



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT FFT

Introduction

This hearing dealt with the tenants' application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords, pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to call witnesses, and to make submissions.

The landlords confirmed receipt of the tenants' application. In accordance with section 89 of the *Act*, I find that the landlords were duly served with the tenants' application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Are the tenants entitled to a monetary award for the landlords' failure to use the rental unit for the purpose stated in the notice to end tenancy (i.e., landlord's use of property)?

Are the tenants entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or

arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy pertains to a cabin that was rented out by the landlords as of March 1, 2018. The landlords live in the main home on the same property. Monthly rent was originally set at \$950.00 at the beginning of the tenancy, but was increased to \$975.00. The tenancy ended after the tenants were served with a 2 Month Notice on March 31, 2019, with an effective date of May 31, 2019. The tenants moved out on April 30, 2019 after giving notice to the landlords on April 14, 2019 that they would be moving out earlier than the effective date of the 2 Month Notice.

The 2 Month Notice was issued by the landlords for the following reason:

- The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse.

The tenants are seeking compensation in the amount of \$11,700.00, equivalent to 12 month's rent, for the landlords' failure to use the cabin for the reason indicated on the 2 Month Notice. The tenants feel that the landlords had intended to rent out the cabin, instead of occupying it for their own personal use. The tenants submitted copies of the online advertisements with the first one dated April 14, 2019, listing the cabin for rent for \$1,350.00 per month, available May 1, 2019. There were two subsequent advertisements posted by the landlords, which the landlords do not dispute posting. The tenants testified that they were present for showings that took place during the tenancy, where at least 4 separate parties had come to view the cabin. The tenants feel that the landlords' true intentions were highlighted by the fact that the landlords had immediately posted the cabin for rent the same date they gave official notice of their move out. The tenants also submitted comments posted online from those viewing the advertisements, and the responses from the landlords.

A poster had commented: "Lol talk about taking advantage of the housing situation,,, 1250 + bills" and the landlords posted the following response:

"Hi! We're genuinely sorry you feel that way, especially since you haven't met us or seen our cabin before you made your judgement.

You may not care but when we originlly placed the ad, we did our due deligence and asked potential renters/applicants at the time (14 in all) their thoughts on what we should ask for rent. The people that actually took the time to walk through the cabin responded with a median price, furnished, of \$1400+ and \$1200+ unfurnished.

According to <https://www.expatisitan.com/cost-of-living/victoria-canada> a 480 sq.ft. furnished unit (ours is 560 sq.ft.) the cost range is \$1,251 to \$1,928 plus utilities, so we're well within those limits.

Sadly, it's easy to throw out a comment to infer something that isn't based on fact, current market conditions or what other individuals actually value towards how and where they live. We get that and realize our place may not be for everyone and that's ok. We've met some of the nicest people here during this experience, even making some good friends, which is priceless.

Hope you have a wonderful summer and enjoy the most out of your own place here on our beautiful island.

Cheers!"

The landlords do not dispute that they had posted the online advertisements as they were simply doing market research to assess local market conditions as they were considering acquiring more rental properties in the area. The landlords were cross examined in the hearing about why they had posted the home for rent immediately on April 14, 2019, the same date that the tenants gave official notice. The landlords responded that their realtor had advised them that the home would show best vacant, and the landlords felt that this would be the best timing for their decision. The landlords testified that they had done research before posting the online advertisement by contacting the RTB, and were informed that advertising the home for rent for market research purposes would not be a contravention of the *Act*. The landlords testified that if their true intention was to re-rent the home, they would have been able to do so given the number of applicants that had responded to their postings.

The landlords testified that cabin was never rented out after the tenants moved out, and even with these tenants their original intention was to never rent the cabin out. The landlords testified that this tenancy had taken place as mutual acquaintances had asked them if they could their friends out with temporary housing while the tenants were renovating their home. The landlords provided evidentiary materials to show that the home was unoccupied from when the tenants had vacated the home to the time of the hearing. The landlords stated in their evidentiary materials that the home is currently not rented out, nor has it ever been rented out.

