



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes:**

OPR, FF

### **Introduction**

This application was brought by the landlord seeking an Order of Possession pursuant to a 10-day Notice to End Tenancy for unpaid rent dated January 23, 2013.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

### **Preliminary Issue- Jurisdiction**

At the outset of the hearing, the issue of jurisdiction was called into question by the respondent tenant, with the tenant alleging an ownership interest in the property. I find that the matter of jurisdiction needs to be resolved before proceeding. The first determination that must be made is whether or not this tenancy relationship is governed by the Residential Tenancy Act.

A determination of whether or not this is a tenancy relationship that falls under the jurisdiction of the Act, would be contingent upon the question of whether or not the respondent holds a greater interest beyond that of mere tenant.

According to the Residential Tenancy Guidelines, if the relationship between the parties is that of seller and purchaser, or if they are co-owners of real estate, the Residential Tenancy Act would *not* apply, as the parties would not have entered into a "Tenancy Agreement" as defined in section 1 of the Act, excerpted below:

**"tenancy"** means a tenant's right to possession of a rental unit under a tenancy agreement;

**"tenancy agreement"** means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

A tenancy agreement is a transfer of an interest in land and buildings, or a license to occupy. The interest that is transferred, under section 1 of the Act, is only the right to possession of the residential premises and nothing more. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement has not been entered into.

The landlord testified that the issue of the tenant's claim of having an ownership interest has already been resolved, because the issue went before the Supreme Court of British Columbia and a ruling was issued dismissing the tenant's civil claim that they are owners. The tenant's claim of ownership was based on the tenant's allegation that the landlord had purchased the property in trust for the tenants. A copy of the Court Order was in evidence confirming that the tenant's application alleging ownership interest was dismissed by the B.C. Supreme Court on December 18, 2012.

Although, no written tenancy agreement was in evidence, the landlord submitted financial records and receipts confirming that the respondents did pay rent to occupy the premises.

Given the above, I find that the applicant and respondent are in a tenancy relationship governed by the Residential Tenancy Act and therefore I do have the authority to hear and decide the dispute before me

### **Issue(s) to be Decided**

Is the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent?

### **Background and Evidence**

The landlord submitted into evidence, proof of service of the Notice of Hearing, a copy of the 10-Day Notice to End Tenancy for Unpaid Rent dated January 23, 2013 with effective date of February 5, 2013, proof of service of the Ten-Day Notice, copies of cheques for payments of rent and loans, financial records, a copy of the rental ledger, affidavits and copies of court documents.

The landlord testified that the tenant fell into arrears for rent and accrued a debt of \$33,000.00 and a 10-Day Notice to End Tenancy for Unpaid Rent was issued and served on the tenant in person on January 24, 2013. The landlord testified that the

tenant did not pay the arrears within 5 days, did not make an application to dispute the Notice and did not vacate the unit. The landlord is seeking an order of possession.

During the hearing, the respondent persisted in protesting against proceeding with the hearing, and continued to insist that they were not tenants, but the rightful owners of the rental unit. The tenants argued that they had been paying the mortgage for a long period of time. The tenant did not submit any documentary evidence with respect to the matters before me and gave no further testimony about their rental arrears nor verification of payment of the rental arrears being claimed by the landlord.

### **Analysis**

Section 26(1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement.

I find that the tenant was not complying with the Act in failing to pay the rent when it was due. Section 46 of the Act states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

However, the Act does provide that, within 5 days after receiving a notice under this section, the tenant has the option of either paying the overdue rent, in which case the notice has no effect or making an application to dispute the Notice.

If a tenant who has received a Ten-Day Notice to End Tenancy for Unpaid Rent does not pay the rent or make an application for dispute resolution within the 5-day deadline, then the tenant is conclusively presumed, under section 46(5) of the Act, to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

I find that the tenant was served with a Ten-Day Notice to End Tenancy for Unpaid Rent and did not pay the rent within 5 days, nor did the tenant dispute the Notice.

Based on the above facts I find that the landlord is entitled to an Order of Possession under the Act.

I hereby issue an Order of Possession in favour of the landlord effective at two days after service on the tenant. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

**Conclusion**

The landlord is successful in the application and is granted an Order of Possession.

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 13, 2013

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Residential Tenancy Branch

