



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding 0858916 BC LTD. and/or 0844221 BC LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC, OPM, OPB, MNDC, FF

### Introduction

This hearing dealt with cross applications. The tenant had filed an Application for Dispute Resolution seeking to cancel a Notice to End Tenancy. The landlord filed an Application for Dispute Resolution seeking an Order of possession based on a mutual agreement to end tenancy and the end of a fixed term sub-tenancy agreement. The landlord also requested a Monetary Order for a variety of losses including over-holding, unpaid utilities; anticipated bailiff and moving costs; opportunity costs and loss of time. The tenant did not appear at the hearing. The landlord(s) named in this proceeding are corporations. The Director of the corporations appeared on behalf of the landlord(s).

### Preliminary and Procedural Matters

Since there are multiple corporate landlords named in this case, represented by the corporations' Director, reference to Landlord in this decision may include the named corporations and their Director.

The landlord testified that the tenant was served with the landlord's Application for Dispute Resolution, including the Monetary Order worksheet, and evidence in person by the property manager at 3:30 p.m. on March 29, 2018 at the tenant's place of work. I was satisfied the tenant was duly served with the Landlord's Application for Dispute Resolution and I continued to hear from the landlord without the tenant present.

The landlord confirmed receipt of the tenant's Application for Dispute Resolution and the Amendment filed by the tenant to correct the name of the landlord(s). The landlord confirmed that the tenant had incorrectly identified the landlord on her original Application for Dispute Resolution. I amended the Applications for Dispute Resolution to identify the landlord(s) as they appear on the sub-lease agreement.

The landlord pointed out that the tenant had also indicated on her Application for Dispute Resolution that there was another tenant; however, there was only one tenant under the lease agreement. Accordingly, I amended the tenant's Application for Dispute Resolution to exclude the second named applicant as I was unsatisfied that person had standing as a tenant.

Since there was no appearance on part of the tenant, I dismissed the tenant's application without leave. I note that the tenant had not provided a copy of a Notice to End Tenancy and according to the landlord one was not issued. Therefore, I did not consider issuing an Order of Possession under section 55(1) of the Act and I proceeded to determine whether the landlord is entitled to an Order of Possession under other provisions of the Act, and a Monetary Order as requested by the landlord.

The landlord's agent stated that he heard from his agent that it appears the tenant may have already vacated the property as of May 6, 2018 as the majority of her possessions are gone from the property, or the tenant is in the process of vacating the property. The landlord's agent has yet to confirm whether the tenant has finished vacating. I informed that the landlord that when a tenant vacates or abandons a property, possession automatically reverts back to the landlord and an Order of Possession is no longer required. The landlord stated that he still seeks an Order of Possession to serve and enforce in the event the tenant attempts to retain possession of the rental unit.

#### Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession?
2. Is the landlord entitled to a Monetary Order for the amounts claimed against the tenant?

#### Background and Evidence

The parties entered into an agreement entitled "Lease/Option Agreement" (herein referred to as "the agreement") that had term that commenced on February 15, 2015 and expired on February 14, 2018 (herein referred to as "the term"). The landlord in this case is referred to as the "Sub-Landlord/Seller" in the agreement and the tenant in this case is referred to as a "Sub-Tenant/Buyer" in the agreement. For ease of reference I have referred to the parties as landlord and tenant except where appropriate to reference them as described in the agreement.

The landlord submitted that the landlords have a long term lease agreement with the owners of the property and an exclusive option to purchase the property from the registered owners of the property. The landlords' lease agreement and option to purchase the property are both registered on the title of the property. The landlord provided a copy of the title which shows a lease and an option are registered in the name of one of the corporate landlords.

In brief, the Lease/Option agreement entered into by the landlords and the tenant provides that the tenant would pay rent of \$1,500.00 on the first day of every month, plus a \$5,000.00 "option fee" in scheduled partial instalments. For the first month, the tenant paid pro-rated rent and there was not "security deposit" paid. The agreement provides that the tenant had up until February 14, 2018 to exercise an option to purchase the property and had to give notice of such an intention to the landlord 30 days in advance. Clause 7.3 of the agreement provides that if the purchase option is not exercised, upon expiration of the term the tenant is required to vacate the rental unit and surrender the property to the landlord. However, I noted that clause 21 of the agreement also provides that if the tenant over-holds after the expiry of the agreement a month to month tenancy shall be construed. The landlord stated that it relies upon clause 7.3 of the agreement to bring the tenancy to an end.

