



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, RP, FFT

### Introduction

On November 4, 2022, the Tenants made an Application for Dispute Resolution seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “Notice”) pursuant to Section 46 of the *Residential Tenancy Act* (the “Act”), seeking a repair Order pursuant to Section 32 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Both Tenants attended the hearing, and the Landlord attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

Tenant A.L. advised that the Notice of Hearing and evidence package was served to the Landlord by registered mail on or around November 17, 2022, and the Landlord confirmed that she received this package. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord has been duly served the Notice of Hearing and evidence package. As such, I have accepted the Tenants’ evidence and will consider it when rendering this Decision.

The Landlord advised that she served her evidence to the Tenants by email on December 6, 2022. A.L. confirmed that they received this package on December 9,

2022, and despite there not being an agreement to exchange documents by email, she acknowledged that they were able to review and respond to this evidence. Based on this testimony, I have accepted the Landlord's evidence and will consider it when rendering this Decision.

At the outset of the hearing, the parties were advised that as per Rule 2.3 of the Rules of Procedure, claims made in an Application must be related to each other, and I have the discretion to sever and dismiss unrelated claims. As such, this hearing primarily addressed issues related to the Notice to end tenancy, and the other claims were dismissed. The Tenants are at liberty to apply for any other claims under a new and separate Application.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

#### Issue(s) to be Decided

- Are the Tenants entitled to have the Notice cancelled?
- If the Tenants are unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Are the Tenants entitled to recover the filing fee?

#### Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on March 1, 2020, that rent was established at an amount of \$2,650.00 per month, and that it was due on the first day of each month. A security deposit of \$1,325.00 was paid, and a pet damage deposit of \$1,325.00 was also recently paid; however, the tenancy agreement was not amended to document this change. An identical copy of the tenancy agreement was submitted by

both parties as documentary evidence for consideration. As such, I accept that both parties agreed to the terms of the tenancy agreement provided.

They also confirmed that the Notice was served by hand on November 2, 2022. The Notice indicated that \$286.14 was owing for utilities and that a written demand was given for these utilities on December 5, 2021. The Notice also indicated that \$1,189.22 was owing for utilities and that another written demand was given for these utilities on November 6, 2022. The effective end date of the tenancy was noted as November 11, 2022, on the Notice.

As the *Act* stipulates that the Landlord can only serve a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities if the amount of utilities has remained unpaid after 30 days of a written demand for those utilities, the Landlord was questioned how it would be possible to include the alleged utilities owing of \$1,189.22 on this Notice given that the written demand was purported to have been served **after** the Notice was served. The Landlord repeatedly attempted to explain why this particular amount was due; however, she eventually conceded that this was included on the Notice in error. As well, she acknowledged that not identifying the Tenants' rental unit address as being different from her own address on the Notice was also an error.

Tenant A.M. advised that they understood that the dispute address was not accurate on the Notice, and they did not take issue with this. However, it is their position that the error of requesting \$1,189.22 for utilities on the Notice renders this Notice invalid as it is a fatal flaw.

With respect to the amount of utilities of \$286.14 owing on the Notice, the Landlord advised that a written demand was given to the Tenants on December 5, 2021, and that the reason it took her almost a year to serve the Notice is because she only noticed in October 2022 that this amount was not paid. As such, she sent the Tenants a reminder to pay this amount on October 16, 2022.

She testified that the inclusion of utilities noted in the tenancy agreement was a "clerical error" on her part, and she referenced the advertisements and the application for tenancy as evidence that utilities were not included as part of this tenancy. She stated that the Tenants paid the utilities after her first demand for them was given on August 14, 2020. As well, she submitted that the Tenants, of their own accord, requested the amount of utilities owed to date in February 2021, which the Tenants subsequently paid. As well, she submitted that another demand for utilities was served to the Tenants

in June 2021, and the Tenants paid this amount. However, the Tenants refused to pay for the utilities owing after the written demand was sent on December 5, 2021.

