



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **CNR, OLC, FFT**

### Introduction

This hearing was convened as a result an application made by the Tenants under the *Residential Tenancy Act* (the “Act”) for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated November 4, 2021 (“10 Day Notice”) pursuant to section 46;
- an order that the Landlord comply with the Act, *Residential Tenancy Regulations* (“Regulations”) and/or tenancy agreement pursuant to section 62 of the Act; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72(1).

The Landlord and two of the three Tenants (“AM” and “KD”) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

KD testified the Landlord was served with the Notice of Dispute Resolution Proceeding and the Tenants’ evidence (“NDRP Package”) by email on November 9, 2021. The Landlord stated the Tenants did not have her consent to serve her serve her by email. However, the Landlord stated she received a copy of the NDRP Package from the Residential Tenancy Branch (“RTB”) on January 24, 2022. I find the Landlord was sufficiently served with the NDRP Package pursuant to section 71(2)(b) of the Act.

### Preliminary Matter – Late Service of Landlord’s Evidence

The Landlord stated she served her evidence through the Tenants mailbox on January 26, 2022. The Landlord was unable to provide any reason why her evidence was not available for service on the Tenants, and filing with the RTB, at least 7 days before the

hearing or that it was new and relevant evidence. Rule 3.15 of the *Residential Tenancy Branch Rules of Procedure* (“RoP”) states:

**3.15 Respondent’s evidence provided in single package**

Where possible, copies of all of the respondent’s available evidence should be submitted to the Residential Tenancy Branch online through the Dispute Access Site or directly to the Residential Tenancy Branch Office or through a Service BC Office. The respondent’s evidence should be served on the other party in a single complete package. The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, *the respondent’s evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.*

See also Rules 3.7 and 3.10

[emphasis in italics added]

The Landlord did not serve her evidence on the Tenants, or file it with the RTB, at least 7 days before the hearing. The Landlord did not provide any reasonable explanation for the delay in service and filing or that it was new and relevant evidence. I decline to admit the Landlord’s evidence as it was not served at least 7 days before the hearing as required by Rule 3.14. To permit the inclusion of the Landlord’s evidence that was served on the Tenants less than 7 days before the hearing would be procedurally unfair to the Tenants.

Preliminary Matter – Severance and Dismissal of Tenants’ Claim

The Tenants’ application includes a claim that the Landlord comply with the Act, Regulations and/or tenancy agreement. Rule 2.3 of the RoP states:

**2.3 Related issues**

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Where a claim or claims in an application are not sufficiently related, I may dismiss one or more of those claims in the application that are unrelated. Hearings before the RTB are generally scheduled for one hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

At the outset of the hearing, I advised the parties the primary issue in the Tenants' application was whether the tenancy would continue or end based on the 10 Day Notice. Furthermore, the Tenants' claim under section 62 of the Act, would not be relevant in the event I found the tenancy was over. Accordingly, I find the Tenants' claim for the Landlord to comply with the Act, Regulations and/or tenancy agreement under section 62 is not sufficiently related to the primary issue of whether the 10 Day Notice is upheld or set aside. Based on the above, I dismiss the Tenants' claim that the Landlord comply, Act, Regulations and/or tenancy agreement. If the tenancy continues, their claims under section 62 will be dismissed with leave to reapply. If the tenancy ends, their claim for an order that the Landlord comply pursuant to section 62 will be dismissed without leave to reapply as the tenancy is over.

#### Preliminary Issue – Amendment to Include Monetary Claim for Unpaid Rent

The Landlord testified, as set out in the 10 Day Notice, the Tenants had rental arrears of \$2,200.00 as of November 1, 2021. At the outset of the hearing, KD stated the Tenants vacated the rental unit on December 1, 2021. The Landlord stated she took back possession of the rental unit on December 2, 2021. The Landlord made a request that, as the fixed term of the tenancy had not ended at the time the Tenants vacated the rental unit, I amend the amount claimed by the Landlord for the rental arrears owing by the Tenants to include unpaid rent for December 2021 and January 2022.

*Residential Tenancy Branch Policy Guideline 3* ("PG 3") addresses situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement. It also addresses situations where a tenant has unsuccessfully disputed a notice to end tenancy issued for the non-payment of rent or utilities, triggering section 55(1.1) of the Act. PG3 states in part:

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. *Compensation due to a loss of rent resulting from the tenant ending the tenancy early or by leaving the rental unit or manufactured home site in an unrentable condition is also not considered unpaid rent. The loss arises after and because of the tenancy ending. If a landlord is seeking such compensation, they*

*must make a separate application for dispute resolution and give proper notice to the tenant in accordance with the provisions of the legislation.* The director cannot make an order for this type of compensation under section 55(1.1) of the RTA (section 48(1.1) of the MHPTA)

[emphasis in italics added]

The Tenants moved out of the rental unit after the rent became due on December 1, 2021. I find the Tenants could reasonably have anticipated that the Landlord would request an amendment to the amount of rental arrears claimed by the Landlord to include rent owing to the date the Tenants vacated the rental unit on December 1, 2021.

