



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNL, FFT

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("Act") for:

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property, dated September 18, 2018 ("2 Month Notice"), pursuant to section 49; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord, the landlord's lawyer and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 146 minutes. The landlord, the landlord's lawyer and the landlord's two witnesses spoke for most of the hearing time.

Two witnesses, "witness JM" and "witness AM" testified on behalf of the landlord at this hearing. Witness JM is the landlord's son and witness AM is the landlord's mother. An English language interpreter, MM, assisted witness AM with translating between English and Spanish during the hearing. Both parties had equal opportunities to question both witnesses. The landlord chose not to call another witness, the landlord's brother MM, at this hearing.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's written evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's written evidence package.

The landlord's lawyer objected to me considering the tenant's written evidence package, stating that she received it late on October 19, 2018, which is less than 14 days prior to this hearing date, contrary to Rule 3.14 of the Residential Tenancy Branch ("RTB") *Rules of Procedure*. I notified the landlord that I would consider the tenant's written evidence package at the hearing and in my decision because the landlord failed to demonstrate any prejudice as a result of how or when he received the evidence. Further, the landlord submitted 97 pages of evidence and two witnesses in response to the tenant's application. The tenant's evidence was received only two days past the 14-day deadline for the tenant. Most of the tenant's evidence was submitted at the parties' previous RTB hearing in August 2018, and included a copy of the decision from the previous hearing which the landlord received.

The tenant confirmed personal receipt of the landlord's 2 Month Notice on September 18, 2018, which is when the landlord said that he served the notice to the tenant. In accordance with section 88 of the *Act*, I find that the tenant was duly served with the landlord's 2 Month Notice on September 18, 2018.

#### Preliminary Issue – Previous RTB Hearing

At the outset of the hearing, both parties agreed that a different Arbitrator at a previous RTB hearing ("previous hearing") on August 2, 2018, dealt with a previous 2 Month Notice, dated June 5, 2018 ("previous 2 Month Notice"). The tenant provided a copy of the "previous decision." The file number for the previous hearing appears on the front page of this decision. At that hearing, the previous 2 Month Notice was cancelled and the Arbitrator questioned the landlord's lack of evidence and good faith intentions.

The landlord confirmed that he issued the current 2 Month Notice, dated September 18, 2018, for the same reason as the previous 2 Month Notice, for his son to move in. However, he indicated that there were further events that had occurred since the last hearing on August 2, 2018.

I find that the previous 2 Month Notice issue is *res judicata*, meaning it has already been decided. The landlord issued the current notice for the same reason. The tenant submitted some of the same evidence as the last hearing.

Accordingly, this hearing is only to decide the current 2 Month Notice, dated September 18, 2018. I can only consider new circumstances that have arisen since the August 2, 2018 hearing occurred.

### Issues to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession for landlord's use of property?

Is the tenant entitled to recover the filing fee for this application from the landlord?

### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This month-to-month tenancy began on October 15, 2010. Monthly rent in the current amount of \$1,456.00 is payable on the first day of each month. A security deposit of \$625.00 was paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit. Both parties signed a written tenancy agreement. The rental property is a four-plex where there are two units above and two units below. The rental unit is one of two units on the upper floor, that has two bedrooms. Witness AM's own property is a neighbouring duplex property beside the rental unit.

The tenant seeks to cancel the landlord's 2 Month Notice and to recover the \$100.00 application filing fee.

A copy of the landlord's 2 Month Notice was provided for this hearing. It states an effective move-out date of December 1, 2018, indicating the following reason for seeking an end to this tenancy:

- *The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse).*

The landlord testified that he requires the rental unit so that his 33-year-old son (witness JM) can move in right away when the tenant vacates. He stated that he is the owner of the rental unit since 2002, together with his brother, MM, and that witness AM is not an owner or a landlord of the property. He maintained that he bought the property so that he could help his kids one day, if needed. He said that his son currently lives in the 1-bedroom basement unit of his house since January 2018, when his son separated from

his wife. He noted that his son's wife continues to live in another house that is also owned by the landlord and rented by her for \$1,500.00 per month and he does not want to displace her because she has shared custody of his son's daughter (the landlord's "granddaughter").

