



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      MNDCT FFT

### **Introduction**

- a monetary order for \$26,400 representing 12 times the amount of monthly rent, pursuant to sections 51 and 62 of the Act; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

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

The tenants testified, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenants confirmed, that the landlord served the tenants with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

### **Preliminary Issue – Admissibility of Recordings**

The tenants submitted an audio recording (the “**Recording**”) a friend made of a conversation between herself and the landlord while the landlord was showing her the rental unit as a prospective renter. The landlord testified that the Recording was made without his consent and was improper and should be excluded from evidence on this basis.

The tenants made no submissions on this point.

The landlord provided no statutory authority to support his position. However, I note that section 183 of the Criminal Code of Canada makes it illegal to “record someone else’s conversation in which you are not the intended recipient”. The Criminal Code does not include a similar prohibition against recording a person’s own conversations without advising the other participants.

I am not aware of any statutory or judicial authority in British Columbia which stands for the proposition that a conversation recorded without the consent of all the participants is not admissible as evidence in a legal proceeding.

As the landlord sought to have the Recording excluded, he bears the burden of proving that its making or inclusion is improper. He has failed to do so. As such, the Recording may be admitted into evidence.

### **Issues to be Decided**

Are the tenants entitled to:

- 1) a monetary order of \$26,400; and
- 2) recover their filing fee?

### **Background and Evidence**

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenants and the landlord's agent ("**CB**") entered into a written tenancy agreement starting November 27, 2018. The rental unit is 620 square feet, has one-bedroom, one-bathroom, and is located in a downtown urban centre. Monthly rent was \$2,200 and was payable on the first of each month. The tenants paid the landlord a security deposit of \$1,100, which the landlord has returned to the tenants.

On January 6, 2020, the landlord served the tenants with a Two Month Notice to End Tenancy for Landlord's Use (the "**Notice**") with an effective date of March 31, 2020.

The Notice indicated the reason for the landlord issuing it as being that "the rental unit will be occupied by the landlord or the landlord's close family member".

Upon receipt of the Notice, the tenants immediately began looking for a new home. They testified that they looked at 12 possible rental unit before securing one for rent as of February 1, 2020. On January 21, 2020, they notified the landlord that they intended to move out of the rental unit on January 31, 2020. The landlord accepted this. The tenants moved out on January 31, 2020 and met with the landlord and a representative of his agent on February 1, 2020 to return the keys and conduct a move-out inspection.

The tenants testified that the move was very stressful for them, and that they had exams on the day of their move-out.

The tenants testified that, on February 14, 2020, they discovered the rental unit for rent on Craigslist, available for February 15, 2020, for \$2,500 per month. They submitted copies of this ad into evidence.

The tenants were shocked to see the ad and sent a friend of theirs to visit the rental unit as a prospective renter. She did so on February 20, 2020. During this visit, she made

the Recording. The tenants referred to three sections of the Recording (which is 18 minutes long) in which the landlord states:

I bought the unit two years ago and it has been rented out to one tenant. Great tenant. I had them have to leave the unit because I had actually planned to move in and live, but then, my mom, she's old and has health issues, so I decided to take care of her.

[...]

I actually had a plan to move in with my girlfriend to. Probably end of this year. I live in [redacted] so I think I'm going to be staying there for a long time.

[...]

Yeah, I live in [redacted]. I've been living in the same... I've been living there since, in the same place, for the last 15 years. That's my home. I like the neighbourhood. I have a small senior dog, who's not going to be able to adapt to a new—anyways so I'm going to be living there for a long time.

The tenants argued that they are entitled to a monetary award of 12 times the monthly rent, pursuant to section 51(2) of the Act. They argued that the landlord did not use rental unit for the purpose stated on the Notice for a period of six months after the effective date of the rental unit, or at all.

The landlord does not deny that he did not use the rental unit for the purpose stated on the Notice. Indeed, he admits that he rented it to another tenant on February 29, 2020 for \$2,250 per month and submitted a copy of the new tenancy agreement into evidence.

Rather, the landlord argued that he was met with extenuating circumstances which prevented him from moving into the rental unit.

The landlord testified that, when he issued the Notice, he intended in good faith to move into the rental unit with his girlfriend following the effective date of the Notice. He testified that he currently lives in a two-bedroom, two-bathroom apartment with his mother. He testified that his mother is 67 years old and suffers from a respiratory disease. He testified that she was hospitalized in February 2019 for this condition, that she had to be intubated, and lost 10 teeth as a result. She testified that, when she left the hospital, she weighed 35 kg. He described this event as “traumatic” for both of them.

The landlord provided a doctor's note and medical records confirm his mother's medical condition and her hospitalization.