She testified that she never pushed the Tenants to pay the utilities, that she never provided bills in a timely manner, and that she was out of the country and not capable of upholding her duties and obligations required by a Landlord. She advised that there was an “oral agreement” between the parties that the Tenants would be responsible for the utilities and that their past behaviour of paying for them supports that position.

Moreover, she stated that the Tenants offered to sign a new tenancy agreement where they would be responsible for the utilities, which reinforces her position that they were aware that they should have been responsible for the utilities all along. She acknowledged that she did not have a written agreement that the Tenants would be responsible for paying for utilities despite the tenancy agreement indicating that they were included as part of the tenancy agreement.

A.M. advised that they viewed the rental unit twice, and the Landlord told them on one occasion that utilities were included, but informed them on a second occasion that utilities were not included. Given that they did not receive a utility bill for five months after the start of the tenancy, they assumed that utilities were included. However, when they first received this demand in August 2020, she conferred with Tenant D.S. and then the Landlord. When the Landlord stated that utilities were owed, the Tenants did not question her and paid the amount owing.

She confirmed that they paid utilities in February 2021 and June 2021, and that when they received the December 2021 request for utilities, they discovered that utilities were actually included as per the tenancy agreement. She stated that they immediately brought this to the Landlord’s attention by email on December 8, 2021, and that they should discuss the matter; however, there was no response from the Landlord. As such, they assumed that this was no longer an issue. When the Landlord sent them a reminder email on October 16, 2022, regarding the outstanding utilities owed, they re-forwarded their December 8, 2021, email in response to the Landlord’s demand. She stated that the Landlord then informed them that they would discuss the issue in October 2022, when she was back in town.

She advised that the Landlord indicated that the “written agreement contains a clerical error that no one noticed for a long time.” As well, she testified that there was no oral agreement that utilities were to be paid by them, and there was no documentary

evidence submitted to corroborate the Landlord's testimony of an express oral agreement of such. It is their position that if there truly was a clerical error in the agreement that no one noticed, it would not make sense that an oral agreement to pay for utilities would then have been necessary to engage in. Furthermore, she highlighted that the Landlord testified that there were no discussions with the Tenants about the Tenants' responsibility to pay for utilities, which was contrary to the Landlord's position that there was an oral agreement.

### Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 26 of the *Act* states that rent must be paid by the Tenants when due according to the tenancy agreement, whether or not the Landlord complies with the tenancy agreement or the *Act*, unless the Tenants have a right to deduct all or a portion of the rent.

Should the Tenant not pay the rent when it is due, Section 46 of the *Act* allows the Landlord to serve a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. As well, should the Tenant not pay the utilities, this same Section of the *Act* allows the Landlord to serve a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities only after a written demand for the utilities is served on the Tenants, and this amount has remained unpaid 30 days after the written demand.

Once this Notice is received, the Tenants would have five days to pay the rent and/or utilities in full or to dispute the Notice. If the Tenants do not do either, the Tenants are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice, and the Tenants must vacate the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlord must be signed and dated by the Landlord, give the address of the rental unit, state the effective date of the Notice, state the grounds for ending the tenancy, and be in the approved form.

When reviewing this Notice, I note that the Landlord has made several errors in this Notice. Given that the Tenants agreed that the dispute address on the Notice was incorrect, but knew that this still applied to them, I do not find that this would invalidate the Notice.

As well, I note that the request for utilities of \$1,189.22 is so obviously incorrect given that the demand letter was provided after the Notice was served. However, I do not necessarily find this to be a fatal flaw which would invalidate the Notice because there is still an alleged amount of utilities of \$286.14 that was outlined as owing after a written demand was given on December 12, 2021. As this amount would seemingly still comply with the *Act*, only this amount of utilities owing will be addressed.

The undisputed evidence before me is that the Tenants received the Notice on November 2, 2022. According to Section 46(4) of the *Act*, the Tenants had 5 days to pay the overdue rent and/or utilities or to dispute this Notice. Section 46(5) of the *Act* states that *“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 is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.”*

As the Tenants received the Notice on November 2, 2022, they must have paid the utilities in full or disputed the Notice by November 7, 2022, at the latest. While the Tenants did not pay this amount of utilities in full to cancel the Notice, they did dispute it within the five-day time frame.

