



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PREMIER CHOICE INVESTMENTS LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes            OPR-DR

### Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution wherein the Landlord sought an Order of Possession based on a 10 Day Notice to End Tenancy, issued on July 11, 2018 (the "Notice").

The Landlord originally applied by way of the Direct Request Proceeding pursuant to section 55(4) of the *Act*. By Interim Decision dated September 17, 2018 the Landlord's application was adjourned to a participatory hearing. This Decision must be read in conjunction with that Interim Decision.

The participatory hearing was conducted by teleconference and was scheduled before me at 9:30 a.m. on November 1, 2018. In attendance for the Landlord were the Owner of the company, P.R., the Landlord's Property Manager, W.M., and two witnesses, C.G. and B.J.

The Tenant did not call into the hearing. As such, service of the Notice of Hearing was considered. W.M. testified that he personally served the Tenant with Notice of the hearing on September 22, 2018. The Landlord's witness, C.G., also testified that he witnessed W.M. personally serve the Tenant with Notice of the hearing. I accept the Landlord's undisputed evidence in this regard and find that the Tenant was served with notice of the proceeding. I therefore proceeded with the hearing in the Tenant's absence.

### Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the Notice?

### Background Evidence

Introduced in evidence was a copy of the residential tenancy agreement confirming that this tenancy began September 1, 2017. Monthly rent was payable in the amount of \$750.00.

The Landlord's Agent testified that the Tenant failed to pay rent as required. Accordingly, he was served with the Notice on July 11, 2018 indicating the sum of \$700.00 was owed for July 2018. The Landlord's witness, B.J., testified that he witnessed W.M. serve the Tenant on this date.

The Notice informed the Tenant he had five days in which to pay the outstanding rent or make an application to dispute the Notice; as the Tenant was served on July 11, 2018, the Tenant had until July 16, 2018 to pay the outstanding rent. The Notice further informed the Tenant that if he did not pay the outstanding rent, or apply to dispute the Notice that his tenancy would end.

As noted in the Interim Decision, Tenant made some small payments to the Landlord following receipt of the Notice.

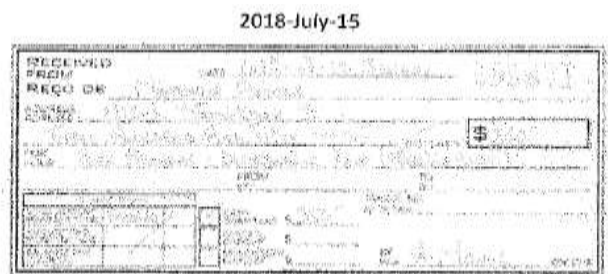
The Landlord's Direct Request Application was adjourned to a participatory hearing for the following reasons:

*"I note that the tenant made payments after the five days that is granted under the 10 Day Notice to End Tenancy that was issued to the tenant. However, I find that the receipts submitted by the landlords are illegible and I am not able to determine whether the landlords accepted the payments "for use and occupancy only".*

*In the absence of this indication on the receipts, it is not clear whether the tenant is aware that the tenancy was not reinstated upon payment to the landlords.*

*I find that that this question can only be addressed through a participatory hearing."*

The Landlord submitted copies of the receipts in evidence. For efficiency I will only reproduce a copy of one receipt however I confirm that each of the receipts submitted look the same as the one issued on July 15, 2018 and appear as follows:



At the hearing, W.M. testified as to the contents of the receipts and confirmed that the receipts issued to the Tenant did not indicate that the payments were made for "use and occupancy only".

Documentary evidence submitted by the Landlord confirms that the Tenant made payments as follows:

July 31, 2018	\$300.00
August 1, 2018	\$150.00
August 19, 2018	\$275.00

The Landlord's Agent further confirmed that the Tenant failed to pay any rent for September and October 2018, and that as of the date of the hearing on November 1, 2018, the Tenant had also failed to pay rent for November.

The Landlord applied for an Order of Possession on September 12, 2018.

