



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW HEARING DECISION AND REASONS AND DECISION ON LANDLORD'S APPLICATION**

Dispute Codes      For the tenant: MNDC, OLC, ERP, LAT, FF  
For the landlord: OPR, MND, MNSD, MNDC, FF

### Introduction

This was the reconvened hearing dealing with the landlord's successful application for a review of the Decision of April 27, 2011, which was based upon the tenant's Application for Dispute Resolution. This should be read in conjunction with my Interim Decision and Reasons of June 9, 2011, along with my Decision of April 27, 2011.

In my original Decision of April 27, 2011, the tenant was granted a monetary order in the amount of \$1,250.00, for a devaluation of the tenancy due to her loss of quiet enjoyment and the tenant's filing fee, which the tenant was allowed to deduct from the next monthly payment of rent. In that Decision, the landlord was ordered to comply with section 29 of the Act in giving notice to the tenant for entering the premises. Further, the landlord was directed to cease and desist from making any further demands from the tenant for reimbursement of any costs associated with the septic tank repair.

The landlord applied for a review based upon her contention that she was unable to attend the original hearing on April 11, 2011, due to circumstances beyond her control, that she had new evidence not available at the time of the hearing, and based upon her contention that the Decision was obtained by fraud. The landlord's application was granted due to the reviewing Dispute Resolution Officer (DRO) finding that the landlord was unable to attend because of circumstances that could not be anticipated and were beyond her control and upon evidence that gave the appearance the Decision was obtained by fraud. The Decision of April 27, 2011, was suspended, pending the review hearing. The DRO ordered that the review be conducted by reconvening the original hearing.

The review Hearing and the hearing on the landlord's application for dispute resolution seeking an order of possession based upon unpaid rent, an order to keep all or part of the security deposit, a monetary order for unpaid rent, for damage to the rental unit and for money owed or compensation for damage or loss under the Act, and to recover the filing fee were scheduled to be heard on June 8, 2011, via conference call hearing.

At that hearing, the sole issue which could be addressed due to time constraints was delivery of evidence packages. Due to the length of that discussion, the hearing was adjourned and reconvened by way of telephone conference on August 22, 2011 at 9:00 a.m.

At the reconvened review Hearing and reconvened hearing for the landlord's application, the parties appeared, gave further affirmed testimony and were further provided the opportunity to present their evidence orally and in documentary form, and to make submissions to me.

#### Issue(s) to be Decided

Has the landlord breached the *Residential Tenancy Act* (the "Act") entitling the tenant to a monetary order for loss of quiet enjoyment, for orders requiring the landlord to comply with the Act and suspending the landlord's right to enter the rental unit, authority to change the locks and to recover the filing fee.

Has the tenant breached the *Residential Tenancy Act* (the "Act") or tenancy agreement, entitling the landlord to an Order of Possession, an order to retain the tenant's security deposit and for a monetary order?

#### Background and Evidence

##### **Tenant's Application:**

As to the tenant's statement of background and evidence in support of her Application, the same is contained in my Decision of April 27, 2011, which is deemed attached by reference mentioned above.

However, at this hearing, I heard testimony that the tenant has now vacated the rental unit, ending the tenancy effectively on May 5, 2011, when she moved out.

As to the landlord's application for review, the tenant testified that the registered mail she sent to the landlord for the original hearing was returned "refused," not undelivered.

The tenant stated that she learned at the end of March 2011, that the landlord had left the country as the landlord never informed her she was leaving and further, the landlord never provided an agent's name and contact information for service.

The tenant denied receiving any communication from the landlord which would indicate the landlord was leaving the country for a period of time.

The tenant testified that when she moved out of the rental unit on May 5, 2011, she knocked on the landlord's door and asked if she, the landlord, wanted to have a move-out inspection that day or the next day.

According to the tenant, the landlord came outside, but with no paperwork, and started yelling at the tenant, words to the effect, "You guys live like pigs."

The tenant stated that the landlord has not provided an opportunity for a move out inspection and stated that she never received a copy of the move-in inspection report.

#### **Landlord's Application:**

As to the landlord's application, as the tenant vacated the rental unit on May 5, 2011, the landlord no longer requires an order of possession. Additionally, the landlord has applied for a monetary order in the amount of \$5,000.00, comprised of unpaid rent for May and June 2011 for \$3,600.00, and damages to the rental unit, including for the landlord's time in cleaning the septic spill.

In support of her application, the landlord testified that the tenant did not pay rent for April and May 2011, totalling \$3,600.00.

As to the balance of the claim of \$5,000.00, the landlord stated the total costs exceed \$5,000.00, but that she has reduced her claim to this amount.

