



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## **DECISION**

Dispute Codes      OPL, MNDC, FF

### Introduction

This hearing dealt with the landlord's application for an Order of Possession for landlord's use of property and a Monetary Order for damages or loss under the Act, regulations or tenancy agreement and recovery of the filing fee. Both tenants appeared shortly after the hearing commenced; however, each of the tenants was made aware of all the parties participating in the teleconference call and what had been heard prior to their appearance. Both parties were provided the opportunity to be heard and to respond to submissions of the other parties.

The tenant testified that he had submitted documentary evidence for this hearing but that it was not served upon the landlord. I informed the parties that I did not have evidence from the tenants; however, the tenants confirmed that the tenant's evidentiary material was also included in the landlord's evidence package. The tenant confirmed that the landlord served the tenants with a copy of the landlord's evidence.

### Issues(s) to be Decided

1. Was the landlord precluded from issuing a Notice to End Tenancy in July 2009?
2. Was the Notice to End Tenancy issued July 20, 2009 withdrawn or waived by the parties?
3. Has the landlord established an entitlement to an Order of Possession?
4. Has the landlord established an entitlement to a Monetary Order?
5. Award of the filing fee.

### Background and Evidence

Upon hearing testimony from both parties, I make the following findings. The tenancy commenced December 1, 2001 and the tenants were required to pay rent of \$700.00 per month. The current landlord acquired the residential property in 2005 and the rent was reduced to \$680.00 per month. The tenants and their six children occupy a large residential dwelling on the property. Since acquiring the property the landlord began redeveloping the property as a 72 lot subdivision and the dwelling occupied by the tenants is to be demolished.

I heard undisputed testimony that in May 2009 the landlord's representative "AD" served a *2 Month Notice to End Tenancy for Landlord's Use of Property* (the "May Notice") upon the tenants. The tenant expressed a desire to purchase the dwelling and a portion of the land and the tenant and AD agreed to withdraw the May Notice while purchase negotiations were in progress. The tenant communicated a proposed purchase price. After receiving the tenants' offer, the landlord determined the offer was inadequate and decided to proceed with the re-development of the property. The landlord proceeded to obtain a demolition permit on July 14, 2009. On July 20, 2009 the landlord's representative AD attended the property and advised the tenant that the landlord did not accept the tenant's offer and that the landlord would be pursuing their development plans. The landlord served the tenant with a *2 Month Notice to End Tenancy for Landlord's Use of Property* (the "July Notice"). The July Notice has an effective date of September 30, 2009. The tenant requested the phone number for another representative of the landlord (herein referred to as GL). The tenant telephoned GL on July 22, 2009 and an audio recording of that telephone conversation was provided as evidence. The tenant did not dispute the July Notice by filing an Application for Dispute Resolution. On September 25, 2009 GL telephoned the tenant to advise that a purchase price could not yet be determined until a much later date.

The tenant was of the position that negotiations were on-going until September 25, 2009 and that the July 2009 Notice was of no affect in accordance with the verbal

agreement reached with AD in May 2009. The tenant submitted that although AD had entered into a verbal agreement to waive the May Notice while negotiations were underway, AD had handed over authority to GL and AD was no longer in a position to rescind the verbal agreement.

The landlord was of the position that AD did have the authority to act on behalf of the landlord and communicate that the landlord intended to proceed with redevelopment plans and issue the July Notice. The landlord was of the position that the parties did not waive or withdraw the July Notice. The landlord submitted that the July Notice was not disputed and the tenant cannot avoid or contract out of the Act.

The tenants have accepted that they cannot afford to purchase the property and that they will have to vacate the property. The tenant requested they be permitted to remain in the dwelling until January 5, 2010 as they have an accepted offer on another home for that date. The landlord was not in a position to agree to accommodate the tenants' request as the landlord submitted that further delays will cause the landlord additional costs and losses. The tenants proposed a vacate date of December 15, 2009; however, the landlord requested an immediate Order of Possession given the tenants were supposed to vacate September 30, 2009.

In making this application for dispute resolution, the landlord requested compensation of \$25,000.00 from the tenants. The landlord submitted that servicing the land was going to be more expensive to accomplish in the winter months, as evidenced by the letter from the landlord's contractor and the landlord is seeking to recover these additional costs from the tenants as the tenants have not vacated the property.

In addition to verbal testimony, I was provided with documentary evidence including a copy of the July Notice, written communications between the tenant and landlord, development plans for the property, the demolition permit, a letter from the landlord's contractor and a Compact Disk containing recordings of two telephone conversations or messages between the tenant and GL.

### Analysis

After the teleconference call ended, I listened to the audio recording provided as evidence for the hearing and have taken it into account in reaching my decision. I provide my findings and analysis considering all evidence before me, including the audio recording.

It should be noted that section 1 of the Act defines “landlord” to include any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
  - (i) permits occupation of the rental unit under a tenancy agreement,
  - or
  - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, other than a tenant occupying the rental unit, who
  - (i) is entitled to possession of the rental unit, and
  - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

(emphasis added)

A landlord is permitted to issue a 2 Month Notice to End Tenancy for Landlord's Use under section 49(6) of the Act where the landlord has all the necessary permits or approvals in place to demolish the rental unit. The landlord identified on the Notice is a limited partnership and I accept that the Notice was signed by a person to act for the landlord with respect to this tenancy. Based on the documentary evidence before me, I am also satisfied that the landlord had obtained all the necessary permits and approvals

to demolish the rental unit before issuing the Notice. Therefore, I find the Notice served upon the tenant on July 20, 2009 to be a valid Notice to End Tenancy.

