



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPC, MNRL, MNSD & FFL

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. An Order for Possession for cause
- b. A monetary order in the sum of \$2110 for unpaid rent
- c. An order to recover the cost of the filing fee

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the one month Notice to End Tenancy was personally served on the Tenant(s) on April 24, 2019. Further I find that the Application for Dispute Resolution and Notice of Dispute Resolution Hearing was sufficiently served on the Tenant on May 9, 2019 as the tenant acknowledged receipt of the documents. With respect to each of the applicant's claims I find as follows:

### Issue(s) to be Decided:

The issues to be decided are as follows:

- a. Whether the landlord is entitled to an Order for Possession?
- b. Whether the landlord is entitled to A Monetary Order and if so how much?
- c. Whether the landlord is entitled to recover the cost of the filing fee?

### Background and Evidence:

The parties entered into a written tenancy agreement that provided that the tenancy would start on August 31, 2019. The rent was initially \$1250 per month payable in advance on the first day of each month. However, both parties agree that additional

facilities have been added and the present rent is \$1600 per month payable in advance on the first day of each month. The tenant did not pay a security deposit.

The landlord testified the tenant has repeatedly paid the rent late including the following:

- The rent for April 2019 was finally paid until April 20, 2019
- The rent for March 2019 has not been fully paid
- The rent for February 2019 was not fully paid until February 25, 2019
- The rent for January 2019 was not fully paid until February 25, 2019.
- The rent for December 2018 was not fully paid until the end of December 2018.
- The rent for November 2018 was not fully paid until the end of November.
- The rent for October 2018 was not paid on time.
- The tenant was regularly late paying the rent prior to this.

The landlord testified the tenant owes \$510 for May 2019 and \$1600 for June 2019

The tenant testified that he is a self employed artist and he would pay the rent when he received money from the sale of his art. The parties agreed to this. In November 2019 the landlord started to charge a \$10 a month late fee which he paid. He submits this is evidence of the landlord accepting the late payments. He further testified he has over \$20,000 in sweat equity fixing the rental property. The landlord is interfering with his enjoyment of the property by cutting the power and showing up uninvited and without giving proper notice.

The landlords deny that they have cut the power to the rental property and they deny showing up without giving proper notice.

The tenant(s) continues to reside in the rental unit. .

#### Analysis - Order of Possession:

Section 47(4) and (5) of the Residential Tenancy Act provides as follows:

47(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit by that date.

This information is set out in the one month Notice to End Tenancy and states as follow:

### **“INFORMATION FOR TENANTS**

- You have the right to dispute this Notice within 10 days after you receive it, by filing an Application for Dispute Resolution with the Residential Tenancy Branch or at a Service BC Office. An arbitrator may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time.
- If you do not file an Application within 10 days, you are presumed to accept this Notice and must move out of the rental unit or vacate the site by the date set out on page one of this Notice (you can move out sooner.) If you do not file an Application, move or vacate, your landlord can apply for an Order of Possession that is enforceable through the court.

**Note: The date a person receives documents is what is used to calculate the time to respond; the deeming provisions do not give you extra time to respond.”**

The tenant failed to file an Application for Dispute Resolution to dispute the one month Notice to End Tenancy.

In certain situation an arbitrator has the power to grant an extension of time if there are exceptional circumstances. However, an arbitrator does not have this power if the effective date of the Notice to End Tenancy has passed. Policy Guideline #36 includes the following:

#### **Notice to End**

##### **Application for Arbitration Filed After Effective Date**

An arbitrator may not extend the time limit to apply for arbitration to dispute a Notice to End if that application for arbitration was filed after the effective date of the Notice to End.

For example, if a Notice to End has an effective date of 31 January and the tenant applies to dispute said Notice to End on 1 February, an arbitrator has no jurisdiction to hear the matter ***even where the tenant can establish grounds***

***that there were exceptional circumstances.*** In other words, once the effective date of the Notice to End has passed, there can be no extension of time to file for arbitration.

The effective date of the Notice to End Tenancy was May 31, 2019. I determined that an arbitrator no longer has the authority to grant an extension of time even if the tenant could establish “exceptional circumstances.”

The tenant testified that after he was served with the Application for Dispute Resolution he mailed documents to the Branch including a Tenant’s Application for Dispute Resolution where he applied to cancel the Notice. He testified this was returned to him and he was told he would have to file the Application in person. He said he did not have the means to go to Burnaby to file the Application. I determined this is not sufficient basis for failing to comply with the Residential Tenancy Act.

Even if the tenant had filed an application to dispute the Notice it would have been cancelled. The tenant testified he mailed the materials after receiving the landlord’s Application for Dispute Resolution. The 10 days had passed by that time. I determined the explanation given by the tenant does not amount to exceptional circumstances.

Further, I determined it was appropriate to consider whether the Notice to End Tenancy should be cancelled on the merits as if the tenant had filed an Application for Dispute Resolution. Policy Guideline #38 provides as follows:

“The *Residential Tenancy Act*<sup>1</sup> and the *Manufactured Home Park Tenancy Act*<sup>2</sup> both provide 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. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.“

The tenant has regularly failed to pay the full rent on time including each the six months prior to the service of the one month Notice to End Tenancy. I determined the tenant failed to prove that the landlord agreed to the late payments. I accept the evidence of the representatives of the landlord that they were continually asking him to pay on the first of each month. The tenants testified he has claims against the landlord for work he has done on the property and because the landlord has breached his quiet enjoyment. Section 26(1) provides as follows:

“Rules about payment and non-payment of rent

26 (1) 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, unless the tenant has a right under this Act to deduct all or a portion of the rent.”

A tenant must first obtain a monetary order from an arbitrator before he is entitled to withhold any rent. The tenant has not filed a claim and does not have a monetary order.

#### Order of Possession:

I determined the landlord was entitled to an Order for Possession. The Tenant(s) have not made an application to set aside the Notice to End Tenancy and the time to do so has expired. In such situations the Residential Tenancy Act provides the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date. I determined the landlord has established grounds to end the tenancy on the merits. Accordingly, I granted the landlord an Order for Possession. I set the effective date of the Order of Possession for June 30, 2019.

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Analysis - Monetary Order and Cost of Filing fee:

The landlord claimed the sum of \$510 for rent for May 2019 and \$1600 for June 2019. I determined the tenant failed to fully pay the rent for these months and the sum of \$2110 is owed.

However, the landlord charged a late fee of \$10 a day. This is contrary to section 7(1) of the Residential Tenancy Regulations which provide that a landlord can only charge a late fee of a maximum of \$25 for the month provided this provision is included in the tenancy agreement. I determined this charge is contrary to the Act and the tenant is entitled to recover it. The landlord testified they received \$610 in late fees up to the end of February 2019. The tenant was not charged a late fee after that is it was difficult enough getting the rent. I determined the \$610 should be deducted from the monetary claim.

I ordered that the tenant pay to the landlord the sum of \$1500 plus \$100 for the cost of the filing fee for a total of \$1600.

Conclusion:

I granted an Order of Possession effective June 30, 2019. I further ordered that the Tenant(s) pay to the Landlord(s) the sum of \$1600.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

**This decision is final and binding on both parties.**

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: June 24, 2019

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Residential Tenancy Branch