Branch records also indicate the Tenant applied for Dispute Resolution on September 5, 2018, although he appears to have abandoned that application.

### Analysis

After consideration of the Landlord's undisputed testimony and evidence and on a balance of probabilities, I find as follows.

I find the Tenant was served with the Notice on July 11, 2018.

The Landlord seeks an Order of Possession pursuant to sections 46 and 55 of the *Residential Tenancy Act*.

Section 46 of the *Act* reads as follows:

**46** (1) 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.

(2) A notice under this section must comply with section 52 [*form and content of notice to end tenancy*].

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(4) Within 5 days after receiving a notice under this section, the tenant may

(a) pay the overdue rent, in which case the notice has no effect, or

(b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.
- (6) If
- (a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and
  - (b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,
- the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

The undisputed evidence of the Landlord is that the Tenant failed to pay the outstanding rent within five days of receipt of the Notice as required by section 46(4); further, the evidence confirms that the Tenant failed to apply for dispute resolution within that strict five day deadline.

Section 46(5) provides that when a Tenant fails to pay the rent, or make an application to dispute the Notice within five days of receipt of the Notice, the Tenant is *conclusively presumed* to accept the end of the tenancy.

While the Tenant made some payments towards the outstanding rent, he did not pay the *full amount owing*. Further, although payments were made in August, standard accounting principles require those payments to be applied to the oldest debt; namely: July 2018, such that no payments were received for the August rent. I also accept the Landlord's agent's testimony that the Tenant failed to pay rent in September and October.

Although the Landlord failed to issue receipts indicating the payments were for "use and occupancy only", this is not, in and of itself, determinative.

**I acknowledge that during the hearing I informed the parties that the Landlord's failure to indicate payment was for "use and occupancy only" was fatal to the Landlord's application for an Order of Possession. However, upon further reflection, and consideration, I wish to clarify and correct those comments. Section 78 of the Act allows me to correct or clarify a Decision and reads as follows:**

- 78** (1) Subject to subsection (2), the director may, with or without a hearing,
- (a) correct typographic, grammatical, arithmetic or other similar errors in his or her decision or order,
  - (b) clarify the decision or order, and
  - (c) deal with an obvious error or inadvertent omission in the decision or order.

(1.1) The director may take the steps described in subsection (1)

(a) on the director's own initiative, or

(b) at the request of a party, which request, for subsection (1) (b) and (c), must be made within 15 days after the decision or order is received.

(2) A request referred to in subsection (1.1) (b) may be made without notice to another party, but the director may order that another party be given notice.

(3) The director must not act under this section unless the director considers it just and reasonable to do so in all the circumstances.

While *Residential Tenancy Policy Guideline 11* provides that a failure to indicate payments are received for use and occupancy only *may* reinstate the tenancy, the Guideline also provides that the intention of the parties must be considered.

Policy Guideline 11 reads in part as follows:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

The evidence establishes that the Landlord applied for an Order of Possession in September of 2018. The Tenant was duly served with that Application such that I find it likely he was aware the Landlord did not intend to continue with the tenancy.

Further, when the Landlord's Direct Request Application was adjourned to a participatory hearing, the Tenant was served with Notice of the hearing. Again, this informed the Tenant the Landlord intended to proceed with ending the tenancy.

Additionally, I accept the Landlord's evidence that the Tenant failed to pay rent in September and October 2018. I find it likely the Tenant ceased making payments as he accepted his tenancy was coming to an end.

In all the circumstances, I find, based on the conduct of the parties, that the Landlord did not reinstate the tenancy when accepting payments from the Tenant after the effective date of the Notice.

**I therefore find the Landlord is entitled to an Order of Possession pursuant to sections 46 and 55 of the Act. This Order must be served on the Tenant and may be filed and enforced in the B.C. Supreme Court.**

Conclusion

The Landlord's application for an Order of Possession is granted.

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: November 1, 2018

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Residential Tenancy Branch