



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      **OPU-DR, MNU-DR, FFL**

### Introduction

This hearing was reconvened as a result of the Landlord's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55 based on a Ten Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated February 2, 2022 ("10 Day Notice");
- a Monetary Order for unpaid rent and/or utilities pursuant to section 55; and
- authorization to recover the filing fee for the Application from the Tenants pursuant to section 72.

Neither of the two Tenants attended this hearing. I left the teleconference hearing connection open until 11:54 am in order to enable the Tenants to call into this teleconference hearing scheduled for 11:00 am ("Adjourned Hearing"). An agent ("RM") of the Landlord attended the Adjourned 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 Dispute Resolution Proceeding for the hearing. I also confirmed from the teleconference system that RM and I were the only ones who had called into this teleconference.

This hearing was reconvened from a non-participatory, *ex parte*, "direct request" proceeding. In an interim decision dated April 29, 2022 ("Interim Decision"), the presiding adjudicator determined that a participatory hearing was necessary to address questions that could not be resolved on the documentary evidence submitted by the Landlord. As a result, this hearing was scheduled and came on for hearing on August 23, 2022 at 11:00 am ("Adjourned Hearing"), to consider the Application. The Interim Decision, and Notices of Dispute Resolution Proceeding, were served on the parties by the Residential Tenancy Branch.

RM stated the Notice of Dispute Resolution Proceeding for the Original Hearing and the Landlord's evidence (collectively the "Original NDRP Package") was served on each of the Tenants by registered mail on April 1, 2022. RM submitted into evidence Proofs of Service on Form RTB-44 and the Canada Post tracking numbers for service of the Original NDRP Package by the Landlord on each of the Tenants. Based on the undisputed testimony of RM, I find the Original NDRP Package was served on each of the Tenants pursuant to the provisions of sections 88 and 89 of the Act.

RM stated the Tenants did not serve the Landlord with any evidence for this proceeding.

### Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession?
- a monetary order for unpaid rent and/or utilities?
- recover the filing fee for the Application from the Tenants?

### 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 Application and my findings are set out below.

RM submitted into evidence a copy of the tenancy agreement and addenda, dated August 30, 2021, between the Landlord and the Tenants. RM stated the tenancy commenced on August 30, 2021, with a fixed term ending August 31, 2022, with minimum rent of \$1,595.00 payable on the 1<sup>st</sup> day of each month, consisting of \$1,495.00 basic rent plus a minimum \$100.00 charge for water, sewer and garbage services ("Minimum Utility Charge"). The Tenants were to pay a security deposit of \$747.50 by August 31, 2021. RM stated the Tenants paid the security deposit and that the Landlord was holding it in trust for the Tenants. RM stated the Tenants vacated the rental unit on May 1, 2022.

RM stated the Landlord served the 10 Day Notice on the Tenants' door on February 2, 2022. The 10 Day Notice stated the Tenants had rental arrears of \$4,760.00 as of February 1, 2022. RM stated the Tenants made three rental payments totaling

\$3,700.00 after the 10 Day Notice was served on them. RM claimed the Tenants owed the Landlord \$1,585.00 for rental arrears from December 1, 2021 through to February 1, 2022 inclusive, calculated as follows:

Date	Base Rent	Minimum Utility Charge	Total Rent	Payment	Balance
01-Dec-21	\$1,495.00	100.00	\$1,595.00	\$0.00	\$1,595.00
01-Jan-22	\$1,495.00	100.00	\$1,595.00	\$0.00	\$3,190.00
01-Feb-22	\$1,495.00	100.00	\$1,595.00	\$0.00	\$4,785.00
08-Feb-22				\$500.00	\$4,285.00
25-Feb-22				\$1,600.00	\$2,685.00
15-Mar-22				\$1,600.00	\$1,085.00
<b>Total</b>	<b>\$5,980.00</b>	<b>\$400.00</b>	<b>\$6,380.00</b>	<b>\$3,700.00</b>	<b>\$1,085.00</b>

RM testified he inadvertently inserted on the 10 Day Notice that the Tenants had rental arrears of \$4,760.00 instead of \$4,785.00 as calculated above. RM indicated the Landlord was waiving the \$25.00 difference. The Landlord did not submit into evidence any copies of the receipts or other evidence of payment for the payments toward rent they on February 8, February 25 or March 15, 2022.

RM stated he was unaware of the Tenants making an application for dispute resolution to dispute the 10 Day Notice.

### Analysis

#### **1. Landlord's Claim for Order of Possession**

Sections 46(1), 46(2), 46(4) and 49(5) 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]*.

- (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.
  
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
  - (a) *is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
  - (b) *must vacate the rental unit to which the notice relates by that date.*

[emphasis added in italics]

The Landlord served the 10 Day Notice on the Tenants' door on February 2, 2022. Pursuant to section 46(4) of the Act, the Tenants had until February 5, 2022, to make an application for dispute resolution to dispute the 10 Day Notice. The Tenants did not make an application for dispute resolution to dispute the 10 Day Notice. Pursuant to section 46(5)(a), the Tenants were conclusively presumed to have accepted the tenancy ended on the effective date of the 10 Day Notice. The 10 Day Notice stated the effective date for move out was February 12, 2021. Pursuant to section 46(5)(a) of the Act, the tenancy ended on May 12, 2022. RM stated the Tenants continued to occupy the rental unit until May 1, 2022.

