



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OL

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on January 21, 2022 (the “Application”). The Landlord filed the Application to obtain a decision from the Residential Tenancy Branch (the “RTB”) on whether a tenancy agreement exists between the Landlord and Tenants. The Landlord also sought an Order of Possession based on a Mutual Agreement to End Tenancy and to recover the filing fee.

T.L. appeared at the hearing as agent for the Landlord. Legal Counsel for the Landlord appeared at the hearing. Legal Counsel for the Landlord provided the correct name of the Landlord, which is reflected in the style of cause.

The Tenant appeared at the hearing and appeared for Tenant M.B. Legal Counsel for the Tenant appeared at the hearing.

Legal Counsel for the Landlord and Legal Counsel for the Tenant advised that the parties have a matter before the British Columbia Supreme Court and that, the Court adjourned the matter for the parties to obtain a decision from the RTB about whether a new tenancy agreement was created between the parties.

I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). T.L. and the Tenant provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all testimony and submissions provided and reviewed the documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Was a new tenancy agreement created between the parties?
2. Is the Landlord entitled to an Order of Possession based on a Mutual Agreement to End Tenancy?
3. Is the Landlord entitled to recover the filing fee?

### Background and Evidence

Legal Counsel for the Landlord provided the following submissions. This matter involves the purchase and sale of the rental unit pursuant to a Contract of Purchase and Sale entered into in 2019. The Tenant was unable to complete the purchase of the rental unit on 11 occasions and extensions of the completion date were granted. Each time the completion date was extended, a new Mutual Agreement to End a Tenancy was also completed with the effective date being the completion date. There were therefore a series of 11 fixed term tenancies between the parties corresponding with the 11 extensions of the completion date for the Contract of Purchase and Sale.

Legal Counsel for the Landlord provided the following further submissions. The Mutual Agreements to End a Tenancy were on RTB forms and included clauses stating that the Tenants agree to vacate the rental unit by a fixed date and therefore these were fixed term contracts and not renewable. The Tenants were not entitled to stay another month in the rental unit by paying a further fee. A tenancy ends pursuant to section 44(1)(c) of the *Residential Tenancy Act* (the “*Act*”) if the parties agree in writing to end the tenancy. Section 44(3) of the *Act* states:

- (3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 44(3) of the *Act* is not applicable because the Mutual Agreements to End a Tenancy required the Tenants to vacate the rental unit on a specific date. It is only where there is no agreement to vacate on a specific date that the tenancy would turn into a month-to-month tenancy.

At first, Legal Counsel for the Landlord submitted that the tenancy ended April 15, 2021, pursuant to a Mutual Agreement to End a Tenancy form that was not before me. However, later in the hearing, Legal Counsel for the Landlord advised that the last Mutual Agreement to End a Tenancy was effective January 15, 2021.

T.L. provided the following testimony. T.L. represents their parents in relation to the rental unit. T.L. started speaking to the Tenant in June or July of 2021 about closing on the sale of the rental unit. In September of 2021, T.L. was “tired of the Tenant’s excuses” about why they could not close on the sale and T.L. called the Tenant. T.L. and the Tenant reached an agreement that, if the Tenant did not come up with the funds to close on the sale by September 2021, the Tenants would move out of the rental unit. T.L. told the Tenant the Tenants could have until October 31, 2021 to move out of the rental unit if the Tenant did not come up with the funds to close on the sale.

During the hearing, T.L. played a voice recording of their call with the Tenant in September of 2021. During the call, the parties agreed the Tenant would move out of the rental unit by October 31, 2021 if the Tenant could not come up with the funds to close on the sale.

Legal Counsel for the Landlord referred to an email dated July 07, 2021, from T.L. to the Tenant which states:

I spoke to my parents. We are ok with a 2 week closing period, no deposit is required if you can complete within 2 weeks.

However, this is the final chance considering there were 11 in the past...

Legal Counsel for the Landlord and T.L. confirmed their position is that there was a tenancy agreement covered by the *Act* between the Landlord and Tenants but that this ended, and no new tenancy agreement was created.

Legal Counsel for the Tenant and the Tenant agreed that the tenancy agreement between the parties ended April 15, 2021; however, their position is that a new tenancy agreement was created.

