



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDCT, FFT

### Introduction

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

- a Monetary Order for compensation under the *Act*, pursuant to section 51; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

This hearing convened on August 7, 2020, September 14, 2020 and December 10, 2020. An Interim Decision dated August 7, 2020 and a Decision dated September 23, 2020 resulted from the first two hearings and should be read in conjunction with this decision.

Counsel for N.B. and counsel for the tenants attended this hearing. The tenants, N.B. N.B.'s agent K.C. (K.C.) and C.I.'s agent (M.S.) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

### Issues to be Decided

1. Are the tenants entitled to a Monetary Order for compensation under the *Act*, pursuant to section 51 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

### Background and Evidence

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

The parties agreed to the following facts. This tenancy began on May 1, 2013 and ended on June 29, 2018. Monthly rent in the amount of \$2,000.00 was payable on the first day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The parties agreed that the tenants were served with a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") on May 28, 2018. The method of service is disputed.

The Two Month Notice was entered into evidence and has an effective date of July 31, 2018. The Two Month Notice states the following reason for ending 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).

All parties agree that on June 14, 2018 the tenants provided K.C. with 10 days written notice to vacate the subject rental property before the effective date of the Two Month Notice. The written notice was entered into evidence. All parties agree that the landlord refunded the tenants \$133.33 for the dates in June 2018 the tenants did not reside at the subject rental property, pursuant to section 50(2) of the *Act* and provided the tenants with one month's rent in accordance with section 51(1.2) of the *Act*.

All parties agree that the landlord did not move into the subject rental property.

N.B. testified that in March of 2018 he was residing out of country and lost his job in March 2018, after working at that company for nine years. N.B. testified that since he no longer had health insurance or a job he decided to move back to Canada and move into the subject rental property. N.B. testified that he received an offer for an interview via email on May 16, 2018 at a company in the same city as the subject rental property. The May 16, 2018 email was entered into evidence. N.B. testified that in the interview he was given a verbal offer for the job subject to a background check and that the company would need some time to provide him with a written offer. N.B. testified that

after receiving the verbal job offer, he instructed K.C. to serve the tenants with the Two Month Notice. K.C. confirmed the landlord's above testimony. K.C. testified that the landlord told him that he was searching for a job and that he was looking into registering his kids at schools near the subject rental property.

N.B. testified that the company "was not that great" and did not get back to him with a formal offer and he didn't know what was going on with his job offer until June 20<sup>th</sup> when the company verbally informed him that they would not be offering him the job.

N.B. testified that after learning that he would not be offered the job he began looking for jobs in both the city he resided in at that time and the city where the subject rental property is located. N.B. testified that he was able to secure a job in the city he resided in, not the city of the subject rental property. No proof of N.B.'s job searches, other than the May 16, 2018 email were entered into evidence.

N.B. testified that on June 29, 2018 he reached out to K.C. and informed K.C. that he would not be moving to the subject rental city and that the tenants could stay if they liked. K.C. confirmed the above testimony. K.C. and N.B. testified that N.B. instructed K.C. to offer the tenants to move back into the subject rental property.

K.C. testified that he called the tenants on June 29, 2020 and verbally offered the tenant's he opportunity to move back in. The tenants deny K.C. made the above offer. K.C. testified that the tenants declined to move back in.

K.C. testified that when the tenants provided their 10 Day Notice to vacate the subject rental property, they asked him if N.B. still intended on moving in. K.C. testified that he informed the tenants that N.B. had advised him that N.B. was looking for a job and schools for his kids. The tenants deny the above conversation occurred.

K.C. testified that the tenants asked him during the move out inspection that occurred on June 29, 2020 if the landlord was still planning on moving in. K.C. testified that he informed the tenants that N.B. had advised him that N.B. was looking for a job and schools for his kids. The tenants deny the above conversation occurred.

N.B. testified that he intended in good faith to move into the subject rental property and was not able to do so because his job offer was rescinded, which was out of his control.