The landlords stated in their evidentiary materials "From the tenant vacancy of May 1st until recently, there are dozens of cabin pictures, in chronological order, clearly showing a continued and unoccupied vacant cabin, reiterating the fact it has not been rented". The tenants testified that the landlords had clearly used the term "unoccupied" in their statement, and that shows that the landlords had failed to occupy the home as intended

on the 2 Month Notice. The landlords clarified in the hearing that their definition of unoccupied meant unoccupied by other parties other than themselves or close family members. The landlords testified that they did indeed use the home as an extension of their primary home on the property. The tenants also questioned why the photos showed a very empty home, and the landlords responded that they were still in the process of moving in furniture, cleaning up, and making changes such as the installation of the carpet.

The landlords testified that this cabin is now used as an extension of their own home, primarily as a rec room and storage, as well as a place for family members such as the landlords' recently retired parents to stay while visiting. The landlords submitted evidentiary materials to show discussions between the landlords and their designer, which the landlords submit shows their intention to use the home for themselves and close family members. The tenants questioned the credibility of the landlords' testimony and evidence as they feel that these discussions only took place after they had filed their application for dispute resolution in June of 2019.

Analysis

Section 51(2) of the Act reads in part as follows:

51(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.*

Residential Tenancy Policy Guideline #2A provides more clarity about the requirements of section 49 of the Act when ending a tenancy for landlord's use.

Vacant possession

*Other definitions of "occupy" such as "to hold and keep for use" (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (**see Section E**). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused.*

6-month occupancy requirement

The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under section 51(2).

Reclaiming a rental unit as living space

If a landlord has rented out a rental unit in their house under a tenancy agreement (for example, a basement suite), the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room, or using a carriage home or secondary suite on the residential property as a recreation room.

I have considered the testimony and evidentiary materials of both parties taking in consideration the specific requirements of the Act, and as further clarified by RTB Policy Guideline #2A. Although it is undisputed by both parties that the landlords did indeed post the home for rent online, the landlords provided an explanation for why they did so, stating that they still had complied with section 49 of the Act by issuing the 2 Month Notice so they may take possession of the cabin to occupy it themselves. I am satisfied

that the home was never re-rented, but the question of whether the cabin was used as intended still exists.

Although *RTB Policy Guideline #2A* clearly states that the definition of occupied does not allow the landlord to simply leave the home vacant and unused, *RTB Policy Guideline #2A* does address a situation where the landlord may reclaim living space that is part of the main living accommodation such as a carriage home or secondary suite on the same property. I am satisfied that this cabin is located on the same property, and therefore I may apply this part of the Policy Guideline. I am satisfied with the landlords' explanation about why the home appears empty, especially taking in consideration that this cabin is an extension of the primary home on the property.

Although the landlords did post the cabin for rent, it was undisputed that the home cabin was never in fact re-rented. The question still remains of whether the landlords had satisfied their obligations under the *Act*, as clarified in the *Policy Guideline #2A* as stated above. I find that the evidence presented does not sufficiently show that the landlords have failed in their obligations to use the cabin as stated on the 2 Month Notice. I find that the cabin has been used, and remains used, as an extension of the landlords' primary home, and even though the landlords had posted the cabin for rent, and even showed the cabin, they have not been in contravention of the *Act*. I had made this finding only after taking in consideration that the landlords were able to provide reasonable explanations to questions by the tenants when cross examined in the hearing, such as why they had decided to only post the advertisements after the tenants had given notice to move out, and why the photos depicted a very empty home.

I find the landlords' reply to the comments on the posting about the listing price does not definitively show the landlords' true intentions or motivations in posting their response. In fact, I find the number of interested applicants supports the landlords' testimony that if their true intention was to re-rent the cabin, the landlords could have done so, at much higher monthly rent than what the tenants were paying.

I am satisfied that the landlords had provided sufficient evidence to show that they have complied with the *Act* and *Policy Guidelines*. As the tenants had vacated the cabin on April 30, 2019, and as the tenants are entitled to compensation under section 51(2) of the *Act* if the landlords fail to use the cabin for the intended purpose for at least 6 months, I dismiss the tenants' application for monetary compensation with leave to reapply. Liberty to reapply is not an extension of any applicable limitation period.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenants

were not successful with their application, I find that the tenants are not entitled to recover the \$100.00 filing fee paid for this application. The tenants must bear the cost of this filing fee.

Conclusion

The tenants' application for monetary compensation is dismissed with leave to reapply.

The tenants' application to recover the filing fee is dismissed without leave to reapply.

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: September 20, 2019

Residential Tenancy Branch