The landlord claimed that his two-year-old granddaughter lives upstairs in the spare bedroom of the same house with the landlord. He said that there were two bedrooms and two bathrooms upstairs and he and his wife occupy the other bedroom. He explained that when his granddaughter wakes up in the middle of the night, he and his wife have to wake up and take her downstairs to her father. He said that they act like parents towards her. He testified that his parenting style is different than his son's and this causes tension and arguments with his son, that has worsened over time. He maintained that his son needs separation from the landlord to live a separate life with his own family. He claimed that his son is in severe financial debt of approximately \$76,000.00, that he has loaned money to him that has not been paid back, and that he is assisting him in paying his bills. The landlord provided copies of his son's loan and debt documents. He explained that he is offering the rental unit at a subsidized rate of \$1,000.00 per month including utilities to his son in order to assist him. He stated that the rental unit is safer than the other lower level units of the four-plex, which are at the ground level and have entry windows. He said that there is another top floor unit beside the tenant but it has been rented to another tenant who has been there long-term for 19 years, before the landlord purchased the property in 2002.

The landlord clarified that he has not raised the rent above the allowable yearly *Residential Tenancy Regulation* ("*Regulation*") amount, and that he has only increased rent in accordance with the *Act* and legal notices of rent increase from 2014 to 2017. He said that he is the main person that deals with this tenancy, not witness AM and not his brother MM who lives out of town. He said that witness AM owns two other properties and is a landlord for those properties, not the landlord's property.

The tenant disputes that the landlord issued the 2 Month Notice in good faith. He said that the parties argued the same issues at the previous hearing but the landlord's agent appeared instead of the landlord and had very little evidence. He claimed that other tenants at the same rental property vacated because the landlord implemented illegal rent increases above the allowable *Regulation* amount. He claimed that these other tenants were harassed by witness AM. He said that witness AM requested illegal rent money from him, he paid her in cash, they were above the allowable *Regulation* amount and the landlord was trying to evict him because he wants more money for rent. He claimed that he paid witness AM \$100.00 extra in rent per month from April to June

2018, which the landlord denied. The tenant claimed that for the first six to eight years of the tenancy, he dealt with witness AM as the landlord, she provided him with rent receipts after he paid her rent, despite the fact that the landlord signed the tenancy agreement. The tenant said that the landlord was rude when he served the 2 Month notice to him and that he called the police because he was afraid of the landlord. He stated that the landlord first said that his brother MM wanted to move into the unit and then his son.

The tenant claimed that the landlord and witness AM have other properties where the landlord's son can stay. He said that witness AM has a vacant ground floor unit at her own property that was advertised for rent during the previous hearing and is now no longer advertised but is still vacant because he can see the unit from his backyard. He said that in September 2018, the landlord's son was using the same address that he was staying at in January 2018. He questioned why the landlord was keeping his daughter-in-law in another one of his properties. He said that young children lived in both ground floor units of the rental property until they moved out and they were safer than the tenant's rental unit, which has no gate in the front entrance and his children are not allowed to use those stairs or patio but have to use the back entrance of the property. The landlord responded by stating that his safety concerns were different than the tenant's.

Witness JM testified that he moved into the landlord's basement in January 2018 because he got separated from his wife and he wanted to move into the rental unit as soon as possible to form his own family dynamic with his daughter in a safe and private place. He said that his divorce should be final in January 2019 and he is in a lot of debt, probably about \$40,000.00, and he has borrowed a lot of money from the landlord that has not been paid back yet. He said that the current arrangement was not working because his parents are older and they are being woken up in the middle of the night by his daughter who lives upstairs with them and they have different parenting styles, which has caused tension. He said that his father is willing to subsidize his rent when he moves into the tenant's rental unit and that he cannot live with his wife because they are currently separated.

When questioned by the tenant, witness JM confirmed that although the rental unit was a move to a different City, his work was right on the border of both cities and did not make much of a difference, as it was only a 10 minute drive away from his current residence with the landlord and was only a little more inconvenient. The tenant challenged that this would be further away from witness JM's work, his daughter's school and daycare. He also questioned why witness JM requires a two-bedroom unit

when he only has his daughter half of the time. Witness JM clarified that he was not aware of the tenant's neighbours living below the rental unit where one child has autism and wakes up at 5:00 a.m. screaming and yelling. He claimed that he was not moving to one of his grandmother's (witness AM's) properties, because it was not his father's property and his understanding was it was not vacant until April 2018.

Witness AM testified that she is not the landlord for her son's property including the tenant's rental unit. She said that the tenant gave her his phone number because they are neighbours and he was going to be out of town for two weeks. She said she has called the tenant before because she was confused. She said that she gave the tenant a rent receipt and signed as the landlord at the beginning of this tenancy in November 2010 because the tenant gave her a cash rent payment instead of leaving his rent in the mailbox as directed by the landlord. She claimed that she was being diligent in keeping track of the cash for the landlord. She said that she has not accepted any other rent payments from the tenant since that date and she has not acted as a landlord for the tenant's tenancy.

