



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      OPR-DR, MNR-DR, FFL

### Introduction

On March 21, 2022, an Adjudicator appointed pursuant to the *Residential Tenancy Act* (the Act) adjourned the Landlord's application for dispute resolution to a participatory hearing. She did so on the basis of an ex parte hearing using the Residential Tenancy Branch's direct request process. The adjudicator adjourned the direct request for the following reasons:

*On the second page of the Proof of Service Notice to End Tenancy, there is no signature of a witness to confirm service of the 10 Day Notice to the tenant. I note the landlord submitted a photograph showing an envelope attached to a door. However, I find this is not adequate evidence of service for a Direct Request, as detailed in Policy Guideline #39. I find I am not able to confirm service of the 10 Day Notice to the tenant, which is a requirement of the Direct Request proceeding, and that a hearing is necessary to address this issue.*

This hearing dealt with the Landlord's application under the Residential Tenancy Act (the "Act") for:

- an Order of Possession under a 10 Day Notice to End Tenancy for Unpaid Rent dated January 10, 2022 (the "10 Day Notice") pursuant to sections 46 and 55;
- a Monetary Order of \$883.00 for unpaid rent pursuant to sections 26 and 55; and
- authorization to recover the filing fee for this application from the Tenant pursuant to section 72.

The Landlord's agent AR and the Landlord's legal counsel SD attended this hearing. They were given a full opportunity to be heard, to present affirmed testimony, and to make submissions.

The Tenant did not attend this hearing. I left the teleconference hearing connection open until 11:10 am in order to enable the Tenant to call into the hearing scheduled to start at 11:00 am. I confirmed that the correct call-in numbers and participant access

code had been provided in the notice of dispute resolution proceeding. I used the teleconference system to confirm that AR, SD, and I were the only ones who had called into the hearing.

All attendees at the hearing were advised the Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) prohibit unauthorized recordings of dispute resolution hearings. They confirmed they were not recording this dispute resolution hearing.

#### Preliminary Matter – Service of Dispute Resolution Documents

AR and SD confirmed the notice of dispute resolution proceeding package and supporting documentary evidence (collectively, the “NDRP Package”) were sent to the Tenant by registered mail on March 23, 2022. The Landlord submitted a Canada Post registered mail receipt with a tracking number in support. That Canada Post tracking number is referenced in the cover page of this decision. Based on the foregoing, I find the Landlord served the Tenant with the NDRP Package in accordance with sections 88(c) and 89(2)(b) of the Act. I further find that pursuant to section 90(a) of the Act, the Tenant is deemed to have received the NDRP Package on March 28, 2022.

AR and SD confirmed the Landlord did not receive any documentary evidence from the Tenant.

#### Preliminary Issue – Amendment

SD submitted that the Landlord seeks to recover unpaid rent for January 2022, and payments for use and occupancy up to and including July 2022.

I note the Landlord’s monetary claim on this application lists only \$883.00 for unpaid January 2022 rent. I find that the Landlord is seeking an amendment to this application in order to request monetary compensation for overholding by the Tenant.

Rule 4.2 of the Rules of Procedure 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.

Since the Tenant has not left the rental unit, I find the Tenant can reasonably anticipate the Landlord to seek additional payment for use and occupancy of the rental unit to the date of the hearing, or June 30, 2022. Accordingly, I allow the Landlord to amend its application to include a monetary claim for compensation for overholding by the Tenant up to June 30, 2022.

#### Issues to be Decided

1. Is the Landlord entitled to an Order of Possession?
2. Is the Landlord entitled to compensation for unpaid rent?
3. Is the Landlord entitled to compensation for overholding by the Tenant?
4. Is the Landlord entitled to recover the filing fee?

#### Background and Evidence

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

This tenancy commenced on September 1, 2004 with a previous landlord, and is currently month-to-month. Rent is \$883.00 due on the first day of each month. The Tenant paid a security deposit of \$309.00 which is held by the Landlord.

The Landlord submitted a copy of the 10 Day Notice into evidence. The 10 Day Notice is dated January 10, 2022 and has an effective date of January 23, 2022. The 10 Day Notice states that the Tenant failed to pay rent of \$883.00 due on January 1, 2022.

During the hearing, AR and SD confirmed that:

- AR served the Tenant with a copy of the 10 Day Notice by posting it to the Tenant's door on January 10, 2022.
- The Landlord received use and occupancy payments from the Tenant for the months of April and May 2022.
- The Tenant did not pay for January, February, March, and June 2022.

- The Tenant is still residing in the rental unit.

I am satisfied based on AR's confirmation under oath that a copy of the 10 Day Notice was posted to the Tenant's door on January 10, 2022. I find that this resolves the proof of service issue highlighted by the Adjudicator in the March 21, 2022 interim decision.

### Analysis

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.

