



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

Dispute Codes      CNR, FFT

### Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on March 2, 2023 (the “10-Day Notice”); and
- return of the filing fee pursuant to s. 72.

C.S. and S.S. appeared as the Tenants. J.B. appeared as the Landlord’s agent.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other’s application materials.

### Issues to be Decided

- 1) Is the 10-Day Notice enforceable?
- 2) If so, is the Landlord entitled to an order of possession and an order for unpaid rent?
- 3) Are the Tenants entitled to the return of their filing fee?

### Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenants moved into the rental unit on October 31, 2021.
- Rent of \$2,679.60 is due on the first of each month as well as a \$100.00 parking fee.
- The Tenants paid a security deposit of \$1,320.00 and pet damage deposit of \$1,320.00 to the Landlord.

I am provided with a copy of the tenancy agreement by the parties. The tenancy agreement lists rent was originally due in the amount of \$2,640.00. The Landlord provides a notice of rent increase effective November 1, 2022 for the increased amount as listed above.

The Landlord's agent testifies that the 10-Day Notice was posted to the Tenants' door on March 2, 2023 after they had fallen behind in their rent. The Tenants acknowledge receipt of the 10-Day Notice on March 2, 2023.

I am provided with a copy of the 10-Day Notice by the Tenants, which shows arrears of rent totalling \$11,038.00. The Landlord provides a copy of the 10-Day Notice as well, though appears to have revised the amount listed to \$10,038.00 as unpaid rent. As explained by the Landlord's agent, the Landlord revised the unpaid rent claim to exclude the parking fee.

The Landlord has failed to provide a rent ledger or summary detailing how it came to tabulate the total unpaid rent. I am provided with a series of 10-day notices to end tenancy from August 2022 to March 2023, though it is unclear if any had been served on the Tenants other than as evidence for this application. In oral submissions, the Landlord's agent testified that the Tenants made the following payments over the relevant period:

<u>Month</u>	<u>Rent Paid</u>
June 2022	\$2,360.00
July 2022	\$2,100.00
August 2022	\$2,000.00
September 2022	\$2,300.00
October 2022	\$0.00
November 2022	\$5,000.00
December 2022	\$0.00
January 2023	\$0.00
February 2023	\$2,800.00
March 2023	\$0.00
<b>TOTAL RENT PAID</b>	<b>\$16,560.00</b>

The Tenants were unable to verify the payment history provided by the Landlord's agent in her oral submissions, though acknowledge that they have had a difficult year and have fallen behind in their rent payments. According to the Tenants, their family contracted COVID-19 in the summer of 2022, which resulted in time off work. I am further advised by the Tenants that S.S. injured his shoulder in November 2022 after falling some 20 feet when evacuating the residential property after the fire alarm had been pulled. The Tenants argue that S.S.'s injury was due to the Landlord's negligence. The Tenants say that S.S. was the primary income earner and has been unable to work since being injured. The Tenants further advise that they recall making the \$2,800.00 payment as mentioned by the Landlord's agent, though appear to have had to rely on the assistance of family to do so.

The parties confirm the Tenants continue to reside within the rental unit.

### Analysis

The Tenants seek an order cancelling the 10-Day Notice.

Pursuant to s. 46(1) of the Act, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(4) of the Act, a tenant has 5-days from receiving a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice. If a tenant files to dispute the notice, the burden of proving it was issued in compliance with s. 46 of the Act rests with the respondent landlord.

I accept that the 10-Day Notice was posted to the Tenants' door on March 2, 2023 and that the Tenants received it on the same date. I find that that the 10-Day Notice was served in accordance with s. 88 of the *Act*.

Though the Landlord has altered the version of the 10-Day Notice it has provided to the Residential Tenancy Branch, in all material aspects I do not find that this is relevant. I accept the version of the 10-Day Notice served on the Tenants was provided to me by the Tenants. I further accept that the revision downward was an attempt by the Landlord to limit the issue to unpaid rent by excluding the parking fees.

As per s. 46(2) of the *Act*, all notices issued under s. 46 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the 10-Day Notice provided to me by the Tenants and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30).

I am advised by the Landlord's agent that, as at the date of the hearing, the Tenants failed to pay rent totalling \$10,038.00. The Tenants acknowledge being behind in their rent payments to the Landlord, though are unclear on the specific amount. The Tenants further argue that their being behind on rent is due to the Landlord's neglect in maintaining the property.

