



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      FFL, OPR, MNRL

### Introduction

This hearing 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 sections 26 and 67; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 11:10 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 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 was advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. The landlord testified that he was not recording this dispute resolution hearing.

Per section 95(3) of the *Act*, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

The landlord confirmed his email address for service of this decision and orders.

The landlord testified that he served the tenant with a copy of this application for dispute resolution and evidence via registered mail on January 25, 2022 and January 26, 2022. The tenant testified that he served the tenant twice to ensure the tenant received the above documents. Canada Post registered mail receipts for same were entered into evidence. I find that the tenant was deemed served on January 30, 2022, five days after the first mailing, in accordance with sections 88, 89 and 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 \$4,200.00. Since filing for dispute resolution, the landlord testified that the amount of rent owed by the tenant has increased to \$7,500.00 for rent from October 2021 to April 2022.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent and or compensation for overholding, not just the amount outstanding on the date the landlord filed the application, should have been reasonably anticipated by the tenant. 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 and damages for overholding, totalling \$7,500.00.

#### 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 sections 26 and 67 of the *Act*?
3. Is the landlord entitled to recover the filing fee 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 the landlord, not all details of the landlord's submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The landlord provided the following undisputed testimony:

- this tenancy began on July 1, 2011,
- monthly rent in the amount of \$1,080.00 is payable on the first day of each month,
- the tenant did not pay a security deposit, and
- a written tenancy agreement was signed by the landlord and a copy was submitted for this application.

The landlord testified that on January 1, 2022 he posted a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") on the tenant's door. The landlord entered into evidence a witnessed proof of service document stating same. The Notice was entered into evidence and states that the tenant failed to pay rent in the amount of \$4,200.00 that was due on January 1, 2022.

The Notice is dated January 2, 2022. The landlord testified that he signed it on January 1, 2022 but wrote January 2, 2022 to allow the tenant one extra day's notice. The effective date of the Notice is January 12, 2022.

The landlord testified that the tenant did not pay rent from October 2021 to the present date. The landlord testified that rent was originally \$1,060.00 but that he served the tenant with a Notice of Rent Increase that increased the rent to \$1,080.00 effective January 1, 2022. The Notice of Rent Increase was not entered into evidence. The tenancy agreement entered into evidence states that rent is \$1,060.00.

## Analysis

Section 88 of the *Act* states that the Notice may be served on the tenant by posting. Based on the witnessed proof of service document and the landlord's undisputed testimony, I find that the Notice was posted on the tenant's door on January 1, 2022. I find that the tenant was deemed served with the Notice on January 4, 2022, three days after its posting, in accordance with sections 88 and 90 of the *Act*.

I find that on January 1, 2022, when the Notice was posted on the tenant's door, January 2022's rent was not yet overdue, therefore, the Notice should have stated that the tenant owed unpaid rent from October December 2021, not October to January 2022. I find that this error is not fatal and that the tenant should have reasonably known the amount of rent outstanding.

Section 52 of the *Act* sets out the form and content requirements of a notice to end tenancy. Section 52 of the *Act* states:

- 52** In order to be effective, a notice to end a tenancy must be in writing and must
- (a) be signed and dated by the landlord or tenant giving the notice,
  - (b) give the address of the rental unit,
  - (c) state the effective date of the notice,
  - (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy,
  - (d.1) for a notice under section 45.1 [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with section 45.2 [*confirmation of eligibility*], and
  - (e) when given by a landlord, be in the approved form.

The Notice is signed and dated; however, the date signed is incorrect. I find that the tenant knew or should have known, the date the Notice was posted on his door and that the Notice was unlikely to have been signed after it was posted. In the current circumstances, it is reasonable to amend the Notice. Pursuant to section 68 of the *Act*, I amend the Notice to state the date of signing to be January 1, 2022.

Upon review of the amended Notice, I find that it is signed and dated by the landlord, gives the address of the rental unit, states the effective date of the notice, states the

ground for ending the tenant, and is in the approved form, in accordance with section 52 of the *Act*.

Based on the undisputed testimony of the landlord, I find that the tenant failed to pay October to December 2021's rent within five days of receiving the Notice. The tenant has not made application pursuant to section 46(4) of the *Act* within five days of receiving the Notice. In accordance with section 46(5) of the *Act*, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice.

In this case, this required the tenant to vacate the premises by January 12, 2022 as that has not occurred, I find that the landlord is entitled to a 2-day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

I accept the landlord's undisputed testimony that rent in 2021 was \$1,060.00 per month. I find that the landlord has not proved that the tenant was served with a valid Notice of Rent Increase effective January 1, 2022 as no such document was entered into evidence. In addition I note that the maximum rent increase permitted for 2022 is 1.5%. The highest allowable rent increase would have only increased the rent to \$1,075.90, not \$1,080.00.

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*. Pursuant to section 26(1) of the *Act*, I find that the tenant was obligated to pay the monthly rent in the amount of \$1,060.00 on the first day of each month. Based on the landlord's undisputed testimony, I find that the tenant did not pay rent in accordance with section 26(1) of the *Act* and owes the landlord rent from October 1, 2021 to January 12, 2022 (the date the tenancy ended as stated on the Notice) as follows:

October to December 2021: **\$3,180.00**

January 1-12, 2022: \$1,060.00 (rent) / 31 (days in January) = \$34.19355 (daily rate) \* 12 (days of tenancy in January 2022) = **\$410.32**

**Total: \$3,590.32**

Residential Tenancy Policy Guideline #3 states:

If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the RTA (section 50(3) of the MHPTA). This includes compensation for the use and occupancy of the unit or site on a per diem basis until the landlord recovers possession of the premises.

As this tenancy ended on January 12, 2022 and the tenant has not yet moved out, I find that the tenant has overheld the subject rental property from January 13, 2022 to the present date. Pursuant to section 57(3) of the *Act* I find that the tenant is required to compensate the landlord for use and occupancy of the subject rental property pursuant to the following calculation:

January 13 – January 31, 2022: \$1,060.00 (rent) / 31 (days in January) = \$34.19355 (daily rate) \* 19 (days tenant overheld in January 2022) = **\$649.68**

February to March 2022: **\$2,120.00**

April 1 to April 11, 2022: \$1,060.00 (rent) / 30 (days in April 2022) = \$35.33333 (daily rate) \* 11 (days tenant overheld in April 2022 at date of hearing) = **\$388.67**

**Total: \$3,158.35**

If the tenant overholds the subject rental property past April 11 2022, the landlord is at liberty to file another claim for damages for overholding.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

### Conclusion

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

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

<b>Item</b>	<b>Amount</b>
Unpaid rent October 1, 2021 to January 12, 2022	\$3,590.32
Damages for overholding January 13, 2022 to April 11, 2022	\$3,158.35
Filing Fee	\$100.00
<b>TOTAL</b>	<b>\$6,848.67</b>

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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.

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: April 13, 2022

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Residential Tenancy Branch