Section 4.2 of the RoP states:

#### **4.2 Amending an application at the hearing**

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.

Pursuant to Rule 4.2, I amend the Landlord's application to increase the amount of rental arrears to \$4,400.00 for November and December 2021. The Landlord also sought unpaid rent for January 2022. However, as stated in PG3, compensation due to a loss of rent resulting from the Tenants ending the tenancy early is not considered unpaid rent. Accordingly, I decline the Landlord's request to include a claim for rent after the Tenants vacated the rental unit on December 1, 2021. If the Landlord is seeking such compensation resulting from the Tenants vacating the rental unit prior to the end of the fixed term of the tenancy, then the Landlord must make a separate application for dispute resolution and give proper notice to the Tenants in accordance with the provisions of the Act.

### Issues to be Decided

Are the Tenants entitled to:

- cancellation of the 10 Day Notice?
- recover the filing fee for their application from the Landlord?
- If the 10 Day Notice is not cancelled, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act and a Monetary Order for the Unpaid Rent pursuant to section 55(1.1) of the Act?

### Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Tenants' application and my findings are set out below.

The parties agreed the tenancy commenced on July 1, 2021, for a fixed term ending June 30, 2022, and then continuing on a month-to-month basis. The rent of \$2,200.00 was payable by the Tenants to the Landlord on the 1<sup>st</sup> day of each month. The Tenants were to pay a security deposit of \$1,100.00 and a pet damage deposit of \$1,100.00 by July 1, 2021. The Landlord confirmed the Tenants paid the security and pet damage deposits and that she is holding the deposits in trust for the Tenants.

The Landlord testified the 10 Day Notice was served in the Tenants' mailbox on November 5, 2021. KD acknowledged the Tenants received the 10 Day Notice. I find the 10 Day Notice was served on the Tenants in accordance with section 88 of the Act. Pursuant to section 90, I find the Tenants were deemed to have received the 10 Day Notice on November 8, 2021, being three days after it was deposited in the Tenants' mailbox.

The Landlord testified the Tenants had rental arrears of \$2,200.00 for November 2021. The Landlord stated the Tenants did not pay the rent on December 1, 2021 and, as a result, the Tenants had rental arrears totalling \$4,400.00 as of the date they vacated the rental unit calculated as follows:

Date	Owed	Paid	Balance
01-Oct-21	\$2,200.00	\$0.00	\$2,200.00
01-Nov-21	\$2,200.00	\$2,200.00	\$2,200.00
01-Dec-21	\$2,200.00	\$0.00	\$4,400.00
<b>Total</b>	<b>\$4,400.00</b>	<b>\$0.00</b>	<b>\$4,400.00</b>

KD testified:

1. the Landlord did not provide a copy of the tenancy agreement to the Tenants within 21 days after the date the parties entered into the tenancy agreement;
2. the Landlord did not remove her personal possessions, and an uninsured motor vehicle, from the residential property after the Tenants took possession of the rental unit;
3. the Landlord did not perform repairs, including a water leak from a ceiling in the rental unit, as required to be performed by the Landlord; and
4. there was an ongoing bedbug infestation in the rental when the Tenants vacated the rental unit.

KD submitted the Tenants were not required to pay rent for the reasons enumerated above that had not been addressed by the Landlord.

### Analysis

#### **1. Order of Possession**

Sections 46 and 53 of the Act 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 *[form and content of notice to end tenancy]*.
- (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.

The Landlord testified the 10 Day Notice was served in the Tenants' mailbox on November 5, 2021. Pursuant to section 90, I find the Tenants were deemed to have received the 10 Day Notice on November 8, 2021. Pursuant to section 46(4), the Tenants had until November 15, 2021, being the next business day after the 5-day dispute period, within which to make an application for dispute resolution to dispute the 10 Day Notice. The records of the RTB indicate the Tenants made their application on November 9, 2021. Accordingly, the Tenants made their application within the 5-day dispute period required by section 46(4) of the Act

KD submitted the Tenants were excused from paying the rent for November 2021 on the basis that the Landlord had not provided the Tenants with a copy of the tenancy agreement, did not remove her personal possessions from the residential property, did not perform repairs to the rental unit and the ongoing bedbug infestation.