The Tenants' obligation to pay rent flows from the tenancy agreement and is further clarified by s. 26(1) of the *Act*, which specifies that a tenant must pay rent when it is due whether or not the landlord complies with the *Act*, regulations, or the tenancy agreement unless the tenant has the right to deduct all or a portion of the rent under the *Act*. The *Act* proscribes a set of limited circumstances in which monies claimed by a tenant can be deducted from rent, which include:

1. Where a tenant has paid a security deposit or pet damage deposit above that allowed by s. 19(1), then the amount that was overpaid may be deducted from rent (see s. 19(2)).
2. The reimbursement of costs borne by a tenant for emergency repairs after the process contemplated by s. 33(5) have been followed (see s. 33(8)).

3. Where a landlord collects rent following a rent increase that does not comply with the amount proscribed by the regulations, then the tenant may deduct the overpayment from rent (see s. 43(5)).
4. As ordered by the Director pursuant to ss. 65 and 72.

Accepting for the sake of argument that the Landlord failed to maintain or repair the property under s. 32(1) of the *Act*, such an argument is irrelevant. The Tenants' obligation to pay rent, as described by s. 26(1) of the *Act*, is clear: even if the Landlord breached their obligation to maintain or repair the property, the Tenants must pay rent. I make no comment or finding on whether the Landlord did breach s. 32(1) of the *Act* as the issue is not strictly before me and simply note that even if a breach did occur, the Tenants were obliged to pay rent when it was due.

The Tenants argue they did not pay rent due to the Landlord's neglect, which resulted in S.S.'s injury. The Residential Tenancy Branch does not have jurisdiction to determine tort based claims and it appears on the Tenants' application that the issue is being dealt with elsewhere. Again, the obligation to pay rent as per s. 26(1) of the *Act* is not excused even if the injury is due to the Landlord's neglect. It is the Tenants obligation to pay rent. In this instance, there is no dispute that the Tenants failed to do so in accordance with the tenancy agreement.

I find that the Landlord properly issued the 10-Day Notice on the basis that rent had not been paid by the Tenants. Accordingly, I dismiss the Tenants' application to cancel the 10-Day Notice without leave to reapply.

Section 55(1) of the *Act* provides that where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, then I must grant the landlord an order for possession. As that has occurred here, I grant the Landlord an order of possession. The Tenants shall provide vacant possession of the rental unit within 2 days of receiving the order of possession.

Pursuant to s. 55(1.1) of the *Act*, if a tenant's application to cancel a notice to end tenancy for unpaid rent is dismissed and the notice complies with the formal requirements of s. 52, then I must grant an order for unpaid rent.

In this instance, the Landlord's agent provided oral submissions to the effect that over the past 10 months, the Tenants have paid \$16,560.00 in rent. Taking into account current rent and previous rent, the total rent that ought to have been paid was

\$26,598.00 ((\$2,640 x 5 months (June 2022 to October 2022)) + (\$2,679.60 x 5 months (November 2022 to March 2023))). Thus, the Landlord submits total unpaid rent is \$10,038.00 (\$26,598.00 - \$16,560.00). As mentioned above, the Tenants acknowledge being in arrears of rent, though they cannot recall specifically what had and had not been paid over the past several months.

I am cognizant that the Landlord bears the burden of proof under the circumstances, which includes providing sufficient evidence to demonstrate unpaid rent. In this instance, I have been provided with no documentary evidence to support the submission from the Landlord's agent other than a series of notices to end tenancy, none of which appear to have been served by the Landlord other than as evidence for this hearing. I would further note that the 10-Day Notice of March 2, 2023 was altered by the Landlord from the one that was served, such that the notices to end tenancy provided to me by the Landlord are self-generated. They are of little value as proof of the payment history. The rent ledger would have been of assistance in these circumstances, both to myself and to the Tenants who could have reviewed the information and verified it in preparation for the hearing.

In light of the lack of documentary evidence, I am unable to make a finding on the rent that is currently owed. Accordingly, I decline to grant an order under s. 55(1.1) of the *Act*.

### Conclusion

I dismiss the Tenant's application cancelling the 10-Day Notice without leave to reapply.

The Landlord is entitled to an order of possession under s. 55(1) of the *Act*. The Tenants shall provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order of possession.

I decline to grant an order for unpaid rent under s. 55(1.1) of the *Act* as the Landlord has failed to provide sufficient documentary evidence to support a finding on unpaid rent.

I find the Tenant was unsuccessful in its application. Accordingly, I dismiss their claim for their filing fee under s. 72(1) of the *Act* without leave to reapply.

It is the Landlord's obligation to serve the order of possession on the Tenants. If the Tenants do not comply with the order of possession, it may be filed by the Landlord with the Supreme Court of British Columbia 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: March 30, 2023

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Residential Tenancy Branch