I have considered whether the landlord was precluded from issuing the July Notice. The tenant submitted that the landlord was precluded from issuing a Notice to End Tenancy while negotiations to purchase the property were underway in accordance with a verbal agreement reached between AD and the tenant in May 2009. I accept that the AD and the tenant mutually agreed to withdraw the May Notice and that it was of no affect on either party. I also accept, based on undisputed testimony, that the tenant had made an offer to purchase the property from the owner; however, I was not provided with documentary evidence of the offer. Rather, from the testimony, it was clear that the offer was inadequate and that AD and GL had determined that they did not wish to proceed with negotiations with the tenant and would proceed with redevelopment plans for the property. I am also satisfied that the landlord's intention to proceed with redevelopment plans and cease negotiations was communicated with the tenant on July 20, 2009 by AD.

The tenant submitted that the landlord AD gave GL the authority to handle the negotiations and tenancy matters and that AD did not have the authority to issue the July Notice; however, this position was disputed by the landlord and I do not find sufficient evidence to support the tenant's position. Rather, I find there are insufficient grounds to find that AD did not have the authority to act on behalf of the landlord in issuing the July Notice.

In light of the above, I do not find sufficient evidence that the landlord was precluded from issuing the July Notice as I was satisfied the negotiations had stalled upon an inadequate offer from the tenant and AD was acting on behalf of the landlord in issuing the July Notice.

Where a tenant receives a 2 Month Notice, the tenant has 15 days to dispute the Notice by filing an Application for Dispute Resolution. If a tenant does not dispute the Notice,

the tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit by the effective date of the Notice.

Since I have found the landlord was not precluded from issuing a Notice to End Tenancy and the landlord issued a valid Notice to End Tenancy that was not disputed by the tenant, I have considered whether the parties waived or withdrew the July Notice.

Residential Tenancy Policy Guideline 11 provides guidelines with respect to the amendment and withdrawal of Notices to End Tenancy. The guideline states that a Notice to End Tenancy may be waived (ie: abandoned or withdrawn), and a new or continuing tenancy created, only be the express or implied consent of both parties.

I heard undisputed testimony that AD advised the tenant that negotiations to purchase the property were no longer being considered and that the landlord was proceeding to end the tenancy. Therefore, I do not find the landlord express consented to withdraw the July Notice.

Upon listening to the audio tape, I note that the tenant and GL did not discuss a waiver or withdrawal of the July Notice. Rather, their discussion related to the tenant's willingness to increase the amount he was willing to pay for the property and GL advising the tenant he would take some time to consider whether the owner was interested in considering the sale of the property to the tenant. I do not find that the landlord implied consent to continue with the tenancy in taking time to consider whether the owner was interesting in entertaining any other offers to purchase the property from the tenant. Although the continued tenancy may have been desirable for the tenant, I do not find the landlord acted in a way as to indicate the landlord was consenting to continue with the tenancy. Rather, I find that in the discussion between GL and the tenant, the parties were discussing the possibility of the tenant purchasing the property and that is a very separate matter from the continuation of a tenancy even though both matters relate to the same property.

I note that the tenant has paid rent for the months up to and including October 2009 and the landlord accepted payment and communicated to the tenant that the rent was being accepted for “use and occupation only”. Thus, I am satisfied the landlord did not reinstate the tenancy in accepting monies for use and occupation by the tenants for the months after September 2009.

In light of the above findings, I do not find the landlord expressly or implicitly consented to abandon or withdraw the July Notice. Therefore, I find the tenancy ended on September 30, 2009 and since the tenants continue to reside in the rental unit, the landlord is entitled to regain possession of the rental unit. Considering the size of the rental unit and the tenants are caring for several children, I provide to the landlord an **Order of Possession effective seven (7) days after service** upon the tenants rather than the three days requested by the landlord during the teleconference call. The Order of Possession may be filed in The Supreme Court of British Columbia and enforced as an Order of that court.

As a tenant who receives a 2 Month Notice to End Tenancy under section 49 of the Act is entitled to compensation equivalent to one month of rent, the landlord may not charge the tenants for unpaid rent or loss of rent for the month of November 2009. If the tenants’ cheque for November 2009 has since been cashed by the landlord, the landlord must refund the amount to the tenants forthwith.

With respect to the landlord’s monetary claim, I found the landlord’s claim premature as the landlord had not yet been invoiced additional costs by the contractor; therefore, I dismissed the monetary claim with leave to reapply.

As the landlord was partially successful with this application, I award the landlord one-half of the filing fee paid for this application and authorize the landlord to deduct \$50.00 from the tenants’ security deposit.

Conclusion

The tenancy has ended and the landlord has been provided an **Order of Possession effective seven (7) days after service** upon the tenants.

The landlord's monetary claim has been dismissed with leave to reapply. The landlord is awarded one-half of the filing fee and may deduct \$50.00 from the tenants' security deposit.

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: November 25, 2009.

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Dispute Resolution Officer