



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW DECISION**

Dispute Codes      CNC CNR

### Introduction

On May 9, 2016 the Tenant filed an application for Dispute Resolution to request Orders to cancel a 1 Month Notice to end tenancy issued on May 4, 2016 for cause and to cancel a 10 Day Notice to end tenancy for unpaid rent that was issued on May 4, 2016. The Tenant's application was scheduled to be heard via teleconference on June 8, 2016.

On June 8, 2016 the hearing commenced; however, the Tenant did not appear at the scheduled time, despite the hearing being scheduled to hear the matters relating to the Tenant's application. The Landlord was in attendance at the scheduled hearing and a Decision was issued June 8, 2016 granting the Landlord an Order of Possession effective June 30, 2016.

On June 21, 2016 the Tenant filed an Application for Review Consideration in response to the June 8, 2016 Decision and Order. On June 29, 2016 an Arbitrator granted the Tenant a Review Hearing and suspended the June 8, 2016 Decision and Order pending the outcome of the Review Hearing.

The Review Hearing was scheduled to be heard on August 10, 2016 via teleconference. The Tenant appeared and requested an adjournment. At the time the adjournment was granted the Landlord had not appeared at the hearing. Copies of the August 10, 2016 Interim Decision and Notice of Hearing documents were sent to both parties.

The Arbitrator who issued the August 10, 2016 Interim Decision indicated he had not heard evidence regarding the facts relating to the issues of the application and he was therefore not seized of the matter. That Arbitrator was not available to continue the Review Hearing and the Review Hearing was scheduled to be heard by me on August 26, 2016 at 9:00 a.m.

The Review Hearing was conducted via teleconference and was attended by the Landlord, the Tenant, the Landlord's witness and the Tenant's witness. Each person gave affirmed testimony. I explained how the review hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Tenant affirmed that he attempted to serve the Landlord with copies of the same documents and evidence that he had served the Residential Tenancy Branch (RTB); however those packages were returned as the Landlord refused to accept them. The Landlord indicated that he could not remember if he received documents from the Tenant as so much time had passed since this process began. A quick review of the Tenant's submissions on file was conducted; after which the Landlord confirmed they were similar documents that he had received in the past. The Landlord indicated he wished to proceed with the hearing, regardless of whether he received copies of the Tenant's documents. As such, I accepted the Tenant's relevant submission as evidence for these proceedings.

The Tenant confirmed that he had received the Landlord's evidence submissions. No issues were raised regarding receipt of the Landlord's submissions, other than to say the documents the Landlord submitted included different rent receipts than what the Tenant had submitted. As such, I accepted the Tenant's relevant submission as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

#### Issue(s) to be Decided

- 1) Should the original June 8, 2016 Decision and Order be confirmed, varied, or set aside.

#### Background and Evidence

The Landlord's witness presented his evidence first while the Tenant's witness was placed on double mute so she could not hear the Landlord's witness' submissions. Each party was provided the opportunity to question the Landlord's witness.

The Landlord's witness submitted affirmed evidence that he attended the rental unit with the Landlord starting on August 1, 2016 and 3 subsequent times after that. He indicated he was present with the Landlord to be a security guard when the Landlord was trying to collect the payment of rent from the Tenant. The Landlord's witness disconnected from the hearing upon completion of his submissions.

The Tenant's witness testified second. Each party was provided the opportunity to ask her questions. The Tenant's witness submitted that she spent a lot of time at the rental unit; however she did not live there. Upon further clarification she indicated she lived at the rental unit while she was on bed rest from the time she was 5 months pregnant until she gave birth on May 6, 2016. The witness argued the Landlord did not make himself available for the Tenant to pay his rent. She asserted the Landlord never stopped by to

pick up the rent until several days after the first of each month so that he could purposely evict the Tenant.

The Tenant's witness testified they always opened the door when the Landlord would knock. When the Landlord asked the witness if she had ever opened the door when he attended on the first of each month, she responded no. She asserted that they would never hear the Landlord knock because he knocked too quietly.

The Tenant's witness submitted she no longer lives with her boyfriend as she and her baby moved into a different home for women near the end of June beginning of July, 2016. The Tenant's witness disconnected from the hearing upon completion of her submissions.

The hearing proceeded to hear the submissions of Landlord and Tenant.

The written tenancy agreement indicated: the tenancy began on August 15, 2015; rent was \$585.00 and payable on the first of each month; the security deposit of \$290.00 was paid; and the Tenant was required to pay \$25.00 late payment fees if rent was not paid on time.

The Tenant denied signing the written tenancy agreement. He argued he began occupying the rental unit in June 2015; his rent was payable on the first of each month and began at \$610.00 per month which was later reduced to \$585.00; and he paid a security deposit of \$310.00.

