



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR-DR, OPR-DR, FFL

Introduction

On August 2, 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:

I have reviewed all documentary evidence and I find that the landlord’s letter indicates that the rent is payable on the first day of each month. However, the tenancy agreement states the rent is due on the fifteenth of each month.

I also note that Policy Guideline #30 on Fixed Term Tenancies states that “rent can only be increased between fixed-term tenancy agreements with the same tenant if the notice and timing requirements for rent Increases are met.”

Furthermore, due to COVID-19, the Residential Tenancy Branch suspended all rent increases from March 30, 2020, to January 1, 2022.

I also note that the landlord increased the rent between the old and current tenancy agreements effective on May 15, 2021, during the rent increase freeze. I find that this rent increase may have an impact on the 10 Day Notice issued to the tenant.

I find these discrepancies in the amount of rent and the due date of the rent raise questions that can only be addressed in a participatory hearing.

This hearing dealt with the Landlord’s application under the Act for:

- an Order of Possession under a 10 Day Notice to End Tenancy for Unpaid Rent dated May 1, 2022 (“the 10 Day Notice”) pursuant to sections 46 and 55;
- a Monetary Order of \$2,735.00 for unpaid rent pursuant to sections 26 and 67; and

- authorization to recover the filing fee for this application from the Tenant pursuant to section 72.

The Landlord attended the hearing and was 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 unlocked until 1:40 pm in order to enable the Tenant to call into the hearing scheduled to start at 1:30 pm. 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 the Landlord and I were the only ones who had called into the hearing.

I advised the Landlord that the Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Documents

The Landlord testified she served the Tenant on August 2, 2022 with notice of this hearing by leaving a copy of the document with an adult at the rental unit. The Landlord submitted a Proof of Service document dated August 2, 2022 which is signed by the recipient, EC. Based on the foregoing, I find the Tenant to be served with notice of this hearing on August 2, 2022, in accordance with section 89(2)(c) of the Act. Records of the Residential Tenancy Branch indicate that the Landlord served the Tenant with the Landlords’ documentary evidence on July 13, 2022 via registered mail. The Landlord submitted a Canada Post registered mail receipt with a tracking number in support. Based on this evidence, I find the Tenant to have been served with the Landlord’s documentary evidence in accordance with section 88(c) of the Act. Pursuant to section 90(a) of the Act, I find the Tenant is deemed to have received the Landlord’s documentary evidence on July 18, 2022.

Preliminary Issue – Amendment

The Landlord submitted that since March 2022, the Tenant has only paid \$1,367.50 plus \$800.00 for a total of \$2,167.50. The Landlord confirmed the Tenant is still residing in the rental unit.

I note the Landlord's monetary claim on this application includes only unpaid March and April 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 September 6, 2022. Accordingly, I allow the Landlord to amend her application to include a monetary claim for compensation for overholding by the Tenant up to September 6, 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

This tenancy commenced in or around April 2020 for a fixed term ending in March 2021. Rent was \$1,250.00 per month. The Tenant paid a security deposit of \$625.00 and a pet damage deposit of \$300.00, which are held by the Landlord in trust.

The parties subsequently entered into another tenancy agreement in or around February and March of 2021, for a fixed term of one year starting on May 15, 2021 and ending on April 15, 2021. Under this tenancy agreement, rent was \$1,367.50 per month, due on the 15th day of each month. A copy of this tenancy agreement has been submitted into evidence.

The Landlord's evidence includes a letter to the Tenant dated February 20, 2021 (the "Letter"), in which the Landlord wrote that for the new tenancy agreement, there would be a 1.4% monthly rent increase from \$1,250.00 to \$1,267.50, plus \$50.00 for internet surcharge and \$50.00 for an additional pet. The Letter states that total monthly rent due on the first of each month is \$1,367.50.

The Landlord testified that she initially had discussions with the Tenant about making rent due on the first day of the month, but later agreed on the fifteenth.

The Landlord further explained that the previous tenancy agreement did not include internet, and the Tenant was supposed to get her own internet. The Landlord testified she lives above the rental unit and had upgraded her internet for sharing with the Tenant.

The Landlord's evidence indicates that the 10 Day Notice was posted to the Tenant's door on May 1, 2022. A copy of the 10 Day Notice has been submitted into evidence.

The 10 Day Notice is dated May 1, 2022 and has an effective date of May 15, 2022. The 10 Day Notice states that the Tenant did not pay March and April rent in the amount of \$2,734.00 due on May 4, 2022. The Landlord testified that she made a mistake with the due date. The Landlord confirmed that the Tenant did not pay rent for March and April 2022.

The Landlord confirmed that the Tenant was still residing in the rental unit.

The Landlord testified that since the 10 Day Notice was issued, the Landlord received a payment of \$1,367.50 for a subsequent month, plus a payment of \$800.00 received about a week before the hearing.

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 accept the Landlord's undisputed testimony that she made a mistake when she wrote the due date as May 4, 2022 on the 10 Day Notice. I accept the Landlord's undisputed testimony that rent is due on the fifteenth day of each month. I find that the signed tenancy agreement submitted by the Landlord indicates that rent is due on the fifteenth day of each month.

Section 68(1) of the Act states:

Director's orders: notice to end tenancy

68(1) If a notice to end a tenancy does not comply with section 52 *[form and content of notice to end tenancy]*, the director may amend the notice if satisfied that

- (a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and

(b) in the circumstances, it is reasonable to amend the notice.