The landlord stated that the tenant caused the septic tank flood, by flushing paper towels and other items not meant for a septic system. The landlord testified that the tenant continued to flush unacceptable items despite numerous requests to refrain from so doing. The landlord billed the tenant for cleaning the septic tank flooding.

Additionally, the landlord stated that there were several missing items from the rental unit and the rug needed cleaning after the tenant departed. Upon query, the landlord testified that the rug was almost ten years old.

The landlord testified that she offered the tenant a chance to inspect the rental unit after the tenant vacated, but did not hear from the tenant. The landlord admitted that the lack of her signature on the condition inspection report was an oversight.

As to the issue of notifying the tenant that she would be leaving for a period of time, the landlord stated that she put a note in the door jamb, listing the dates she would be gone, March 21-April 14, 2011, and listed three contacts should any repairs become necessary.

The landlord stated that the tenant changed the locks without her permission or knowledge, the information of which she acquired when the landlord tried to enter the premises on May 1, 2011, and could not get in.

The landlord stated that she did not disturb the tenant's quiet enjoyment and only entered the premises of the tenant to water plants and tend to the yard. Upon query, the landlord stated that she did not phone or notify the tenant when she went to the property.

The landlord acknowledged that the tenant vacated the rental unit on May 5, 2011.

Although the landlord submitted a significant amount of evidence, the relevant evidence included photos, a copy of the condition inspection report, the note placed in the tenant's door jamb, a self generated invoice to the tenant, requesting \$150.00 for 7 and ½ hours for septic tank flood clean up, statements from the persons listed as contacts on the landlord's note left for the tenant, a bill from a septic tank company, dated May 9, 2011, a 10 Day Notice for Unpaid Rent (the "Notice"), carpet cleaning receipt for the amount of \$576.80, a written statement from an acquaintance of the landlord stating that cleaning of the rental unit took 44 hours and she was paid \$440.00 by the landlord, an invoice in the amount of \$806.84 for repair of the rental unit, and a listing of missing items from the home. I note that the repair invoice contained allegations such as doors broken due to "slamming" and handle being replaced with the notation ("must have tried to break in.")

**Tenant's response:**

The tenant stated that she was shocked at the allegation that she changed the lock and denied changing the lock.

The tenant stated that she gave the landlord written notice of her intent to vacate on April 30, 2011; however the tenant stated she informed the landlord on May 1, that she would be unable to leave until May 5, 2011.

The tenant reiterated her testimony of the original hearing, stating that she notated on a separate notebook that the landlord came to the rental unit 18 days in January 2011.

### Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

Although I have reviewed all evidence and testimony, only the evidence and testimony relevant to the issues and findings in this matter are cited in this Decision.

### **Tenant's Application:**

Residential Tenancy Branch Policy Guideline 12 states that when a tenant serves documents, such as the Notice of Hearing, to a landlord, the tenant is required to serve the landlord or the landlord's agent. The document the landlord relied upon to obtain a favourable Request for Review, the letter dated February 26, 2011, supplied the tenant contacts for emergency repair, not an agent's name for service. Additionally, the tenancy agreement failed to provide an agent's name for service.

I find that the landlord did not provide the tenant an agent's name for service of the hearing documents in her absence and I therefore find the letter of February 26, 2011, to be insufficient notice to the tenant, in contradiction of section 89 of the Act and policy guideline.

Additionally, the landlord stated the letter was placed in the door jamb, and the tenant denied ever receiving the letter. I therefore find the landlord failed to serve the letter of February 26, 2011, in a manner complying with Policy Guideline 12, which states that service by posting on the door requires that the document be **attached** to the door or other conspicuous place obvious to the tenant.

I find on a balance of probabilities, that the tenant did not receive the landlord's notice that she would be out of town on the dates mentioned in the notice nor did she receive the list of emergency contacts.

Due to the landlord's violation of the Act and policy guideline in serving the letter and in failing to supply the tenant an agent for service, I do not accept the landlord's assertion that the original Decision was obtained by fraud.

I therefore find the landlord has failed to prove a basis on which the Decision of April 27, 2011, should be set aside or varied.

Additionally I find the landlord's testimony that she appeared on the rental premises unannounced on many occasions and the tenant's testimony that the landlord appeared 18 times in January, in violation of section 29 of the Act, confirms that the tenant suffered a loss of her quiet enjoyment, which was the subject of the April 27, 2011, Decision.

I therefore confirm the Decision given on April 27, 2011, which granted the tenant a monetary claim in the amount of \$1,250.00.

### **Landlord's Application:**

In a claim for damage or loss under the Act or tenancy agreement, the claiming party has to prove four different elements:

**First**, proof that the damage or loss exists, **secondly**, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, **thirdly**, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and **lastly**, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

As to the landlord's claim for unpaid rent for April 2011, under section 26 of the Act, the tenant is required to pay rent in accordance with the terms of the tenancy agreement and is not permitted to withhold rent without the legal right to do so. I find that the tenant was obligated to pay rent for the month of April, but failed to pay. I therefore find the landlord has established a **monetary claim** in the amount of **\$1,800.00** for unpaid rent for April 2011.