The landlord testified that in the months leading up to the expiry of the term the tenant communicated to him that she would be unable to purchase the property. On February 3, 2018 the parties signed a document that states, in part:

The Sub-Landlord/Seller agreed to lease to the Sub-Tenant/Buyer, and the Sub-Tenant/Buyer agreed to lease from the Landlord/Seller, the Real Property and improvements located at:

[Address of rental unit]

**For a FIXED TERM OF 3 years**, which commenced on **February 15, 2015 (the "Commencement Date")** and shall terminate on **February 14, 2018 (the "End Date")**.

The Sub-Tenant/Buyer has failed to provide written **Notice to Exercise Option to Purchase** the Property at least 30 days before the TERM END DATE.

Therefore, the Agreement will expire on February 14, 2018 and the tenant will be required to vacate and deliver up possession of the Premises to the Sub-Landlord/Seller on that date.

**In order to provide the Sub-Tenant with more time to move out and clean the Property**, the Sub-Landlord/Seller hereby agrees to allow the Sub-Tenant/Buyer to HOLD OVER for 2 additional weeks, and vacate the Property on February 28, 2018. In return, the Sub-Tenant/Buyer must compensate the Sub-Landlord/Seller with a payment of SEVEN-HUNDRED & FIFTY DOLLARS (\$750.00) by or before the February 14, 2018.

The landlord considered the above described document to be a mutual agreement to end tenancy.

As an alternative position, the landlord also takes the position that this is a sub-let agreement and that the end of the sub-let period has expired.

As mentioned previously, the landlord is of the understanding the tenant may have vacated as of May 6, 2018, or is in the process of vacating since there are only a few possessions at the property; however, the landlord seeks an Order of Possession to serve and enforce in the event the tenant attempts to retain possession of the rental unit. The landlord requested an Order of Possession effective as soon as possible.

The landlord also seeks monetary compensation from the tenant as follows:

1. Utilities -- \$621.40

The landlord submitted that the tenant is responsible to pay for utilities and the tenant failed to pay all of the water, sewer, garbage bills to the City for 2017. The outstanding utility bills were then transferred to the property tax account in January 2018. The landlord provided a copy of a utility bill from the City dated September 6, 2017 and a Notice of Outstanding Taxes dated January 18, 2018 showing the transfer of the utility bill to the property tax account.

2. Over-holding -- \$6,075.00

The landlord seeks compensation of \$100.00 per day for 60 days for the period of time the tenant was over holding. The landlord acknowledged that the daily rate is something he determined to be appropriate and that the agreement does not stipulate an amount payable for over-holding. The landlord acknowledged the tenant paid rent for February 2018 and over-holding for the last two weeks of February 2018 in an amount to one-half of the monthly rent. The landlord also acknowledged that the tenant subsequently deposited another \$1,500.00 into the landlord's back account. In

an email, the tenant described the \$1,500.00 payment as being rent for March 2018. In an email, the landlord described the payment as being accepted toward the penalty for over-holding.

During the hearing, I reviewed portions of the Act that deal with an over-holding tenant and the landlord was agreeable to reducing this claim to calculated as the amount of the rent payable on a per diem basis for the period of April 1, 2018 to May 6, 2018 which is the date the landlord's agent believes the tenant may have vacated the property.

3. Landlord's time -- \$300.00

The landlord seeks compensation of \$300.00 for six hours of his time spent preparing a response to the tenant's Application for Dispute Resolution that he considered "frivolous". Costs to prepare for and participate in a dispute resolution proceeding are not recoverable under the Act, with the exception of recovery of the filing fee, and I dismissed this claim summarily during the hearing.

4. Court bailiff -- \$2,500.00

The landlord claimed this amount in anticipation that the tenant may have to be removed by the bailiff. Since this claim is anticipatory only and there is question as to whether such a loss will be incurred, I dismissed this claim with leave to reapply.

5. Moving costs -- \$2,500.0

The landlord claimed this amount in anticipation of having to move the tenant's possessions from the rental unit, as part of claim #4 above. As with claim #4 above this amount is anticipatory at best and I dismissed this claim with leave to reapply.

6. Opportunity cost -- \$5,000.00

The landlord testified that his realtor suggested the list price for the rental unit be reduced \$5,000.00 during the period of time the tenant remained in possession of the rental unit after the tenancy ended because the rental unit was full of the tenant's possessions and did not show well. The landlord did not provide evidence to corroborate this position and I dismissed the claim summarily during the hearing without considering further whether such a claim could be made under the Act.

## Analysis

Upon consideration of the unopposed evidence and submissions before me, I provide the following findings and reasons.