When reviewing this matter, I find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Furthermore, given the contradictory testimony and positions of the parties, I may also turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

The consistent and undisputed evidence before me is that the tenancy agreement indicated that utilities were included as part of this tenancy. I find it important to note that as the Landlord is the person renting out the unit, she is responsible for the drafting

of the tenancy agreement. While she maintains that the inclusion of utilities in the tenancy agreement was a “clerical error”, when reviewing the tenancy agreement, it cannot be more apparent that there are clearly, easily identifiable boxes that the Landlord can simply check off depending on which items she wants to be included as part of the tenancy.

Given that the Landlord must actively read the description of each box, process that information, and then physically check off the boxes of items that she wants to include as part of the tenancy, I reject that this was simply a clerical error as suggested by her. In my view, a clerical error would be one in which there is a typo, for example, or where the Landlord did not identify that the rental unit was a separate unit from her own address. In this vein, I note that the Landlord made this same address error on the Notice, and that she requested utilities as owing in the amount of \$1,189.22 for a demand given after the Notice. I would deem these to be clerical errors.

However, in considering these errors in conjunction with the manner with which the Landlord manages the tenancy, I find that a clear pattern emerges. I note that the Landlord appeared to have little involvement with managing the tenancy, and this was echoed in her testimony that she would make requests for utilities sporadically, which appeared to be mostly due to her being out of the country. Furthermore, I note that that she waited almost a full year before acting on a demand letter for utilities. As well, she suggested that she had “oral agreements” with the Tenants about other issues including utilities, but none of these were documented in writing. Similar to this, a pet damage deposit was paid recently; however, the Landlord does not appear to have documented this change in writing by amending the tenancy agreement with the Tenants.

When reviewing the totality of the evidence and testimony before me, I found that the Landlord took a hands-off, ambivalent, inattentive, and casual approach towards managing this tenancy, and it is not surprising that she was unaware of what she included as part of the tenancy. Regardless, it cannot be disputed that utilities were included as it was clearly indicated inasmuch on the tenancy agreement, and the responsibility for this rests with the Landlord.

It is apparent that the Landlord does not take the appropriate care to document any changes to the tenancy agreement, and I note that the Landlord has not provided any documentary evidence to support that there was a written agreement that the Tenants would be responsible for utilities contrary to what was indicated on the tenancy agreement.

While I accept that the Tenants paid for utilities after infrequent written demands from the Landlord, this does not change the fact that the Landlord indicated on the tenancy agreement that utilities were included. Furthermore, I do not find that the Landlord provided any documentary evidence to corroborate her position that there was an explicit oral agreement that the Landlord would not be responsible for paying for the utilities. Moreover, I do not find that by paying for utilities, this establishes that the Tenants engaged into an oral agreement.

Based on the careless and ambivalent manner with which the Landlord has chosen to manage the rental unit, I am satisfied that this issue was borne solely out of the Landlord's negligence and inattentiveness, and that the Landlord is now attempting to backtrack on the terms of the tenancy agreement that she herself drew up. As a result, I do not find the Landlord to be credible on the whole.

Ultimately, as the burden rests with the Landlord to prove the validity of the Notice, I find that the Landlord has failed. I accept that the Landlord breached the agreement by requesting that utilities be paid. As such, I am not satisfied that there have been any credible grounds to justify service of the Notice, and I find that the Notice of November 2, 2022, is cancelled and of no force and effect.

With respect to the amount of utilities that the Tenants have paid in the past when not required to, the Tenants may make a separate Application seeking remedy for this. However, it will be up to the next Arbitrator to determine if the Tenants adequately mitigated their loss, as they could have simply referred to their tenancy agreement and addressed this issue sooner.

As the Tenants were successful in this Application, I find that the Tenants are entitled to recover the \$100.00 filing fee. Under the offsetting provisions of Section 72 of the *Act*, I allow the Tenants to withhold this amount from the next month's rent.

### Conclusion

Based on the above, I hereby order that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities of November 2, 2022, to be cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*.



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: December 21, 2022

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Residential Tenancy Branch