As to the landlord's claim for unpaid rent for May 2011 for \$1,800.00, Section 45 (2) of the Residential Tenancy Act requires a tenant to give notice to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that:

- (a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement

Based on the testimony and evidence and a balance of probabilities, I accept that the landlord received the tenant's notice of her intent to vacate the rental unit on April 30, 2011. However, I find that this notice does not comply with this section 45 on ways to end a fixed term tenancy.

I, however, find the landlord provided insufficient evidence that she took reasonable steps to mitigate her loss by attempting to re-rent the rental unit for the month of May 2011, thereby failing step 4 of her burden of proof.

I find the tenant over held in the rental unit by 5 days, when she did not vacate the rental unit until May 5, 2011. I therefore find the landlord has established a **monetary claim** for the tenant's over holding in the amount of **\$290.90** (\$1,800.00 monthly rent x 12 months ÷ 365 days = \$58.18 daily rate; 5 days x \$58.18).

As to the balance of the landlord's \$5,000.00 monetary claim, less her claim for unpaid rent for April and May in the amount of \$3,600.00, this is comprised of the claim for the landlord's own time in cleaning the septic tank flood, a charge from a septic company for the flooding, loss of items left in the furnished rental unit, repair and cleaning.

I have addressed the issue of the septic tank cleaning in the Decision of April 27, 2011, stating that the landlord was responsible for the repair/replacement of the septic tank. As I have confirmed that Decision, I **dismiss** the landlord's claim for her time spent on the cleaning and the septic company cleaning.

As to the remaining portion of the landlord's claim, Section 35 of the Act, among other things, requires a landlord to offer a tenant at least 2 opportunities at the end of the tenancy to complete a move-out condition inspection. A failure to provide the opportunities for inspection at the end of the tenancy results in the application of section 36(2); which extinguishes the right of a landlord to claim against the deposit for damages when the tenant was not provided the opportunities for inspection at the end of the tenancy.

The obligation of the landlord is to provide opportunities for a move in and move out condition inspection. I do not find the landlord provided those 2 opportunities for a

move out inspection. The landlord testified that she offered the tenant a chance to inspect the premises on May 5, 2011; however the tenant denied she was offered the chance to perform a proper inspection as the landlord appeared with no paperwork and began shouting. I find disputed verbal testimony concerning just the one opportunity to inspect fails to meet the landlord's burden of proof.

Additionally, I find the condition inspection report does not comply with section 20 of the Residential Tenancy Branch Regulations, as the report does not list the move-out inspection date or the landlord's signature.

Further, there is no evidence before me, other than disputed verbal testimony, that the landlord complied with section 23 of the Act by giving the tenant a copy of the inspection report at the beginning of the tenancy.

Further, the landlord's claim lacked specificity as to the exact amounts she was claiming for and I am not able to determine the remainder of the landlord's claim.

As I find the landlord failed to comply with the Act by offering the tenant two opportunities for a final move-out inspection and by failing to give the tenant a copy of the condition inspection report and as I find the landlord's claim lacked specificity, I find the landlord's claim for any remaining cleaning or damage has not been substantiated and I **dismiss** the remaining claim.

### Conclusion

I find the landlord has established a total **monetary claim** in the amount of **\$2,115.90**, comprised of unpaid rent for April 2011, in the amount of \$1,800.00, over holding by the tenant in May in the amount of \$290.90 and a partial filing fee of \$25.00, which I have awarded her reflecting a partial success with her application.

In my Decision of April 27, 2011, which I have confirmed, the tenant was awarded a monetary claim in the amount of \$1,250.00, which I now offset against the landlord's monetary claim of \$2,115.90. I therefore find the landlord has established, after the offset, a monetary claim of **\$865.90**.

I direct the landlord to satisfy this monetary claim by retaining \$865.90 from the tenant's security deposit of \$900.00 and grant the tenant a **monetary order** for the balance due in the amount of **\$34.10**, pursuant to section 67 of the Act.



I am enclosing a monetary order for **\$34.10** with the tenant's Decision. This order is a **legally binding, final order**, and it may be filed in the Provincial Court of British Columbia (Small Claims) should the landlord fail to comply with this monetary order.

As I have granted the landlord a monetary award which is offset by the tenant's monetary claim, I hereby **cancel** the tenant's Monetary Order in the amount of \$1,250.00 issued to her in the original Decision of April 27, 2011, and that Order of April 27, 2011, is of no force or effect.

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: August 26, 2011.

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Residential Tenancy Branch