### ***Jurisdiction***

My jurisdiction to resolve disputes and issue orders is provided by the Director of Residential Tenancy Branch under the *Residential Tenancy Act* (herein referred to as "the Act"). I do not have jurisdiction to resolve disputes that pertain to contracts to which the Act does not apply.

The Act applies to tenancy agreements between a landlord and tenant concerning possession of a rental unit and residential property. A rental unit is living accommodation rented or intended to be rented to a tenant. Residential property includes buildings, or part thereof, and parcels of land where one or more rental unit is located. The subject property is residential living accommodation and possession of the rental unit was provided to the tenant as such.

More complex is the agreement between the parties. The agreement appears to be a combination of a sub-tenancy agreement and an option to purchase agreement. Residential Tenancy Policy Guideline 27: *Jurisdiction* provides information and policy statements with respect to various circumstances where an Arbitrator may take jurisdiction or decline jurisdiction. Below, I have reproduced the portion that deals with the transfer of an ownership interest in land.

#### ***vi. Transfer of an Ownership Interest***

If the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply as the parties have not entered into a "Tenancy Agreement" as defined in section 1 of the Acts. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are changing hands are part of the purchase price, a tenancy agreement has not been entered into.

Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Acts, is the right to possession of the residential premises. 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 may not have been

entered into. In such a case the Residential Tenancy Branch may again decline jurisdiction because the Acts would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Acts may apply and the Residential Tenancy Branch may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

[My emphasis underlined]

Upon review of the agreement between the parties, I find the following to relevant factors in determining whether this is a tenancy agreement or an agreement that transfers an interest in the property to the tenant.

The agreement between the parties provides that the tenant was to pay \$1,500.00 on the first day of every month as “rent” and there is a requirement to pay an “option fee” of \$5,000.00, in partial payments that are on scheduled dates and separate charges from rent. The tenant would be provided use and occupation of the property by paying the “rent” of \$1,500.00 until such time the option to purchase was exercised at which time the agreement would convert to an “Agreement of Purchase and Sale” [Clause 13], or until the end of the term. Accordingly, I find the requirement to pay rent is distinguishable from the option fee or payment toward the purchase price of the property and rent remains payable until the agreement term ends, or the agreement converts to an Agreement of Purchase and Sale. I find the requirement to pay rent is consistent with a tenancy agreement.

The landlord was required to pay property taxes and house insurance during the term; whereas, the tenant was responsible for paying for utilities, insurance on personal property and additional insurance premiums related to a home based business. I find these terms are also consistent with a tenancy agreement.

However, the agreement has some inconsistencies with a tenancy agreement. For instance, the agreement provides that the tenant is responsible for repairs required to the property. Further, the standard terms that are required to be in all tenancy agreements, as provided in Schedule 1 of the Residential Tenancy Regulation, are not present in the agreement. Where a term in a tenancy agreement does not comply with

the Act, section 6 of the Act provides that the term is not enforceable. Accordingly, the term requiring the tenant to make repairs would be unenforceable should this agreement be found to be a tenancy agreement and the offending term does not in itself result cause me to conclude this is not a tenancy agreement. As for the absence of the standard terms, the tenant would remain entitled to the benefits of all standard terms and the landlord would be obligated to comply with the standard terms even though they do not appear in the agreement. Accordingly, I find the absence of the standard terms is not insurmountable.

Finally, in order for me to have jurisdiction, I must be satisfied that the landlord(s) named in this proceeding meet the definition of a landlord. The named landlords are not the registered owners of the property. Rather, the landlords named in this decision have a long term lease and an option to purchase the property from the owners, and those rights are registered on title of the property. The landlord is of the position the landlords have sub-let the property to the tenant.

Residential Tenancy Policy Guideline 19: *Assignment and Sublet* provides information and policy statements with respect to subletting agreements. The policy guideline provides, in part:

### **C. SUBLETTING**

#### **Sublets as contemplated by the *Residential Tenancy Act***

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.



Landlord is defined in the RTA as:

**"landlord"**, in relation to a rental unit, includes 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;

Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.

The sub-tenant's contractual rights and obligations are as set out in the sublease agreement. Generally speaking, the sub-tenant does not acquire the full rights provided to tenants under the Act. For example, if the landlord ends the tenancy with the original tenant, the tenancy ends for the sub-tenant as well. The sub-tenant would not be able to dispute the landlord ending the tenancy with the original tenant; it would be up to the original tenant to dispute the notice.