Legal Counsel for the Tenant asked T.L. questions and T.L. provided the following testimony. T.L. disagrees that they entered into a new tenancy agreement with the Tenants. T.L. did accept \$48,000 from the Tenant on July 06, 2021; however, this was not for rent. T.L. did accept rent for August and September of 2021 from the Tenant. T.L. did not pick up rent from the Tenant for October and November of 2021 because the Tenants were supposed to move out of the rental unit pursuant to the voice recording. T.L. did not put the agreement between them and the Tenants that the Tenants would move out by October 31, 2021 in writing and did not advise the Tenants in writing to move out by October 31, 2021.

Legal Counsel for the Tenant submitted that the previous tenancy between the parties ended March 31, 2021, and a new tenancy agreement started April 01, 2021. Legal Counsel for the Tenant stated that T.L. accepted \$12,000.00 per month in rent from the Tenants and the Tenants remained in possession of the rental unit after March 31, 2021.

The Tenant testified as follows. The parties agreed that, if the Tenant gave T.L. \$48,000.00, the rental unit would be put up for sale again and the Tenants would stay in it until the Landlord found a buyer or the Tenant came up with the purchase price. The rental unit was put back on the market for sale and the Landlord did showings of the rental unit. T.L. was collecting rent during this time as well as referring to themselves as a landlord.

The Tenant acknowledged it is them in the voice recording played by T.L. during the hearing and that they agreed to move out of the rental unit by October 31, 2021 if they did not come up with the funds to close on the sale of the rental unit. However, the Tenant testified that the parties did not put anything in writing and therefore the Tenants carried on being tenants. The Tenant pointed out that T.L. referred to payments as "rent" in documentary evidence submitted. The Tenant testified that they had a verbal discussion with T.L. around April or May of 2021 about the tenancy continuing as well as the terms of the tenancy agreement.

Legal Counsel for the Tenant and the Tenant submitted that a new tenancy agreement was created through the verbal discussion between the Tenant and T.L. in April or May of 2021 and by T.L. accepting rent payments.

In reply, T.L. testified that they were not accepting the \$12,000.00 payments as rent but on the basis that the Tenant would close on the sale of the rental unit. T.L. testified that there was a verbal agreement between the parties that the Tenants could stay in the rental unit until they could close on the sale of the rental unit and therefore the Tenants were occupying the rental unit and paying \$12,000.00 per month for this. T.L. testified that the \$12,000.00 was going towards the purchase price of the rental unit and was not rent. T.L. testified that the parties had a "rent-to-own" agreement between them. T.L. testified that payments made by the Tenants for April to September of 2021 were going towards the purchase price of the rental unit because there was no tenancy agreement between the parties and the Tenants were paying for an extension of the completion date. T.L. pointed to the July 07, 2021 email and stated that this shows the parties were still talking about the Tenant purchasing the rental unit.

Legal Counsel for the Landlord asked the Tenant questions and the Tenant testified that they did not confirm their verbal discussion with T.L. about a continuing tenancy in writing because T.L. was supposed to do so. The Tenant acknowledged they do not have written evidence of a new tenancy agreement between the parties.

In response to a question by me, T.L. testified that the first time they sought to have the Tenants removed from the rental unit was with the previous hearing, the decision from which has been submitted. The prior hearing took place April 27, 2021, and involved an Application for Dispute Resolution filed by the Landlord on January 29, 2021 for an Order of Possession based on a Mutual Agreement to End Tenancy.

In reply, the Tenant testified that it is not accurate that rent payments were going towards the purchase of the rental unit as the Contract of Purchase and Sale was separate and apart from the tenancy agreement in this matter and the Tenant was making separate payments in relation to these. The Tenant testified that T.L. did not say at any point that the payments were going towards the purchase of the rental unit. The Tenant denied that this was ever a "rent-to-own" agreement.

In reply, Legal Counsel for the Landlord submitted that the Contract of Purchase and Sale and the tenancy agreement between the parties operated in tandem. Legal Counsel for the Landlord submitted that the monies paid to the Landlord were for

extending the Contract of Purchase and Sale and not rent. Legal Counsel for the Landlord referred to a term in the Contract of Purchase and Sale to support their position. T.L. testified that monies paid from January of 2019 to April of 2021 were not going towards the purchase price; however, from that point on payments were and it was discussed verbally between the Tenant and T.L. that this was the case. T.L. pointed to the Statement of Adjustments in evidence showing that the security deposit paid was on the Statement of Adjustments.