#### *1. Is the Landlord entitled to an Order of Possession?*

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

If a tenant does not pay rent when due, section 46 of the Act permits a landlord to take steps to end a tenancy by issuing a notice to end tenancy for unpaid rent.

Section 46(2) of the Act requires that the notice to end tenancy given by a landlord comply with section 52 of the Act in order to be effective. Section 52 states:

#### **Form and content of notice to end tenancy**

- 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.

In this case, I have reviewed a copy of the 10 Day Notice and find that it complies with the requirements of section 52 in form and content.

As AR attended this hearing and was able to confirm service under oath, I accept the Landlord's evidence that a copy of the 10 Day Notice was posted to the Tenant's door on January 10, 2022, in accordance with section 88(g) of the Act. I find that pursuant to section 90(c) of the Act, the Tenant is deemed to have received the 10 Day Notice on January 13, 2022.

Section 46(4) of the Act permits a tenant to dispute a 10 day notice to end tenancy for unpaid rent within 5 days after receiving such notice. Therefore, the Tenant had until January 18, 2022 to dispute the 10 Day Notice. In this case, the Tenant did not apply to dispute the 10 Day Notice by January 18, 2022 or at all.

Section 46(5) of the Act states that if a tenant who has received a notice under section 46 does not pay the rent or make an application for dispute resolution in accordance with section 46(4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

I find that, pursuant to section 46(5) of the Act, the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the 10 Day Notice, which is January 23, 2022.

Furthermore, sections 55(2)(b) and 55(4) of the Act states as follows:

**Order of possession for the landlord**

55 [...]

(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:

[...]

(b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired; [...]

[...]

(4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 *[Resolving Disputes]*,

(a) grant an order of possession, and

(b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

In this case, I have found the 10 Day Notice was deemed served on January 13, 2022, the time for disputing the 10 Day Notice expired on January 18, 2022, and the Tenant did not pay rent or make an application for dispute resolution. Accordingly, I conclude that the Landlord is entitled to an Order of Possession pursuant to sections 55(2)(b) and 55(4)(a) of the Act.

As the effective date stated on the 10 Day Notice has passed, I grant an Order of Possession to the Landlord effective two (2) days after service of the Order upon the Tenant.

*2. Is the Landlord entitled to compensation for unpaid rent?*

Based on the Landlord's testimony and evidence, I find that the Tenant did not pay rent when due on January 1, 2022.

Pursuant to section 55(4)(b) of the Act, I order that the Tenant pay to the Landlord \$618.03 (equivalent to  $\$833.00 \times 23/31$  days) for unpaid rent from January 1, 2022 to January 23, 2022.

*3. Is the Landlord entitled to compensation for overholding by the Tenant?*

Section 57(3) of the Act states that a landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

Section 57(1) of the Act defines an "overholding tenant" as a tenant who continues to occupy a rental unit after the tenant's tenancy is ended.

Based on the Landlord's testimony, I find that the Tenant is an overholding tenant under section 57(1) of the Act, and that the Landlord is entitled to compensation for the Tenant's use of the rental unit up to and including the date of the hearing.

Pursuant to section 57 of the Act, I order that the Tenant pay to the Landlord \$2,713.97 (equivalent to  $\$833 \times 8/31$  days +  $\$833 \times 5$  months -  $\$833 \times 2$  months) as compensation for overholding from January 23, 2022 to June 30, 2022, which includes adjustments for the \$1,666.00 in payments accepted by the Landlord for use and occupancy only.

*4. Is the Landlord entitled to recover the filing fee?*

The Landlord has been successful in this application. I grant the Landlord's claim for recovery of the \$100.00 filing fee under section 72(1) of the Act.

Pursuant to section 72(2)(b) of the Act, I order that the Landlord is authorized to retain the \$309.00 security deposit held by the Landlord in partial satisfaction of the total sum awarded on this application.

The Monetary Order granted to the Landlord for the balance of the amount awarded is calculated as follows:

<b>Item</b>	<b>Amount</b>
Unpaid Rent to January 23, 2022 (\$833.00 × 23/31 days)	\$618.03
Compensation for Overholding to June 30, 2022 (\$833 × 8/31 days + \$833 × 5 months)	\$4,379.97
Less Use and Occupancy Payments Received (\$833 × 2 months for April and May 2022)	- \$1,666.00
Filing Fee	\$100.00
Less Security Deposit	- \$309.00
<b>Total Monetary Order for Landlord</b>	<b>\$3,123.00</b>

Conclusion

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective two (2) days after service upon the Tenant. 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 Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord is authorized to retain the Tenant's \$309.00 security deposit in partial satisfaction of the sum awarded in this application.

Pursuant to sections 55 and 57 of the Act, I grant the Landlord a Monetary Order in the amount of \$3,123.00 for the balance awarded. 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: July 7, 2022

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Residential Tenancy Branch