



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC

### Introduction

The tenant applies for a monetary award for the equivalent of one month's rent due under s. 51 of the *Residential Tenancy Act* (the "Act") in the event that a landlord issues a two month Notice to end Tenancy. She also applies for the equivalent of twelve months rent imposed as a penalty under that same section in the event that the landlord fails to carry out the purpose for ending the tenancy stated in the Notice.

Both parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

The hearing took place on April 18, 2019 but the matter was set over to April 23 to permit the tenant to submit evidence of internet "screen shots" discovered during the tenant's response to the landlord's testimony.

### Issue(s) to be Decided

Has the landlord failed to account to the tenant for the equivalent of one month's rent due under s. 51? Has the landlord failed to carry out the stated purpose of the Notice contrary to s. 51?

### Background and Evidence

The rental unit is the four bedroom upper portion of a house. There is, or was, an undeveloped basement below it that the landlord reserved for her own use.

The tenancy started in November 2017 for a twelve month term "and renew annually" according to the written tenancy agreement. The monthly rent was \$1999.00. The tenant paid a \$999.50 security deposit and a \$999.50 pet damage deposit.

On October 29, 2018 the landlord served the tenant with a two month Notice to End Tenancy for landlord use of property; that the landlord or a close family member intended to occupy the rental unit. The Notice indicated the tenancy was to end December 31, 2018.

The tenant proceeded to find a new rental accommodation starting November 15, 2018 and informed the landlord of that fact by text on November 5. They agreed to a move-out inspection and return of keys to take place on November 16.

The tenant did not pay the November rent.

On November 16 the parties conducted the move out inspection. They agreed the tenant would be responsible for a \$35.00 item. The landlord returned the \$1999.00 of deposit money, less the \$35.00 but not before the tenant signed a mutual agreement to end the tenancy on November 16.

The tenant says the landlord immediately renovated the rental unit; changing it from a four bedroom home into a ten bedroom house, including bedrooms in the basement.

The tenant's friend S.L. filed a statement indicating that in March 2019 she attended the premises in response to an add offering a bedroom in a shared accommodation. S.L. met the landlord and saw the house. In the portion of the home that had been the tenant's rental unit, the landlord appeared to have reserved two bedrooms to herself, one for her and one for her daughter, and was renting out the various other rooms. S.L. opined that since the rooms of the landlord and her daughter were devoid of any personal items, the two were not actually living there.

S.L. had responded to an ad for a room in the basement but was told by the landlord that all the basement rooms were rented. S.L. in her statement says that she was shown two rooms in the upper portion of the home, the former rental unit. She says that what had been the living room was newly walled off with a lockable door.

The tenant files the statement of her son Z.R. who says that he had lived in the rental unit with his mother and that after November 16, 2018 he returned to the home two or three times a week to retrieve mail but no one ever answered the door.

The landlord testifies about what monies were returned at the end of the tenancy.

She testifies that up until October 2018 she had been living in her home in a nearby city with her husband and three children ages: 22, 15 and 9, all in school. She and her husband separated in October and once the tenant left she moved in right away, leaving the day to day care of her children to her husband. In January she broke her leg and was in a cast for two months. During her recovery she went to China for 21 to 27 days with her husband and her nine year old daughter. She says that she now lives in this property with her daughter while her husband and her two other children remain in the former family home.

The landlord says she has done renovation work in the basement in order to rent it out. She says the former rental unit upstairs is still a four bedroom unit. She says that after the tenant vacated, she moved in right away. She admits that she has a roommate named W, who is a friend and who shares common facilities with her and pays \$550.00 per month.

The landlord says she had advertised for tenants but stopped after securing W. as a roommate.

She submits a variety of documentation; a driver's licence, receipts and bills, showing this address to be her address.

In response the tenant testified that she was, as that moment, looking on the Craigslist website at an ad for one of the bedrooms in the facility. It was my determination at that time that Craigslist was a public area and I myself viewed the ad. Extraordinarily, the ad disappeared from the website at that very moment. The tenant indicated she had taken a "screen shot" of the ad. Since it was immediate evidence produced to rebut the landlord's testimony, I permitted the tenant an opportunity to submit a copy of it.

The tenant further says the landlord has converted the former four bedroom rental unit into a seven bedroom facility.

The landlord was given an opportunity to respond to the tenant's response. She says the ad the tenant was viewing was for a basement room not a part of the rental unit.

The tenant did file a screen shot of the ad referred to. It shows a 145 square foot bedroom for rent available April 17<sup>th</sup> with shared facilities with other tenants.

### Analysis

Both parties gave their evidence in a clear and straightforward fashion. When asked to clarify any testimony, each of them did so without hesitation or contradiction.

### One Month Compensation

Under s. 51(1) of the *Act*, a tenant receiving a two month Notice is entitled to the equivalent of one month's rent. A landlord is obliged to pay it when the tenancy ends. A tenant is permitted the option to simply offset it against the last month's rent.

Under s. 50 of the *Act*, a tenant who has received a two month Notice may end the tenancy even earlier by giving at least ten days notice to the landlord and paying the proportion of rent due to the effective date of that ten day notice.

In this case the tenant did give the landlord a ten day notice to end this tenancy on November 15. However, the tenant had not paid the November rent and did not tender the proportionate rent for November 1 to 15 when she gave the ten day notice. The tenant day notice from the tenant was therefore not a lawful notice ending the tenancy.