In reply, Legal Counsel for the Tenant submitted that there is no evidence to support that payments made after April of 2021 were to go towards the purchase price of the rental unit because there was no enforceable Contract of Purchase and Sale in place at that point. The Tenant testified that they never had a conversation with T.L. about payments made after April of 2021 going towards the purchase price of the rental unit and that the Contract of Purchase and Sale and the tenancy agreement were always two separate contracts.

I told the parties I would issue a written decision about whether a new tenancy agreement was created between the parties and then determine what was required in relation to the request for an Order of Possession based on a Mutual Agreement to End a Tenancy. I told the parties that, if I find a new tenancy agreement was created, I will reconvene the hearing if necessary. Legal Counsel for the Landlord confirmed the Landlord is seeking an Order of Possession based on the Mutual Agreement to End a Tenancy effective January 15, 2021.

I have reviewed the documentary evidence submitted and will refer to it as necessary below.

### Analysis

The definition of a tenancy agreement is set out in section 1 of the *Act* as follows:

"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

Policy Guideline 11 addresses waiver of notices to end tenancy and new or continued tenancies and states at page 2:

#### D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
- the conduct of the parties.

I find the parties entered into a tenancy agreement covered by the *Act* starting January 09, 2019, because the parties agreed on this and there is a written tenancy agreement between the parties in evidence.

I find the parties entered into numerous Mutual Agreements to End a Tenancy, with the final one being effective January 15, 2021, because the parties agreed on this and the documentary evidence shows this.

I find the original tenancy agreement starting January 09, 2019, was meant to end with the first Mutual Agreement to End a Tenancy signed by the parties but that the original end date was continually extended through subsequent Mutual Agreements to End a Tenancy.

The Landlord takes the position that the tenancy ended with the Mutual Agreement to End a Tenancy effective January 15, 2021 (the "January 2021 Mutual Agreement"). I do not accept that the tenancy ended with the January 2021 Mutual Agreement for three main reasons.

First, the Tenants remained in the rental unit and continue to live in the rental unit.

Second, the Landlord accepted rent payments after January 15, 2021, which T.L. acknowledged in their testimony. T.L. submitted that payments accepted after April of 2021 were going towards the purchase of the rental unit; however, I do not accept this for the following reasons. The documentary evidence shows T.L. referred to the payments as rent payments. The payments themselves state they are rent payments. The Contract of Purchase and Sale ended prior to further payments being accepted as shown in the letter dated April 15, 2021, from the lawyer for the Landlord to the Tenants. The payment amounts are the same as the rent amount.

Third, in September of 2021, T.L. agreed to the Tenants remaining in the rental unit until at least October 31, 2021.

I find the points about waiver set out in Policy Guideline 11 apply to Mutual Agreements to End a Tenancy as well. Parties can waive their right to rely on a Mutual Agreement to End a Tenancy by their conduct. I find that the Landlord, through T.L., did waive their right to rely on the January 2021 Mutual Agreement by the conduct of T.L. Specifically, I find T.L. waived their reliance on the January 2021 Mutual Agreement by accepting rent payments after January 15, 2021, and agreeing in September of 2021 that the Tenants could remain in the rental unit until at least October 31, 2021. I find the conduct of T.L. inconsistent with the position that the tenancy ended in January of 2021 pursuant to the January 2021 Mutual Agreement.

Given the above, I find the tenancy did not end pursuant to the January 2021 Mutual Agreement and that the parties, through their conduct, continued the tenancy.



Given my decision about whether a new tenancy agreement was created between the parties, I do not find it necessary to reconvene the hearing to hear arguments on whether the Landlord is entitled to an Order of Possession based on the January 2021 Mutual Agreement as I have found that the Landlord waived reliance on this and therefore the Landlord is not entitled to an Order of Possession pursuant to it.

Given the Landlord was not successful in the Application, I decline to award the Landlord reimbursement for the filing fee.

The Application is dismissed without leave to re-apply.

### Conclusion

The Application is dismissed without leave to re-apply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: April 25, 2022

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Residential Tenancy Branch