The landlord testified that, when the Notice was issued in January 2020, his mother intended to move to Korea, and live in a government-provided and -subsidized apartment (the “**Korean apartment**”). He submitted a certified translation of a lease for the Korean apartment in his mother's name, which indicates a move-in date of February 14, 2020, and a “strata fee payment receipt” for May 2020, which indicates that 47,430

KRW (approximately \$53 CAD) is due in strata and utilities fees. He testified that his cousin enters this apartment once a month to keep an eye on it, and that the utilities charges are likely from the refrigerator running.

The landlord testified that, despite his mother's move-in for the Korean apartment being recorded as February 14, 2020, she never intended to move into it until after the landlord moved into the rental unit (that is, after April 1, 2020).

The landlord testified that in mid-January, he became aware of the COVID-19 pandemic's growth in Asia and became concerned about his mother moving to Korea due to her age and existing respiratory issues. He testified that he and his mother monitored the situation carefully, and, in early February 2020, made the decision to delay her move to Korea indefinitely.

The landlord testified that he would have offered to allow the tenants to remain in the rental unit once they made this decision, but by this time the tenants had already moved out.

The landlord testified that his mother cannot drive, and she does not feel comfortable taking public transit due to the COVID-19 pandemic having reached Canada. He testified that he decided not to move into the rental unit so that he could stay living with his mother and take care of her, as if he moved out, she would not be able to shop for essentials by herself.

The landlord argued that this constitutes an extenuating circumstance, as set out in section 51(3) of the Act, and that he should not have to pay the penalty as set out in section 51(2) of the Act.

The tenants argued that the landlord's testimony was not credible. They argued that he did not submit any copies of airline bookings for his mother's return to Korea, and this indicated that his mother had no intention of returning to Korea. They provided a prior RTB decision (032020\_Decision7171) in which the presiding arbitrator found that booking a flight prior to issuing a two-month notice is a step that should be taken to confirm a close family member would be moving into the rental unit.

The landlord responded that his mother had not booked her flight at the time they decided to indefinitely postpone her return to Korea, as such there was no booking evidence to provide. He noted that the time he and his mother became concerned about COVID-19 was two and a half months prior to his mother's projected departure date.

The tenants argued that the landlord's actual motive to end the tenancy was so that he could fire his property manager and administer the new tenancy himself. The landlord admitted that, once he decided to re-rent the rental unit, he chose to do it himself rather than use his property manager. He admitted that this saved him \$200 per month. However, he testified that this was not a motivating factor in ending the tenants'

tenancy. He testified that at the time he issued the Notice, he had no plans to re-rent the rental unit. He testified that he was unhappy with the property manager's service, and chose to administer the rental unit himself, rather than continue with unsatisfactory service.

Finally, the tenants argued that the landlord's testimony was not consistent with the recording made by their friend when she went to see the rental unit. They noted that in the recording, the landlord made no mention of COVID-19 as the reason why he did not move into the rental unit. Additionally, they argued that the Recording suggests the landlord will be moving in with his girlfriend at the end of the year, which contradicts his testimony at the hearing. They also noted that the landlord gave no evidence as to how he planned on handling his dog when he and his girlfriend moved in together.

The landlord testified that he did not mention COVID-19 to the tenants' friend (who he thought was a prospective renter) because he did not feel comfortable sharing all the details of his mother's health problems with a complete stranger.

The landlord did not provide any response to the other discrepancies between the Recording and his testimony noted by the tenants.

## **Analysis**

Section 51(2) and (3) states:

### **Tenant's compensation: section 49 notice**

**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.

Rule of Procedure 6.6 states:

#### **6.6 The standard of proof and onus of proof**

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party.

In this case, the tenants must prove on a balance of probabilities that the landlord did not use the rental unit for the purpose stated on the Notice, and the landlord must prove on a balance of probabilities that extenuating circumstances exist for not having done so.

The landlord has admitted that he breached section 51(2). As such, all that is left is determine if his reasons for so doing amount to extenuating.

Policy Guideline 50 states of extenuating circumstances:

#### **E. EXTENUATING CIRCUMSTANCES**

An arbitrator may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit. These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but didn't notify the landlord of any further change of address or contact information after they moved out.

The following are probably not extenuating circumstances:

- A landlord ends a tenancy to occupy a rental unit and they change their mind.
- A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations

I note that the landlord's motives for issuing the Notice are not a factor in the section 51 analysis, except insofar as they assist in determining the credibility of the landlord. The landlord's motives would have been relevant in determining the validity of the Notice, has the tenants applied to cancel it before moving out (as per section 49 of the Act).