The parties signed a mutual agreement to end the tenancy on November 16. In my view that agreement did not eliminate the landlord's obligation to pay the s. 51 amount equivalent to one month's rent. The tenant was obviously moving as a result of the two month Notice and the landlord, newly separated, was keen to have possession. Neither party turned her attention to the fact of s. 50 of the *Act* and the tenant's right to give her own ten day notice. I find it was not the parties' intention to void the two month Notice and dispense with the rights and obligations that flowed from it or to void the tenant's right to the s. 51 money; a right clearly set out in the two month Notice document itself. Rather, the document was intended to confirm in writing the landlord's right to possession earlier than the end of December.

In result, the landlord owes the tenant \$1999.00, being the equivalent of one month's rent, less proportionate rent for half of the month of November. I award the tenant \$999.50 under this head.

### Twelve Months Rent

Prior to a tenancy or after a tenancy ended by a tenant or as a result of a tenant's conduct, a landlord can do what she pleases with a rental unit. She can move in herself, leave it empty or she can rent it for as much rent as she feels the market will

bear. She can renovate the space or demolish it. All without consequence under the *Act*.

However, when it is the landlord who chooses to end the tenancy for her own purposes and forces an unwilling tenant to find new accommodation and to relocate, the *Act* sets out certain obligations on a landlord and imposes monetary sanctions for non-compliance.

Section 51(2) and (3) provide:

(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
- (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
- (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

The "stated purpose" in the Notice in question was to allow the landlord or a close family member to occupy the rental unit. Section 49 of the *Act* lists that as a lawful reason for a landlord to end a tenancy by giving two months notice.

In regard to s. 51(3), the landlord does not argue the existence of extenuating circumstances in this case.

Is the Landlord Living There?

There was significant evidence on this point. The landlord's documentary evidence is persuasive that she is using the rental unit or at least a portion of it as a residence.

While I am not satisfied that it has been shown that the landlord is not living there at least some of the time, it is my view that the words "reside" and "occupy" do not mean the same thing and that when the *Act* directs that a former rental unit be "occupied" by a landlord or close family member it does not mean that one of them has to take up residence there.

According to Black's Law Dictionary (6<sup>th</sup> ed.) the word "occupy" means "to take or enter upon possession of; to hold possession of; to hold or keep for use." The noun "occupation" is defined as "possession; control; tenure; use. The act or process by which real property is possessed and enjoyed. Where a person exercises physical control over land."

To occupy a property in the legal sense one need only have the right to possess it to the exclusion of others. One may "occupy" a property without "residing" there.

Residential Tenancy Policy Guideline 2 "Good Faith Requirement When Ending a Tenancy" is a guideline directed to considerations when determining whether or not a landlord who has given a Notice to End Tenancy for landlord use of property (or for other similar reasons) that has been challenged by a tenant has a good faith intention to carry out the stated reason for the Notice. The Guideline states that the *Act* allows a landlord to end a tenancy if the landlord intends in good faith to "move in themselves, or allow a close family member to move into the unit."

I do not take this to be a determination that for a landlord to "occupy" the rental unit under s. 49 he or she (or a close family member) must "move in." In almost all cases, the Notice to End Tenancy for landlord use of property will be given because the landlord does intend to move in and reside in the rental unit. It is this common situation that the "plain language" text of the Guideline was intended to capture. The phrase is contained in a general preface leading up to the substance of the Guideline, namely: the need for a good faith intention on a landlord's part. In my view it was not meant to be a directive or a policy that the word "occupy" in s. 49 of the *RTA* will be interpreted to mean "reside."

Of equal importance, the *Act* uses the word "reside" elsewhere in the statute. In s. 88, dealing with service, the *Act* requires that service by mail be to the address at which the

person “resides” or by serving a tenant by leaving a copy at the tenant's residence with an adult who apparently “resides” with the tenant.

It is a principal of statutory interpretation to infer an intended difference in meaning from the use of different words (R. Sullivan, *Driedger on the Construction of Statutes* (3<sup>rd</sup> ed. 1996) 164)

I conclude that the drafters of the legislation were aware of the difference in meaning between the word “occupy” and the word “reside” and that by using the word “occupy” in s. 51(2)(b), they did not intend to mean that the landlord or a close family member must also “reside” in the rental unit for the required six months. If it were otherwise, the drafters would have used the word “reside” in s. 51.

#### Is the Landlord Occupying the Rental Unit

Section 49 (3) of the *Act* permits a landlord to end a tenancy on two month's notice if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

The evidence establishes that the landlord regained exclusive possession of the rental unit on November 16, 2018 and thus occupied it at that time.

Section 51(2)(b) imposes a twelve month's rent penalty if “the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.”

It is clear that the landlord has rented out portions of the lower or basement floor, but that area was not part of the rental unit and so anything the landlord might do with it is of no consequence.

It is also clear that the landlord has conveyed, assigned or licensed the right to occupy at least one of the rooms in the tenant's former rental unit to W.

Section 51(2)(b) requires the landlord to occupy “the rental unit” which the *Act* defines as “living accommodation rented or intended to be rented to a tenant.” In this case it is the four bedroom upper portion of the landlord's house.

By giving up occupation of a portion of the tenant's rental unit the landlord is no longer occupying “the rental unit;” she is occupying only a portion of that rental unit. The *Act*

has no provision for a landlord occupying anything less than “the rental unit” in these circumstances.

As a result, the landlord has not used the rental unit for the purpose stated in the Notice for at least 6 months' duration, beginning within a reasonable period after the effective date of the Notice. The tenant is entitled to recover the equivalent to twelve times the amount of monthly rent; the sum of \$24,987.50.

### Conclusion

The tenant is entitled to an award totalling \$24,987.50. There is no claim for recovery of any filing fee. The tenant will therefore have a monetary order against the landlord in the amount of \$24,987.50

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: April 29, 2019

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Residential Tenancy Branch