The 10 Day Notice states that the Tenant did not pay March and April rent in the amount of \$2,734.00 due on May 4, 2022. I find that there was likely a typo on the 10 Day Notice as the amount owing for two months should be \$2,735.00. I find that the Tenant knew, or should have known, that the unpaid amount was \$2,735.00 and that half of this amount (\$1,367.50) was due on March 15, 2022 while the other half was due on April 15, 2022. I find that it is reasonable in the circumstances to amend the 10 Day Notice to correct the total amount owing and the due dates.

I find that the 10 Day Notice otherwise complies with the requirements of section 52 in form and content.

Based on the Landlord's undisputed evidence and testimony, I find that a copy of the 10 Day Notice was posted to the Tenant's door on May 1, 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 May 4, 2022.

Section 46(4) of the Act permits a tenant to dispute a 10 day notice to end tenancy for unpaid rent, or pay the outstanding rent in full, within 5 days after receiving such notice. Therefore, the Tenant had until May 9, 2022 to dispute the 10 Day Notice or pay the outstanding rent in full. In this case, the Tenant did not apply to dispute the 10 Day Notice by May 9, 2022 or at all.

I accept the Landlord's evidence that she later received partial payments of \$1,367.50 and \$800.00 from the Tenant.

I find the evidence further indicates that the Landlord had increased rent by 1.4% (or \$17.50 per month) without complying with the timing and notice requirements for rent increases under part 3 of the Act.

Residential Tenancy Policy Guideline 30. Fixed Term Tenancies states:

D. RENEWING A FIXED TERM TENANCY AGREEMENT

A landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term. If a tenancy does not end at the end of the fixed term, and if the parties do not enter into a new tenancy agreement, the tenancy automatically continues as a month-to-month tenancy on the same

terms. Rent can only be increased between fixed-term tenancy agreements with the same tenant if the notice and timing requirements for rent Increases are met.

(emphasis added)

Sections 41 and 42 of the Act state:

Rent increases

41 A landlord must not increase rent except in accordance with this Part.

Timing and notice of rent increases

42(1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

- (a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;
- (b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

(emphasis added)

Section 43(5) of the Act states that if a Landlord collects a rent increase that does not comply with the Act, a tenant may deduct the increase from rent or otherwise recover the increase.

I find that the Landlord did not issue a notice of rent increase using the approved Residential Tenancy Branch form at least 3 full months before the effective date of May 15, 2021. Therefore, I find that the Landlord's 1.4% rent increase did not comply with the timing and notice requirements under the Act.

I find the evidence suggests that the Tenant paid the 1.4% rent increase from May 2021 to February 2022, which the Tenant was entitled to deduct from rent. I find that the Tenant would have also been entitled to withhold the rent increase component charged in the March and April 2022 rent. I find that as at the time of receiving the 10 Day

Notice, the total amount that the Tenant was entitled to deduct from rent would have been $\$17.50 \times 12 \text{ months} = \210.00 .

I note that the Tenant had also been paying extra for the internet surcharge and being allowed to keep an additional pet, but I do not find these amounts to be strictly rent increases under the Act as the Tenant was receiving additional services or benefits in return.

Section 46(5) of the Act states that if a tenant who has received a notice under section 46 does not pay the rent in full 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.

In this case, I find that as at May 1, 2022, the Tenant was entitled to withhold \$210.00 from rent payable to the Landlord pursuant to section 43(5) of the Act. Therefore, of the \$2,735.00 in rent stated to be owing for March and April 2022, the Tenant was required to pay \$2,525.00 within 5 days of receiving the 10 Day Notice in order to cancel the notice. I accept the Landlord's testimony that she has only received partial payments of \$1,367.50 for a subsequent month, plus a payment of \$800.00 received about a week before the hearing. Therefore, I find that the Tenant did not pay \$2,525.00 to the Landlord within 5 days of receiving the 10 Day Notice.

Based on the foregoing, 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 May 15, 2022.

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 May 4, 2022, the time for disputing the 10 Day Notice expired on May 9, 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 already 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?

I find the Landlord is entitled to compensation for unpaid rent for March and April 2022 under section 55(4)(b) of the Act, less the amount that the Tenant is legally entitled to deduct from rent under section 43(5) of the Act.

Pursuant to section 55(4)(b) of the Act, I order the Tenant to pay the Landlord \$2,525.00 for unpaid rent.

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.

I find that the Landlord is entitled to \$1,350.00 for each month that the Tenant overholds the rental unit.

Pursuant to section 57 of the Act, I order that the Tenant pay to the Landlord compensation for overholding at \$1,350.00 per month from May 15, 2022 to September 6, 2022.

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 Tenant's \$625.00 security deposit and \$300.00 pet damage deposit held by the Landlord in partial satisfaction of the total awarded in this application.

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

Item	Amount
Unpaid Rent for March and April 2022 (\$1,367.50 × 2 months)	\$2,735.00
Less Amount Deducted under Section 43(5) of the Act (\$17.50 × 12 months from May 2021 to April 2022)	- \$210.00
Compensation for Overholding from May 15, 2022 to September 6, 2022 (\$1,350.00 × 3 months + \$1,350.00 × 23/31 days)	\$5,051.61
Less Payments Received from Tenant (\$1,367.50 + \$800.00)	- \$2,167.50
Filing Fee	\$100.00
Less Security Deposit	- \$625.00
Less Pet Damage Deposit	- \$300.00
Total Monetary Order for Landlord	\$4,584.11

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 \$625.00 security deposit and \$300.00 pet damage 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 **\$4,584.11** for the balance awarded in this decision. 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: September 08, 2022

Residential Tenancy Branch