The reason provided by the landlord for why he did not move into the rental unit, *if true*, is an extenuating circumstance. It would be unjust to punish the landlord for altering his plans to move into the rental unit so that he could care for his mother, when circumstances beyond his control or ability to reasonably anticipate caused the effect of moving into the rental unit on his mother to become unsafe and potentially deadly.

The tenants did not seriously contest that the landlord's story, if true, did not meet the standard of extraordinary circumstances. Instead they argued that the story itself was false. For the reasons that follow, I do not find this to be the case, and find that the landlord was credible as a witness.

The tenants' arguments against the landlord's credibility focused on three main points:

- 1) the lack of airline book corroborating his mother's return to Korea;
- 2) the discrepancies between the Recording and his testimony; and
- 3) the decision to terminate the property manager's services.

I will address each of these in turn.

#### 1. Lack of Airline Booking

I am not persuaded by the prior RTB decision provided to me by the tenants that confirmation of an airline booking is a *required* piece of evidence to determine if someone intended to travel somewhere. I agree that it is a useful piece of evidence to have which would corroborate a party's testimony that someone intended to travel somewhere. However, there are other ways to corroborate such testimony.

In this case, the landlord provided a translated copy of lease for the Korean apartment, in his mother's name, and a copy of a strata fee payment receipt. I find that these two documents corroborate the landlord's testimony that his mother intended, at one point, to move to Korea.

Additionally, I accept the landlord's testimony that his mother had not yet booked a return ticket to Korea by the time they decided to indefinitely postpone her return, as I do not find it unreasonable for her not to have booked such a ticket two and half months prior to her intended departure date.

#### 2. Discrepancies with the Recording

Contrary to the submissions of the tenants, I do not find that the landlord's statements in the Recording significantly disagree with his testimony. I find that the landlord's

statement of “I had actually planned to move in and live, but then, my mom, she’s old and has health issues, so I decided to take care of her” accords completely with his testimony at the hearing. I acknowledge that it contains no reference to COVID-19 being the source of the health concerns, but I do not find that the lack of this mention in anyway undermines the credibility of the landlord’s evidence. I find it entirely reasonable that the landlord would not want to provide details about his mother’s health issues and would rather keep his conversation general.

Additionally, I do not find that the statement “I actually had a plan to move in with my girlfriend to. Probably end of this year. I live in [redacted] so I think I’m going to be staying there for a long time” to significantly contradict his testimony. He testified that he intended to move in with his girlfriend, but then had to change his plans. The Recording reflects this. The time frame on which he intended to do this is off, but I do not see of what significance that is. The statement that he intended to move in with his girlfriend enhances his credibility, as it indicates he intended to use the rental unit for the stated purpose.

Finally, the landlord gave no testimony as to what his plans were with regard to his “senior dog”. As such, there is no contradiction between the testimony and the Recording. However, in light of the past statement on the Recording that the landlord intended at one point to move into the rental unit, I find it unlikely that he would not have moved into the rental unit due to that the difficulty in change of circumstances for his dog. I find it more likely that on the Recording he was acknowledging a difficulty that would have had to be faced by his dog in moving to the rental unit and explaining a “silver-lining” of the move being called off.

### 3. Property Manager

I find the fact that the landlord opted not to continue using the property manager’s services when he re-rented the rental unit to indicate the landlord to have no bearing on his credibility. The explanation that the landlord was not satisfied with the services provided by the property manager to be a reasonable one. I do not have a copy of the property management agreement, so I cannot say whether the landlord could have terminated the property manager’s services without ending the tenancy. However, in my experience, such a clause is very unlikely.

I find it more likely than not that, if the landlord wanted to terminate the services of the property manager to save money, he could have done so without having to end the tenancy.

I acknowledge that the landlord was able to save \$200 per month in management fees by not using a property manager for the new tenancy. However, I do not find this fact harms the landlord’s credibility, when a reasonable alternate explanation exists: the landlord, after deciding not to move into the rental unit, decided to re-rent the property

and, as no contact was in place between him and the property manager, opted not to re-engage the property manager.

Overall, I found that landlord to be a credible witness. I do not find the arguments raised by the tenants seriously detract from his credibility. His explanations to the arguments were reasonable and in no way seemed contrived.

As such, I accept the landlord's evidence in its entirety. For the reasons stated above, I find that extenuating circumstances existed which prevented him from using the rental unit for the purpose stated on the Notice.

Accordingly, I dismiss the tenants' application without leave to reapply.

### **Conclusion**

I dismiss the tenants' application without leave to reapply.

As the tenants have not been successful, I decline to order that the landlord repay the tenants their 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*.

August 10, 2020

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Residential Tenancy Branch