The sub-tenant typically pays rent to the original tenant; but even if he or she fails to do so, the original tenant's responsibility to pay rent to the landlord is unaffected and the original tenant can be evicted if rent is not paid. Again, it should be noted that there is no contractual relationship between the original landlord and the sub-tenant. In the event of a dispute, the sub-tenant may apply for dispute resolution against the original tenant, but likely not the original landlord, unless it can be shown there has been a tenancy created between the landlord and sub-tenant.

[My emphasis underlined]

In this case, I heard that the landlords have a long term lease, 10 years, with the owners of the property. While I was not provided a copy of the original lease agreement, I presume the landlords have the right to possession of the rental unit under their lease agreement and I did not hear anything to contradict that presumption. Also, the landlord did not occupy the rental unit during the time the tenant was entitled to possession of the rental unit. The agreement with the tenant was only 3 years and the agreement terminated and the tenant was required to vacate the rental unit before the end of the landlord's lease. The tenant was required to pay rent to the landlord (the original tenant, not the owner). In these circumstances, I find I am satisfied that the tenant sublet the rental unit from the landlords named in this dispute and that the landlords meet the definition of landlord under paragraphs (c) of the definition.

In light of all of the above, I find I am satisfied that the landlords named in this decision meet the definition of landlord under a sublease agreement and that there was no transfer of ownership interest to the tenant. Accordingly, I am satisfied I have jurisdiction to resolve this dispute.

### ***Order of Possession***

Section 55(2) provides the circumstances where a landlord may seek an Order of Possession, including:

(c.1) the tenancy agreement is a sublease agreement;

In keeping with my findings above, since the parties had a sublease agreement and the term of the sublease agreement has expired, I find the landlord entitled to an Order of Possession, as requested, pursuant to section 55(2)(c.1) of the Act. Although there appears to be a discrepancy between clause 7.3 and 21 of the agreement, as described in the Background and Evidence section of this decision, the landlord argued that clause 7.3 applies and there was no argument presented to me in support of finding clause 21 should apply instead of clause 7.3. Considering the tenant has not paid any monies to the landlord after March 2018 and appears to have vacated the rental unit or is in the process of vacating the rental unit, I provide the landlord with an Order of Possession effective two (2) days after service upon the tenant.

Having been satisfied this is a sublease agreement and the sublease agreement has come to an end, thereby entitling the landlord to an Order of Possession, I find it unnecessary to further consider whether the tenancy came to an end by way of a mutual agreement.

## ***Monetary Compensation***

### *Utilities*

Clause 5 (a) of the agreement provides that the tenant is responsible to pay for all utilities, including those provided by the City. The landlord has provided evidence to show the tenant did not pay the utilities owed to the City for water, sewer, garbage services provided in 2017 and I grant the landlord's request for an award of \$621.40.

### *Over-holding*

The landlord requested that the landlord be compensated for the tenant during the period of April 1, 2018 through to May 6, 2018 since she continued to hold possession of the rental unit for that period of time and did not pay for the continued use and occupation.

Section 57 of the Act provides for what happens if the tenant does not vacate the rental unit when the tenancy ends. Section 57(3) of the Act provides:

(3) A landlord may claim compensation from an over holding tenant for any period that the over holding tenant occupies the rental unit after the tenancy is ended.

The tenant paid \$1,500.00, the equivalent of the monthly rent payable under the agreement, to the landlord for the month of March 2018 but nothing afterward. Accordingly, I find the landlord entitled to further compensation equivalent to the monthly rent of \$1,500.00 for the month of April 2018 plus the rent on a per diem basis for May 1 – 6, 2018 which I calculate to be \$290.32. Therefore, I award the landlord the sum of \$1,790.32 for over-holding.

### *Other claims*

The landlord's other monetary claims were dismissed, with and without leave, during the hearing as explained in the Background and Evidence section of this decision.

*Filing fee*

The landlords had some success in their application and I award the landlords recovery of the \$100.00 filing fee paid for their application.

*Monetary Order*

Based on the awards provided above, I provide the landlords with a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Utilities	\$ 621.40
Over-holding	1,790.32
Filing fee	<u>100.00</u>
Monetary Order	\$2,511.72

Conclusion

The tenant's application was dismissed without leave due to her failure to appear at the hearing.

In the event the tenant has not already vacated or abandoned the rental unit, the landlord has been provided an Order of Possession effective two (2) days after service upon the tenant.

The landlord has been provided a Monetary Order in the sum of \$2,511.72 for unpaid utilities, over-holding, and recovery of the filing fee. The landlord's request to recover bailiff costs and moving costs were dismissed with leave as the claims are anticipatory and such losses have not been incurred. The balance of the landlords' monetary claims have been dismissed without leave.

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: May 11, 2018

---

Residential Tenancy Branch