Sections 55(2), 55(3) and 55(4) of the Act state:

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

- (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;*
  - (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
  - (c.1) the tenancy agreement is a sublease agreement;
  - (d) the landlord and tenant have agreed in writing that the tenancy is ended.
- (3) The director may grant an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.
- (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.

[emphasis added in italics]

I find the Minimum Utility Charge of \$100.00 per month formed part of the rent the Tenants were required to pay each month. As such, I find it was unnecessary for the Landlord to serve the Tenants with a 30-Day Demand in writing that they pay the Minimum Utility Charge each month. Based on the undisputed testimony of SK, I find the Tenants owed the Landlord \$4,785.00 for rental arrears as of the date of the 10 Day Notice. However, as noted above, the 10 Day Notice stated the rental arrears were \$4,760.00 as of February 1, 2022. Based on the foregoing, I find the Landlord has satisfied its onus to prove, on a balance of probabilities, that the 10 Day Notice was issued for a valid reason.

The Landlord did not provide any receipts or other evidence of the three payments made by the Tenants after service of the 10 Day Notice on the Tenants to show the payments were received by the Landlord for use and occupancy of the rental unit only. However, the Tenants vacated the rental unit on May 1, 2022. As such, it is

unnecessary for me to consider whether the Tenants had an expectation that the tenancy would be reinstated when they made these three payments totalling \$3,700.00 to the Landlord.

I have reviewed the 10 Day Notice and find it complies with the section 52 form and content requirements. Accordingly, pursuant to section 55(4)(a) of the Act, I find the Landlord is entitled to an Order of Possession. However, as the Tenants have already vacated the rental unit, an Order of Possession is no longer required by the Landlord.

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

Sections 26 of the Act state:

- 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.

The 10 Day Notice stated the Tenants had rental arrears of \$4,760.00. RM testified the Tenants paid a total of \$3,700.00 after the 10 Day Notice was served on the Tenants, leaving a balance of \$1,060.00 owing for rental arrears. As the Tenants did not vacate the rental unit until May 1, 2022, the Landlord sought an additional \$3,190.00 in rental arrears for the months of March and April 2022. Subsection 57(3) of the Act states:

- 57(3) 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.

*Residential Tenancy Policy Guideline 3* ("PG 3") provides guidance, among other things, on situations where a landlord may seek unpaid rent or, where the tenancy has ended pursuant to conclusive presumption under section 46(5)(a) of the Act. PG 3 states in part:

**B. Overholding tenant and compensation**

Section 44 of the RTA (section 37 of the MHPTA) sets out when a tenancy agreement will end. *A tenant is not liable to pay rent after a tenancy agreement has ended. 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.* In certain circumstances, a tenant may be liable to compensate a landlord for other losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant's occupancy of the unit or site.

[emphasis in italics added]

Accordingly, the landlord must seek compensation where the tenant overholds the rental unit after the tenancy has ended pursuant to subsection 57(3) of the Act. The Application does not contain a claim to seek monetary compensation for the Tenants overholding the rental unit. As such, the Landlord is not entitled to seek compensation for the Tenants overholding the rental unit after the effective date of the 10 Day Notice. In these circumstances, the Landlord has the option of making an application for dispute resolution to seek compensation for the time the Tenants overheld the rental unit rental after the effective date of the 10 Day Notice as stated in PG 3.

As noted above, I have found the Tenants had rental arrears of \$1,060.00 for the months of December 1, 2021 through to March 1, 2022 inclusive, after deduction of rental payments of \$3,700.00 from the rent of \$4,760.00 claimed in the 10 Day Notice. Pursuant to section 55(4)(b) of the Act, I order the Tenants pay the Landlord \$1,060.00 in satisfaction of the rental arrears owed. Pursuant to section 72(2)(b), the Landlord may deduct the Tenants' security deposits of \$747.50 from the rental arrears owed by the Tenants, leaving a balance of \$312.50.

### 3. Reimbursement of Landlord's Filing Fee

As the Landlord has been successful in their application, they may recover the \$100.00 filing fee for his application from the Tenants pursuant to section 71 of the Act.

#### Conclusion:

I order that the Tenants pay the Landlord \$412.50, representing the following:

Description	Amount
Rental Arrears for December 1, 2021 to March 1, 2022, inclusive	\$1,060.00
Landlord's Filing Fee for Application	\$100.00
Less Tenants' Security Deposit	-\$747.50
<b>Total</b>	<b>\$412.50</b>

This Monetary Order must be served by the Landlord on the Tenants and may be enforced in Provincial 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 6, 2022

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Residential Tenancy Branch