



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW HEARING DECISION**

Dispute Codes      Landlord:    OPR, MNR, MNSD and FF  
                              Tenants:    CNR, SS, O and FF

### Introduction

This hearing was convened by Order of M. Justice Davies of the Supreme Court of British Columbia in result of Judicial Review conducted on February 17, 2012. The Judicial Review was sought by the tenant seeking a new hearing following an initial hearing on February 3, 2012.

The Honourable Justice directed that my orders of February 3, 2012 be stayed for 30 days pending a rehearing on the full record and a new determination.

As a preliminary matter, the tenant's agent, his father-in-law and co-resident, submitted that the hearing could not proceed as the decision of the Honourable Justice had stayed the orders for 30 days, and the hearing had been set three days short of that. I am informed that the intention of such a stay is to forestall enforcement of the orders for sufficient time to permit the matter to be reheard and that conduct of the hearing within the 30 days would not contradict the wishes of the court. Therefore, the hearing proceeded.

Both parties had made application for dispute resolution following issuance of a 10-day Notice to End Tenancy for unpaid rent served in person on January 9, 2012.

The landlord applied on January 23, 2011 for an Order of Possession to uphold the Notice, and for a monetary award for the unpaid rent, recovery of the filing fee, and authorization to retain the security deposit in set off against the balance owed.

The tenant's prior application of December 19, 2011 sought to have the Notice to End Tenancy set aside, other unspecified remedies and recovery of his filing fee. On

hearing the matter on February 3, 2012, I found as fact that the tenant was three months in arrears in the rent and issued the landlord with an Order of Possession and a monetary award including rent for December 2011 and January 2012 and one-half of February plus filing fee for a total of \$3,706 to be paid by the landlord retention of the tenant's security deposit of \$725 plus a Monetary Order for the balance of \$2,981.

### Issues to be Decided

Taking into account the full record as directed by the Court, this matter requires a decision on whether the landlord is entitled to an Order of Possession and a Monetary Order pursuant to the 10-day Notice to End Tenancy for unpaid rent or if the notice should be aside as requested by the tenant.

### Background and Evidence

Facts introduced into the record during the original hearing included:

1. That the tenancy began on September 1, 2010 under a fixed term agreement set to end on February 28, 2011 when the applicant's co-tenant left the tenancy;
2. Rent was \$1,450 per month with a rent increase to \$1,512 on February 1, 2012 and the landlord holds a security deposit of \$725 paid on August 12, 2010;
3. The 10-day Notice to End Tenancy of January 9, 2012 was served after the tenant failed to pay the rent for December 2011 and January 2012. By the time of the hearing, the rent due February 1, 2012 had not been paid;
4. As the tenant was having difficulty in transferring his funds from Taiwan, the building manager had exercised some tolerance in accepting late rent from February 2011 provided the tenant paid late fees. Though frequently late, rent had always been paid eventually;
5. On September 16, 2011, the building manager replied to the tenant's letter of September 14, 2011 responding to a late notice, and promising payment by September 20, 2011. The building manager's letter explained that acceptance of late rent with a penalty was intended for occasional use and that she had been

instructed that rent had to be paid on the due date. The letter stated that if rent was not on time beginning October 1, 2011 that management would terminate the tenancy;

6. On December 6, 2011, the tenant again replied to a late notice, explaining that banks in Taiwan are very busy at that time of year and promising payment shortly.
7. The resident manager wrote to the tenant on December 25, 2011 citing the outstanding balance and stating that the rent must be paid immediately or the landlord would initiate proceedings to obtain an Order of Possession. The tenant replied on December 26, 2011 with a promise that payment was imminent;
8. When the December rent remained unpaid, and the tenant failed to pay the rent due for January 1, 2012, the landlord served the tenant with the Notice to End Tenancy in person on January 9, 2012;
9. At the time of the hearing on February 3, 2012, none of the arrears had been paid and the February rent was added to the arrears.

Claims and facts presented at the Judicial Review and/or during the present court ordered hearing included:

1. A claim by the tenant that from February of 2011, the building manager and the tenant had created an oral contract which permitted the tenant to pay rent as funds became available and superseded the written rental agreement signed on August 9, 2010.
2. The tenant's agent stated that evidence he presented to the Judicial Review included a letter signed on February 9, 2012 by the building manager – who had been discharged from her duties – in which she concurred with the claim of the oral agreement.
3. That document had not been submitted with the new evidence before me and the tenant's agent stated that the hearing should not proceed as the whole record

was not before me for the consideration ordered by the court. The Notice of Hearing sent by the branch to the parties included the direction all documents submitted before the Judicial Review must be submitted to the branch and the other party for the present hearing. I find that the tenant's failure to submit evidence favourable to his claims cannot constitute a deficiency in the record.

4. In addition, the landlord submitted an affidavit sworn by the building manager on February 14, 2012 referring to the document of February 9, 2012 and stating that she did not compose the letter, did not understand its contents when she signed it, and did not state to the tenant that he could pay rent any time during the month.
5. In the period since my original hearing of February 3, 2012 and the Judicial Review of February 17, 2012, the tenant remains in possession of the rental unit, the former arrears remains unpaid, and the tenant has now failed to pay the rent for March 2012.

### Analysis

As stated in my decision of February 3, 2012:

"Section 26 of the *Act* provides that tenants must pay rent when it is due.

Section 46 of the *Act* provides that a landlord may issue a Notice to End Tenancy for unpaid rent on a day after the rent is due. The tenant may cancel the notice by paying the overdue rent or make application to dispute the notice within five days of receiving it as the tenant has done in this matter.

In this instance, while the tenant has made application, I find as fact that the tenant did not pay the rent within five days of receiving the notice which, therefore, remains in effect.

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Therefore, under section 46(5) of the *Act*, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice to End Tenancy which was December 20, 2011."

Having reviewed evidence from the original hearing, evidence from the Judicial Review and from the present hearing, I find no reason to vary my original decision except to increase the monetary award to add rent not paid since my original decision.

I find that the written rental agreement which states that rent is due on the first day of the month remains in force and that the building manager's tolerance of late rent for a period did not constitute a new agreement, and clearly was never intended to accommodate no payment of rent for two month as was the case at the time of the Notice to End Tenancy or for four months as is the case at the time of the present hearing.

Again, I find that the landlord is entitled to an Order of Possession effective two days from service of it on the tenant.

I further find that the landlord is entitled to a monetary award for the unpaid rent, to recover the filing fee for this proceeding and authorization to retain the security deposit in set off against the balance owed, now calculated as follows:

Rent December 2011	\$1,450.00
Lawfully increased rent for February 2012	1,512.00
Rent for March 2012	1,512.00
Filing fee	<u>50.00</u>
Sub total	\$5,974.00
Less retained security deposit (No interest due)	<u>- 725.00</u>
<b>TOTAL</b>	<b>\$5,249.00</b>

### Conclusion

The landlord's copy of this decision is accompanied by an updated Order of Possession, enforceable through the Supreme Court of British Columbia, to take effect two days from service of it on the tenant.

In addition to authorization to retain the security deposit in set off, the landlord's copy of this decision is accompanied by a Monetary Order for **\$5,249.00**, enforceable through the Provincial Court of British Columbia, for service on the tenant.

The landlord remains at liberty to make application for any further damage or losses as may be ascertained at the conclusion of the tenancy.

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 20, 2012.

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Residential Tenancy Branch