



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      **CNL, LAT, FFT, OLC, LRE**

### **Introduction**

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

An order to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property pursuant to section 49;

An order to change the locks to the rental unit pursuant to section 31;

Authorization to recover the filing fees from the landlord pursuant to section 72;

An order for the landlord to comply with the Act, Regulations and/or tenancy agreement pursuant to section 62; and

An order to suspend a landlord's right to enter the rental unit pursuant to section 70.

Both of the tenants attended the hearing and were represented by the co-tenant, CB ("tenant"). Both of the landlord attended the hearing and were represented by the co-landlord, KT ("landlord"). As both parties were in attendance, service of documents was confirmed. The landlord confirmed receipt of the tenant's application for dispute resolution and the parties acknowledged the exchange of evidence and stated there were no concerns with timely service of documents. Both parties were prepared to deal with the matters of the application.

### **Preliminary Issue – severing of issues**

Rules 6.1, 6.2 and 2.3 pertain to the hearing of a dispute resolution proceeding, reproduced below.

#### **6.1 Arbitrator's role**

The arbitrator will conduct the dispute resolution process in accordance with the Act, the Rules of Procedure and principles of fairness.

#### **6.2 What will be considered at a dispute resolution hearing**

The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application.

The arbitrator may refuse to consider unrelated issues in accordance with Rule 2.3 [*Related issues*]. For example, if a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.

### **2.3 Related issues**

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

I determined the tenant's application to cancel the landlord's notice was not substantially related to the remainder of his application. I dismissed the remainder of the tenant's application with leave to reapply.

### **Preliminary Matter – Settlement attempted**

Section 63 of the *Act* allows an Arbitrator to assist the parties settle their dispute and record the settlement in the form of a decision and order if the parties settle their dispute during the dispute resolution proceeding. Accordingly, I attempted to assist the parties to resolve this dispute by helping them negotiate terms of a settlement. The parties could not reach consensus on the terms of a settlement; therefore, I heard testimony, considered the evidence, and issued a decision to resolve this dispute.

### **Issue(s) to be Decided**

Should the Two Month's Notice to End Tenancy for Landlord's Use be upheld or cancelled?

### **Background and Evidence**

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree that the tenancy involves an entire house. The tenancy began with a different landlord, but the landlord in these proceedings is the current landlord. When

the tenancy with this landlord began, the parties signed a new tenancy agreement, provided as evidence. The tenancy began between these parties on June 1, 2017 when the landlord became the owner of the property. Rent was set at \$1,752.00 per month but is currently \$1,867.00 per month payable on the 13<sup>th</sup> day of the month.

The landlord provided the following testimony. The rental unit is one of two houses the landlord owned. The other house was principally occupied by the landlord and was sold in September 2019 with the landlord and his family moving into rental accommodations on December 1, 2019. On that day, the landlord became a tenant of his own landlord. Copies of the purchase and sale agreement and the tenancy agreement with the landlord's landlord were provided as evidence.

The landlord testified that this tenancy agreement with his own landlord was a fixed term agreement which ends on March 1, 2020. As of that date, the landlord '*has nowhere to go*'. He wants to live in the house he owns with his family. The landlord testified he respects the facts. If he doesn't move in, he understands he can be '*punished*'. He will move in as soon as the rental unit is empty. He has not booked movers or made any arrangements to move utilities into his own name because the tenants have not yet moved out. He has not served his own landlord with a notice to end tenancy for the same reason although he has '*passed the information*' on to his landlord.

The landlord served his tenants with a Two Month's Notice to End Tenancy for Landlord's Use ("Notice") on December 16, 2019 by registered mail. The tenant acknowledges signing for the registered mail on December 18<sup>th</sup> at the Canada Post outlet. A copy of the Notice was provided as evidence. The Notice, signed on December 16<sup>th</sup>, provides an effective date of February 13, 2020. The reason for ending the tenancy stated on the Notice reads:

*The rental unit will be occupied by the landlord or the landlord's close family member.*

The landlord testified he has not yet compensated the tenants with the equivalent of one month's rent compensation because he does not know if they will move out. The tenant has not provided him with a 10 days notice that that they will move out in accordance with the landlord's Notice, so the landlord submits he is not liable to pay until they advise him they're moving out.

The tenant provided the following testimony. There was a verbal discussion with the landlord on September 18, 2019 whereby the landlord advised him the landlord was going to 'fix up' the rental unit occupied by the tenants then sell it and move into a final

residence in a different city. The landlord's son works in this different city and having a residence there would be beneficial to the landlord and his family. The tenant acknowledges this discussion was done verbally and he does not have this statement in writing.

The tenant submits that if the actual purpose of ending the tenancy was to renovate the rental unit then sell it, then the landlord has served him with the wrong notice to end tenancy. The tenant further argues that the landlord does not have the permits required for the landlord to perform renovations to the rental unit, as far as he knows. The tenant directed my attention to a video taken of a conversation he had with the landlord on November 3, 2019 as evidence of the landlord acknowledging his intent to repair then sell the rental unit.

The tenant also disputes the effective date stated on the Notice. It was received by him on December 18<sup>th</sup> while the effective date is February 13, 2020. This gives less than the full 2 month's notice as required by the *Act*. Also, the landlord has not compensated him with the equivalent of one month's rent for serving him with the Notice as required by the *Act*.