Section 26 of the Act states:

- 26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Pursuant to s. 26(1) of the Act, a tenant must pay rent when it is due whether or not the landlord complies with the *Act*, the Regulations, or the tenancy agreement unless the *Act* grants the tenant the right to deduct all or a portion of the rent. The Act stipulates a set of limited circumstances in which monies claimed by the Tenant can be deducted from rent, which include:

- 1. where a tenant has paid a security deposit or pet damage deposit above that allowed by s. 19(1), then the amount that was overpaid may be deducted from rent (see s. 19(2));

2. the reimbursement of costs borne by a tenant for emergency repairs after the process contemplated by s. 33(5) have been followed (see s. 33(8));
3. where a landlord collects rent following a rent increase that does not comply with the amount proscribed by the regulations, then the tenant may deduct the overpayment from rent (see s. 43(5)); and
4. as ordered by the Director pursuant to sections 65 and 72.

None of the circumstances listed above are presently applicable. The reasons KD gave for the Tenants not paying the rent are not relevant as they are not a reason a tenant is excused from paying the rent. The Act is unequivocal that the obligation to pay rent rests solely with the Tenants and makes no consideration for the circumstances described by KD.

As KD has acknowledged rent was not paid by the Tenants for November 2021 as set out in the 10 Day Notice, I find there is no basis upon which to cancel the 10 Day Notice. Accordingly, the Tenants' application to cancel the 10 day Notice is dismissed.

Subsections 55(1) and 55(1.1) of the Act state:

- 55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
  - (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
- (1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 [*landlord's notice: non-payment of rent*], and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

I have reviewed the 10 Day Notice and find that it complies with the form and content requirements of section 52 of the Act. Section 55(1) of the Act provides that, where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the Act, then I must grant the landlord an Order of Possession. Based on the above, I grant the Landlord an Order of Possession pursuant to section 55(1) of the Act. KD admitted the Tenants moved out of the rental unit on



December 1, 2021. Pursuant to section 68(2) of the Act, I order the tenancy ended on December 1, 2021.

In accordance with PG 3, an order for unpaid rent is limited to rent owed during the tenancy and does not include compensation for an overholding tenant. Where a tenant continues to reside in the rental unit and is unsuccessful in disputing a notice to end tenancy at the hearing, the tenancy ends on the date of the hearing of the tenant's application as ordered by the Direct in accordance with section 68(2) of the Act. KD acknowledged the Tenants moved out of the rental unit on December 1, 2021.

## ***2. Monetary Order for Unpaid Rent***

The Landlord and KD agreed the rent for the rental unit was \$2,200.00 payable on the 1<sup>st</sup> day of each month. KD acknowledged the Tenants did not pay the rent for November 2021. Pursuant to section 26(1) of the Act, the rent of \$2,200.00 for December 1, 2021, was owing on the day the Tenants moved out of the rental unit. KD acknowledged the Tenants did not vacate the rental unit until December 1, 2021. I have found the tenancy ended on December 1, 2021 and, as of that date, the rent of \$2,200.00 was due for December 2021. Based on the above, I find the Tenants had rental arrears of \$4,400.00 for November and December 2021. The Tenants must compensate the Landlord this amount. Pursuant to section 55(1.1), if a tenant's application is in relation to non-payment of rent and the application is dismissed, then the director must grant an order requiring payment of the unpaid rent. Pursuant to section 55(1.1), I order the Tenants pay the Landlord \$4,400.00 in satisfaction of the rental arrears.

Pursuant to section 72(2)(b), the Landlord may deduct the Tenants' security deposit of \$2,200.00 from the rental arrears owed by the Tenants, leaving a balance of \$2,200.00.

As I have found the tenancy is over, I dismiss without leave to reapply, the Tenants' claim that the Landlord comply, Act, Regulations and/or tenancy agreement.

As the Tenants have been unsuccessful in their application, I dismiss their claim for reimbursement of their filing fee from the Landlord.

Conclusion

Pursuant to section 55 of the Act, I order that the Tenants deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision and attached orders by the Landlord. Should the Tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

Pursuant to section 67 of the Act, I order that the Tenants pay the Landlord \$2,200.00 representing the following:

Description	Amount
Rental Arrears	\$4,400.00
Security and Pet Damage Deposits Credit	-\$2,200.00
<b>Total</b>	<b>\$2,200.00</b>

It is the Landlord's obligation to serve these orders on the Tenants. If the Tenants do not comply with the monetary portion of this order, it may be filed with the Small Claims Division of the Provincial Court and enforced as an order of that Court.

I dismiss, without leave to reapply, the Tenants' claim that the Landlord comply, Act, Regulations and/or tenancy agreement. The Tenants' claim for reimbursement of their filing fee from the Landlord 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: February 24, 2022

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Residential Tenancy Branch