monetary Order for Unpaid Rent and or Utilities (MNRL).

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: January 26, 2022

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Residential Tenancy Branch