



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes**

Primary Landlord File: OPN, OPM, FFL,  
Secondary Landlord File: MNR-DR, OPR-DR, FFL,  
Tertiary Tenant File: CNR, OLC, LRE

### **Introduction**

This cross-application hearing dealt with the landlord's primary application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for a Mutual Agreement to End Tenancy, pursuant to section 55;
- an Order of Possession for tenant's Notice to End Tenancy, pursuant to sections 49 and 55; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

This cross-application hearing dealt with the landlord's secondary 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 section 67; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The Landlord's secondary application originated as a direct request proceeding and was ultimately adjourned and joined with the other two files, which were already set for hearing on August 5, 2022. This decision should be read in conjunction with the Interim Direct Request Decision dated June 13, 2022 and the Correction Decision dated June 13, 2022. The Interim Direct Request Decision states:

Notices of Reconvened Hearing are enclosed with this interim decision. The landlord must serve the Notice of Reconvened Hearing, the interim decision, and all other required documents, upon the tenant within three (3) days of receiving this decision in accordance with section 89 of the Act.

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

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46;
- an Order to restrict or suspend the landlord's right to enter, pursuant to section 70; and
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62.

The tenant, the landlord and the landlord's son (M.D.) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

#### Preliminary Issue- Credibility

The landlord and M.D.'s testimony throughout the hearing was clear, direct and supported by documentary evidence. I found the landlord and M.D.'s testimony to be reliable and bore an air of reality.

The tenant's testimony was inconsistent throughout the hearing. The tenant's testimony regarding the dates documents were sent and received changed throughout the hearing and the tenant evaded answering direct questions. The same questions had to be asked multiple times to receive an answer.

Where the testimony of the landlord and the tenant differ, I prefer the testimony of the landlord over that of the tenant.

Preliminary Issue- Service

The landlord testified that the primary application for dispute resolution and evidence were served on the tenant via registered mail on April 21, 2022. A registered mail receipt for same was entered into evidence.

The tenant testified that she received the above package on June 3, 2022 in person.

M.D. testified that he looked up the delivery receipt on the Canada Post website and it states that the April 21, 2022 mailing was delivered to the tenant on April 25, 2022. I prefer the testimony of the landlord and M.D. over that of the tenant. I find that the tenant was served with the landlord's primary application for dispute resolution via registered mail on April 25, 2022, in accordance with section 89 of the *Act*.

The landlord testified that the Notice of Reconvened Hearing, Interim Direct Request Decision and the landlord's evidence were served on the tenant via registered mail on June 15, 2022. The landlord entered into evidence a registered mail receipt stating same.

The tenant testified that she did not receive the above package. The tenant testified that she usually checks her mail and she received something on July 26, 2022 and "the lady" told her that the package was returned to sender.

I find that the tenant was deemed served with the Notice of Reconvened Hearing, Interim Direct Request Decision and the landlord's evidence on June 20, 2022, five days after the registered mailing, in accordance with section 89 and 90 of the *Act*. I find that it was the tenant's responsibility to check her mail regularly and that failure to do so does not override the deeming provision in section 90 of the *Act*.

The tenant originally testified that she served the landlord with her application for dispute resolution on July 26, 2022 by registered mail.

The landlord testified that he received the tenant's evidence in the July 26, 2022 mailing but the tenant's application for dispute resolution was not in that package. The landlord did not state on what date the tenant's evidence was received.

The tenant then changed her testimony and testified that she did not serve the landlord with a copy of her application for dispute resolution because she did not know that she was required to and that the July 26, 2022 package only contained her evidence.

The Notice of Dispute Resolution Proceeding for the tenant's application was provided to the tenant on April 21, 2022 and states:

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

I find that the tenant failed to serve the landlord as required under section 89 of the *Act* and as expressly stated in the Notice of Dispute Resolution Proceeding provided to the tenant. The tenant's application is dismissed with leave to reapply for failure to serve.

As the landlords confirmed receipt of the tenant's evidence, I find that the landlords were deemed served with it on July 31, 2022, four clear days before this hearing, pursuant to section 88 and 90 of the *Act*.

Section 3.14 of the Residential Tenancy Branch Rules of Procedure (the "*Rules*") state that evidence must be received by the respondent and the Residential Tenancy Branch directly not less than 14 days before the hearing.

Section 3.15 of the *Rules* states that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

I find that the tenant's evidence was served too late to be considered as the late service breached both sections 3.14 and 3.15 of the *Rules*. The tenant's evidence is excluded from consideration.

#### Preliminary Issue – Amendment

The landlord's original application for dispute resolution claims unpaid rent in the amount of \$2,400.00. The landlord testified that since filing for dispute resolution, the amount of unpaid rent has increased to \$3,600.00.

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.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent, 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 in the amount of \$3,600.00.

#### Issues to be Decided

1. Is the landlord entitled to an Order of Possession for a Mutual Agreement to End Tenancy, pursuant to section 55 of the *Act*?
2. Is the landlord entitled to an Order of Possession for tenant’s Notice to End Tenancy, pursuant to sections 49 and 55 of the *Act*?
3. Is the landlord entitled to an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55 of the *Act*?
4. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
5. Is the landlord entitled to recover the filing fees for these applications from the tenant, pursuant to section 72 of the *Act*?

#### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant’s and landlord’s claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on January 15, 2021 and the tenant currently resides in the subject rental property. This was originally a fixed

term tenancy which reverted to a month to month (periodic) tenancy on January 15, 2022. Monthly rent in the amount of \$1,200.00 is payable on the first day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that this tenancy started on January 15, 2021 between the landlord, the tenant and tenant J.W. The landlord testified that tenant J.W. provided written notice to end the tenancy effective January 15, 2022. Both parties agree that tenant J.W. has vacated the subject rental property. Tenant J.W.'s written notice to end tenancy effective January 15, 2021 was entered into evidence.

Both parties agree that on December 1, 2021 the tenant provided the landlord with written notice to vacate the subject rental property on February 1, 2022. Both parties agree that in addition to the written notice described above, the tenant and the landlord signed a Mutual Agreement to End Tenancy, Residential Tenancy Branch Form 8. The written notice is signed and dated by the tenant, gives the address of the subject rental property, and states the effective date of the notice.

The tenant testified that she felt pressured to sign the Mutual Agreement to End Tenancy because the landlord brought it over to the subject rental property for her to sign after she provided the written notice to vacate. The landlord testified that after the tenant provided the written notice to end tenancy, he wanted to make sure the proper legal paperwork was filled out so he brought the paperwork to the tenant and she signed it.

The tenant testified that she intended on moving out but the place she arranged fell through.

The landlord testified that they agreed to allow the tenant to reside in the subject rental property two weeks after tenant J.W. moved out.

Both parties agree that the tenant did not move out on February 1, 2022 and did not pay rent for March, April or May 2022. Both parties agree that between March and August 5, 2022 the following rent payments were made:

- May 25, 2022- \$1,200.00,
- June 24, 2022- \$1,200.00, and
- July 21, 2022- \$1,200.00.

The tenant testified that the Ministry makes her rent payments, and that Ministry did not send the rent payments for March, April or May. The tenant did not enter into evidence any information from the Ministry pertaining to rent payments.

The tenant testified that she was personally served with a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) on April 23, 2022. The landlord testified that the 10 Day Notice was personally served on April 9, 2022. The landlord entered into evidence a witnessed proof of service document stating that M.D. served the tenant in person on April 9, 2022. The tenant then changed her testimony and testified that she received the 10 Day Notice in person on April 9, 2022. I note that the tenant filed to dispute the 10 Day Notice on April 12, 2022.

### Analysis

Section 45(1) of the *Act* states:

- 45** (1)A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a)is not earlier than one month after the date the landlord receives the notice, and
  - (b)is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 55(2)(a) of the *Act* states:

- (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:
- (a)a notice to end the tenancy has been given by the tenant;

Upon review of the tenant's notice to end tenancy, I find that the notice to end tenancy meets the form and content requirements of section 52 of the *Act*.

Based on the testimony of both parties and the notice to end tenancy drafted by the tenant and entered into evidence, I find that the tenant provided the landlord with notice to end tenancy in accordance with section 45(1) of the *Act* and the landlord is entitled to a two -day Order of Possession in accordance with section 55(2)(a) of the *Act*.

I find that even if the landlord's acceptance of rent for February 2022 re-instated the tenancy, then this tenancy would end pursuant to section 46 of the *Act*.

Based on the testimony of both parties and the witnessed proof of service document entered into evidence, I find that the tenant was personally served with the 10 Day Notice on April 9, 2022. Upon review of the 10 Day Notice I find that it meets the form and content requirements of section 52 of the *Act*.

Section 46(1) of the *Act* states that 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.

Section 46(4) of the *Act* states that 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.

Based on the testimony of both parties I find that the tenant failed to pay rent for March, April and May 2022 and did not pay the overdue rent within five days of receiving the 10 Day Notice. I find that the tenant owes the landlord \$3,600.00 in unpaid rent, pursuant to sections 26 and 67 of the *Act* for March, April and May 2022. Pursuant to section 46(1) of the *Act*, I uphold the 10 Day Notice.

Section 55(1) of the *Act* states:

- 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.

I find that since the 10 Day Notice complies with section 52, the tenant's application to cancel the 10 Day Notice was dismissed and the landlord's 10 Day Notice was upheld, the landlord is entitled to a 2-day order of possession, pursuant to section 55(1) of the *Act* for failure to pay rent. The tenant is responsible for ensuring that rent is paid, whether it be through the tenant or the Ministry. The failure of the Ministry to pay rent on



behalf of the tenant does not alleviate the tenant's responsibility to pay rent under section 26 of the *Act*.

I decline to consider the Mutual Agreement to end tenancy as I have already determined that the landlord is entitled to an Order of Possession pursuant to the tenants' notice to end tenancy and the 10 Day Notice.

As the landlord was successful in the primary and secondary applications for dispute resolution, I find that the landlord is entitled to recover the filing fee for both applications from the tenant, in the amount of \$200.00.

### Conclusion

I issue a Monetary Order to the landlord in the amount of \$3,800.00.

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.

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.

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: August 05, 2022

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Residential Tenancy Branch