The Landlord testified the Tenant may have occupied the rental unit in June 2015 based on a verbal tenancy agreement and then later entered into and signed the written tenancy agreement. The Landlord confirmed rent has always been payable on the first of each month. He disputed the allegation that rent was \$610.00; rather, the \$610.00 was the \$585.00 rent plus the \$25.00 late payment fee because the Tenant continuously pays his rent late.

The Tenant confirmed he was personally served the 10 Day Notice and the 1 Month Notice to end tenancy on May 4, 2016. He argued the Landlord did not have a witness with him when the Notices were served to him. He also asserted that he paid the Landlord his rent payment of \$585.00 on May 4, 2016 as per the receipt submitted into his evidence.

The Tenant asserted the Landlord provided incorrect testimony as he heard the Landlord state the 2 Notices were served to him by posting them on the door on May 5, 2016. He argued the evidence showed the Notices were served to him in person on May 4, 2016. I explained to the Tenant that based on my records the Landlord had testified the Notices were served upon the Tenant as stated on the Proof of Service Document, which stated in person on May 4, 2016. The Landlord had continued his submissions stating that notices would be posted to the door at times when the Tenant failed to open the door.

The Landlord testified that he did not have copies of his evidence in front of him during this hearing. He asserted the Proof of Service Document that was submitted into evidence correctly describes the method and date of service of the two Notices. He asserted that he served the Tenant a 10 Day Notice to end tenancy every month, as rent was always late, and if the Tenant did not answer the door the Notices would have been posted to the door.

The Proof of Service Document submitted into evidence indicates the 1 Month Notice and the 10 Day Notice were served by "leaving a copy with the tenant" on "04/05/206" and was signed by a witness with the initials G.B.

The Landlord testified the parties had attended another hearing earlier in the year that related to a different file number and different notices to end tenancy. A copy of the Decision from that March 2016 hearing was submitted into evidence by the Tenant.

The Landlord asserted that the Arbitrator from that previous hearing confirmed there was evidence of two late payments of rent in January 2016 and March 2016; however, there was insufficient to prove September 2015 rent was late at that time. He stated that in addition, there was evidence that the Tenant has since paid his May 2016 rent late which is why he served the Tenant with the 1 Month Notice to end tenancy. He noted that June, July, and August 2016 rents were also paid late. He stated the May 2016 rent payment was not made until after he handed the Tenant the 10 Day Notice and 1 Month Notice to end tenancy.

The Tenant testified and confirmed the dates that his rent had been paid. He argued that the receipts he submitted had the actual dates rent was paid and the actual amounts paid. Specifically, the Tenant confirmed the payment dates as follows: January 2016 rent was paid on January 2, 2016; February 2016 rent was paid on February 10, 2016; March 2016 rent was paid on March 2, 2016; April 2016 rent was paid April 1, 2016; and May 2016 rent was paid May 4, 2016.

The Tenant acknowledged that all rent receipts had the words "for use and occupancy" written on them except the April 2016 receipt. He stated the Landlord usually attended his rental unit with a pre-prepared receipt. Upon review of the Tenant's evidence I noted that the hand written April 2016 receipt did have the words "for use and occupancy" on the top of it. I questioned the date written on the receipt which shows as "011 April 11, 2016". The Tenant asserted the Landlord did not have a typed receipt prepared for that day so he hand wrote the receipt and the Tenant argued the date was definitely to be read as being April 1, 2016.

### Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 82(3) of the *Act* stipulates that upon review of the director's decision and/or order, following the Review Hearing, the director may confirm, vary or set aside the original decision or order.

The original Decision of June 8, 2016 was not based on the facts regarding the issuance of the 1 month Notice to end tenancy and the 10 Day Notice on May 4, 2016. Rather, the Decision and Order of Possession were issued due to the absence of the applicant Tenant who failed to appear at the June 8, 2016 hearing to present the merits of his application. Therefore, I **vary** the original June 8, 2016 Decision, pursuant to section 82(3) of the *Act*, as follows:

In the case of verbal testimony when one party submits their version of events, in support of their claim, and the other party disputes that version, it is incumbent on the party who bears the burden of proof to provide sufficient evidence to corroborate their version of events. In the absence of irrefutable evidence to support their version of events or to doubt the credibility of the parties, the party who bears the burden of proof would fail to meet that burden.

The *Residential Tenancy Act* defines a “**tenancy agreement**” as 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.

Section 91 of the *Act* stipulates that except as modified or varied under this *Act*, the common law respecting landlords and tenants applies in British Columbia. Common law has established that oral contracts and/or agreements are enforceable.

Therefore, based on the above, and in the presence of disputed verbal testimony as to whether the Tenant signed the written tenancy agreement, I find the parties had entered into a tenancy agreement, verbal or written, which is recognized and enforceable under the *Residential Tenancy Act*. The undisputed terms of that tenancy agreement included: rent was payable on the first of each month; the current amount of rent payable is \$585.00 per month; and the Tenant had paid a security deposit at the start of the tenancy.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent in full or to make application to dispute the Notice or the tenancy ends.