When the tenant questioned witness AM, she said that she could not remember if any of the events had happened. She then clarified to the landlord's lawyer, upon re-direct-examination that she meant to say that she did not remember those events happening as stated by the tenant. The tenant asked witness AM whether she arranged for the cleaning of the tenant's house for a period of four years. He then asked whether she told him to move out of the unit after knocking on his door and becoming upset that one of the tenant's children sprayed her car with water and she called the tenant names. The tenant said that he sent a text message to the landlord indicating that witness AM called him names. The tenant asked whether witness AM had a garden and storage cabin on the landlord's property for many years. The tenant claimed that witness AM has wanted him to leave the rental unit since the cleaning issue between them.

### Analysis

### Credibility

Overall, I did not find witness AM to be a credible witness and I afforded very little weight to her testimony. I found her to be evasive when questioned by the tenant and she was not forthcoming with her answers. She was willing and able to answer questions from the landlord's lawyer but she became angry and upset, often yelling answers, while her interpreter was translating questions from the tenant. Witness AM claimed that she could not recall any of the tenant's events that he questioned her about

during cross-examination. She only seemed to remember events mentioned by the landlord's lawyer, despite the fact that those events occurred at the beginning of the tenancy over 8 years ago, and she claimed having memory issues with the tenant's questions from around the same time period. The landlord's lawyer then questioned witness AM again, who later claimed that she could not remember the events happening, not that she did not recall the events at all. The landlord's lawyer indicated there was a language barrier but I do not find this to be the case, because there was no language barrier when the landlord's lawyer was asking her similar questions.

I found the tenant to be a credible and forthright witness, testifying in a calm and candid manner. The tenant stopped questioning witness AM after recounting three incidents because witness AM continued to claim that she could not remember what happened. In these instances, I have preferred the testimony of the tenant, as compared to witness AM.

### 2 Month Notice

Subsection 49(3) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit if the landlord or a close family member intends, in good faith, to occupy the rental unit.

According to subsection 49(8) of the *Act*, a tenant may dispute a 2 Month Notice by making an application for dispute resolution within fifteen days after the date the tenant received the notice. The tenant received the 2 Month Notice on September 18, 2018, and filed his application to dispute it on September 19, 2018. The tenant's application is within the 15 day time limit under the *Act*. Therefore, the onus shifts to the landlord to justify the basis of the 2 Month Notice.

*Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy* states:

*A claim of good faith requires honesty of intention with no ulterior motive...*

...

*If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.*

*If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy.*

I find that the landlord had a number of ulterior motives for issuing the 2 Month Notice and it was not issued in good faith for the reasons explained below.

Both parties agreed that they attended a previous hearing before a different Arbitrator at the Residential Tenancy Branch just three months prior on August 2, 2018. The landlord confirmed that he issued the current 2 Month Notice for the same reason as the previous notice, but he adduced more evidence for this hearing because his agent at the last hearing did not provide enough evidence, which was noted in the Arbitrator's decision. Although the landlord's lawyer claimed that things had become more tense with the landlord and his son since the previous hearing, she only mentioned this once I notified the landlord that he could not reargue the same case that had been decided at the previous hearing.

I find that the landlord reissued the current 2 Month Notice for the same reason because he was unsuccessful at the previous hearing. I find that no new circumstances have arisen since the previous hearing on August 2, 2018. The previous 2 Month Notice is *res judicata* as it has already been decided. The landlord is attempting to bolster his case with more evidence and documents because he failed to do so at the last hearing and it was noted by the Arbitrator in his decision.

I also find that there is tension between witness AM and the tenant regarding whether she acted as a landlord for this unit. I find that witness AM's hostility towards the tenant during his simple cross-examination questioning of her, confirms the tension between the parties as cited by the tenant, including the cleaning and name-calling incidents.

Moreover, the rental unit is further away from witness JM's place of employment and he agreed that it would be a little more inconvenient for him to travel. The landlord has other properties where he can house his son, including where his daughter-in-law is currently staying, as well as the other upper unit of the same four-plex rental property.



Based on a balance of probabilities and for the reasons outlined above, I find that the landlord has not met his burden of proof to show that his son intends to move into the rental unit in good faith.

Accordingly, I allow the tenant's application to cancel the landlord's 2 Month Notice. The 2 Month Notice, dated September 18, 2018, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*. The landlord is not entitled to an order of possession for landlord's use of property.

As the tenant was successful in this application, I find that he is entitled to recover the \$100.00 filing fee from the landlord.

### Conclusion

The tenant's application to cancel the landlord's 2 Month Notice is allowed. The landlord's 2 Month Notice, dated September 18, 2018, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*. The landlord is not entitled to an order of possession for landlord's use of property.

I order the tenant to deduct \$100.00 from a future rent payment at the rental unit, in full satisfaction of the monetary award issued for the application filing fee.

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 08, 2018

---

Residential Tenancy Branch