The tenant has also made rent payments subsequent to being served with the Notice. Payment is made by post-dated cheque and rent cheques for January and February were accepted. The tenant testified that the landlord never supplies receipts for payment of rent, the cancelled cheques are satisfactory proof of payment for the tenant.

Lastly, the tenant points out that this is the second Notice to End Tenancy for landlord's Use that the landlord has served on him. A previous dispute resolution hearing took place whereby the previous Notice was cancelled. Neither party provided me with a copy of the previous decision or the file number.

### Analysis

The landlord served the tenant with the Two Month's Notice to End Tenancy for Landlord's Use on December 18, 2019 as acknowledged by the tenant. The tenant filed to dispute the Notice on December 31, 2019, within 15 days as required under section 49(8) of the *Act*.

Residential Tenancy Policy Guideline 2A: [Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member] provides guidance for landlords and tenants to understand the requirements for ending a tenancy pursuant to section 49.

Section 49 of the Residential Tenancy Act (RTA) allows a landlord to end a tenancy if the landlord intends, in good faith, to occupy the rental unit, or a close family member intends, in good faith, to occupy the unit.

## GOOD FAITH

*In Gichuru v Palmar Properties Ltd. (2011 BCSC 827)* the BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, **the onus is on the landlord to establish they are acting in good faith: *Baumann v. Aarti Investments Ltd., 2018 BCSC 636.***

Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement...The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no other ulterior motive.

The tenant has disputed the good faith intention of the landlord, arguing that the landlord's true intent is to 'fix up' the rental unit and then sell it. The evidence supplied by the tenant by means of a video taken on November 3<sup>rd</sup>, I found to have poor audio quality and I understood very little of what the landlord said. I must therefore give little weight to that evidence. The tenant's submission that the landlord was going to 'fix up and sell' the rental unit was not corroborated with any documentary referred to during the tenant's testimony. Given this, I rely on the landlord's documents to determine the good faith of the landlord. As stated earlier, the onus is on the landlord to establish his good faith in ending the tenancy.

I find that there are sufficient doubts as to the landlord's true intentions. First, the landlord points to the tenancy agreement he has with his own landlord as proof that his tenancy is ending. The landlord before me has not been served with a Notice to End Tenancy from his own landlord. This landlord has not provided sufficient evidence to demonstrate to me that he is required to end the tenancy with his own landlord because the fixed term ended, as the landlord submits. While the status of the landlord's own

tenancy is not before me, I have reviewed that tenancy agreement and I am not of the opinion that the tenancy agreement is a fixed term tenancy requiring vacant possession on March 1, 2020.

Conversely, if this landlord wanted to end the tenancy with his own landlord so he could move into the rental unit that he owns, he hasn't provided sufficient evidence to show that he has given his landlord a tenant's one month notice to end the tenancy.

Second, the landlord did not provide a timeline as to when he intended to move from the home he currently occupies, nor did he show any quotes or invoices for movers or other documentation to support such a move. He hasn't provided any corroborative evidence of cancelling utilities at his current residence, establishing utilities at the rental unit for his family or himself or supplied written documentation of any kind to show he is moving from one residence to another. Before me, there is insufficient evidence from the landlord to show he has taken any steps to achieve his intent to move into the rental unit together with his family.

The landlord has not met the burden of establishing he truly intends doing what was said on the Notice to End Tenancy. I am not satisfied on a balance of probabilities that the landlord has sufficiently shown he does not have an ulterior motive for ending the tenancy. For this reason, I find the Notice is cancelled and of no further force or effect.

Lastly, I note the question of waiver arises because the landlord accepted rent money from the tenant after serving the tenant with a notice to end tenancy. The question of waiver is discussed in Residential Tenancy Policy Guideline PG11 [Amendment and Withdrawal of Notices]:

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 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.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right.

Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to *Act* upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive *Act* of the party showing such purpose, or acts amount to an estoppel.

The evidence shows the landlord accepted payment of rent for January and February. No receipts for rent were given, so the landlord cannot establish that the acceptance of the rent was for use and occupancy only. During the hearing, the landlord made no mention of letting the tenant know that accepting rent after serving a notice to end tenancy was for use and occupancy only.

Turning to the conduct of the parties, section 51(1) of the *Act* states A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. Nowhere does the *Act* stipulate that the tenant is required to acknowledge their intent to vacate the rental unit before receiving the compensation, as argued by the landlord. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. By his failure to advise the tenant that he could skip paying rent for a month or that the equivalent of one month's rent would be returned, I find an implied waiver on behalf of the landlord. Implied waiver has also been demonstrated for the landlord's failure to provide a receipt indicating the rent he accepted after serving the Notice was for 'use and occupancy only'. For these reasons, the right of the landlord to end the tenancy based on the Notice before me is waived, and the tenancy shall continue until it is ended in accordance with the *Act*.

As the tenant's application was successful, the tenant is entitled to recovery of the \$100.00 fee for the cost of this application. In accordance with section 72 of the *Act*, the tenant may deduct \$100.00 from a single rent payment owed to the landlord.

Conclusion

The Two Month's Notice to End Tenancy for Landlord's Use is cancelled and of no further force or effect.

In accordance with section 72 of the *Act*, the tenant may deduct \$100.00 from a single rent payment owed to the landlord.

This decision is final and binding and 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: March 03, 2020

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Residential Tenancy Branch