The undisputed evidence was the May 1, 2016 rent was paid on May 4, 2016. The Landlord submitted a receipt dated May 4, 2016 indicating the Tenant paid him \$500.00 instead of the full rent of \$585.00. The Tenant submitted a receipt dated May 4, 2016 indicating he had paid the rent in full in the amount of \$585.00. The Landlord bears the burden of proof to establish the actual amount paid on May 4, 2016. The Landlord appeared at the hearing without having his documents with him and did not provide

additional evidence in support of the actual amount received on May 4, 2016, other than his verbal testimony. That verbal testimony was disputed by the Tenant.

Based on the above, I find the Landlord submitted insufficient evidence to prove the Tenant paid \$500.00 and not \$585.00 on May 4, 2016. Furthermore, the payment was paid on the same date the 10 Day Notice was issued. Therefore, I find the May 1, 2016 \$585.00 rent was paid in full on May 4, 2016. As a result the 10 Day Notice became void and of no force or effect because the rent had been paid in full within the required 5 day time limit.

Section 53 (1) of the Act provides that if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) as applicable.

Subsection (2) of Section 53 states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

Upon review of the 1 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the Act [form and content] and I find that it was served upon the Tenant in a manner that complies with section 89 of the Act.

The 1 Month Notice was issued May 4, 2016 pursuant to Section 47(1) of the Act listed an effective date of May 14, 2016, which automatically corrected to **June 30, 2016**, pursuant to section 53 of the Act. The reason listed on the 1 Month Notice was "Tenant is repeatedly late paying rent".

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice. The burden of proof is based on the balance of probabilities, meaning the events as described by one party are more likely than not.

Residential Tenancy Policy Guideline 38 confirms that the Act provides that a landlord may end a tenancy where the tenant is repeatedly late paying rent. Three late payments are the minimum number sufficient to justify a notice under these provisions. It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. I agree with this policy and find it is relevant to the issues currently before me.

The Landlord's witness provided evidence regarding events that occurred in August 2016; three months after the aforementioned Notices to end tenancy were issued. Therefore, I conclude pursuant to section 62 of the Act the Landlord's witness' statements have no relevance to the matters before me.

In regards to the Tenant's witness' statements, I found her submissions to be contradictory. Initially she stated she never lived with the Tenant and then later in her

submissions she confirmed she lived the Tenant during her pregnancy. Furthermore, she confirmed she is residing approximately 5 nights and every day with the Tenant now that they have a son together. The Tenant's witness also contradicted her own submissions regarding when the Landlord would attend the rental unit to pick up rent. First she stated the Landlord purposely delayed until several days after rent was due before he would come to pick up rent. Then she stated they never answered the door when the Landlord knocked because he would knock too quietly.

Based on the above inconsistencies, and in consideration that the Tenant's witness was his girlfriend and mother of her child, I gave the Tenant's witness' submissions very minimal evidentiary weight, as her submissions would be influenced by her relationship with her boyfriend.

By his own submissions, the Tenant confirmed he had paid his rent late. Specifically, the Tenant confirmed his late rent payments occurred as follows: January 2016 rent was paid on January 2, 2016; February 2016 rent was paid on February 10, 2016; March 2016 rent was paid on March 2, 2016; and May 2016 rent was paid May 4, 2016.

In consideration of the above; and notwithstanding the Tenant's argument April 2016 rent was paid on the first or that he heard the Landlord say the Notice was posted to his door on May 5, 2016; I find the Landlord has satisfied me that the Tenant has repeatedly paid his rent late on at least three occasions prior to the issuance of the 1 Month Notice to end tenancy dated May 4, 2016. Therefore, I uphold that 1 Month Notice to End Tenancy based upon this reason and I dismiss the Tenant's application to cancel the 1 Month Notice issued May 4, 2016, without leave to reapply.

Section 79 (7) of the Act stipulates that a party to a dispute resolution proceeding may make an application under this section (*application for review of director's decision or order*) only once in respect to the proceedings. The Tenant filed an Application for Review Consideration and was granted this new Review Hearing. Therefore, no further applications for Review Consideration may be filed by the Tenant regarding the June 8, 2016 proceeding, pursuant to section 79(7) of the Act.

Section 55(1) of the Act stipulates that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Based on the above, the Order of Possession issued June 8, 2016 effective June 30, 2016 is cancelled and of no force or effect. I award the Landlord an Order of Possession effective **Two (2) Days after service upon the Tenant**, pursuant to section 55(1) of the Act. In the event that the Tenant does not comply with this Order it may be filed with the Supreme Court and enforced as an Order of that Court.

Conclusion

The June 8, 2016 original Decision was **varied**, and the Order of Possession issued June 8, 2016 was cancelled, pursuant to section 82(3) of the *Act*. The Tenant's application was dismissed based on the facts before me and the Landlord was issued an Order of Possession effective after 2 days upon service to the Tenant.

This decision is final, legally binding, and 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, 2016

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Residential Tenancy Branch