K.C. testified that he told N.B. to leave the subject rental property vacant for six months, pursuant to local laws. N.B. agreed with the above testimony. N.B. testified that leaving the property vacant represented a big loss for him. N.B. testified that the subject rental property was not re-rented until February of 2020. N.B. testified that he also kept the subject rental property empty in case his new job fell through and he and his family needed a place to stay.

All parties agree that N.B. listed the subject rental property for sale in September of 2018. N.B. testified that he listed the property to test the market and to determine the value of the subject rental property, but that he did not have any intention to sell the property.

N.B. testified that he had no malicious intent to evict the tenants and raise the rent. In support of this statement N.B. and pointed to the fact that he did not raise the rent during the entire tenancy.

Counsel for the tenant submitted that the tenant received the Two Month Notice immediately after they declined to accept a rent increase over and above that permitted by law. The tenants entered into evidence an email exchange between K.C. and the tenants dated May 10-11, 2018 in which the tenants declined to agree to the additional rent increase. K.C.'s responding email dated May 11, 2018 states in part:

I will speak to my client about serving the one time to market increase, which would take effect September 1<sup>st</sup>, and we'll go from there. If this is not an option, and he wasn't to list we'll be sure to let you know and you will DEFINITELY get proper notice anytime the Realtor wants to do a showing.

Another email from K.C. to the tenants was sent later in the day on May 11, 2018 and states in part:

...I was trying to come to come common ground in order for you to stay in the home, and for the owner to keep it as a rental. Unfortunately, that is now a moot point as the owner has lost his job and either needs to sell the home or move in himself to finish off that basement prior to listing. He plans to come use the home as of August 1<sup>ST</sup>. We will serve the 2 month notice prior to the end of May, this means that June you will have to pay rent, July will be rent free, and you will have to vacate the home by July 31<sup>st</sup>.....

Counsel for the tenants submitted that the Two Month Notice was served on the tenants in bad faith because they refused to agree to a rent increase over and above that allowed by law.

Counsel for the tenants submitted that the evidence of N.B.'s job search is scant at best and that N.B. has no proof a job offer was ever extended. Counsel for the tenants submitted that N.B. has not provided any proof of other job applications in the subject rental city.

Counsel for the tenants submitted that the May 11, 2018 email from K.C. in which K.C. states that the landlord might sell the subject rental property shows that N.B. was not just testing the water in September of 2018 when N.B. listed the property for sale.

Counsel for N.B. submitted that N.B. served the Two Month Notice on the tenants in good faith because, at the time it was served, N.B. intended on moving into the subject rental property. Counsel for N.B. submitted that the retraction of N.B.'s job offer was an exceptional circumstance which prevented N.B. from being able to move into the subject rental property.

M.S. submitted that the version of Residential Tenancy Policy Guideline #2 available to the public in May 2018 which dealt with the good faith requirement when ending a tenancy, poorly defined "occupy" and "reasonable steps" as applied to section 51. M.S. submitted that Policy Guideline #2 was not updated to its current form unit 2019 and so the new version cannot be used retroactively. M.S. submitted that the Policy Guidelines do not provide guidance on how to remedy a situation like this other than uprooting the landlord's life and forcing the landlord to live in the subject rental property for six months.

### Analysis

I find that the tenants were sufficiently served, for the purposes of this *Act*, with the Two Month Notice, pursuant to section 71 of the *Act* on May 28, 2018 as they confirmed receipt of it on May 28, 2018.

Counsel for N.B. and K.C. spent considerable time during the hearing submitting and testifying that N.B. acted in good faith when he instructed K.C. to serve the tenants with the Two Month Notice. I find that good faith has no place in a section 51 claim, what matters in a section 51 claim are the actions of the owner of the subject rental property.

Good faith only comes into play if a tenant is seeking to dispute a Two Month Notice. Section 49(3) of the *Act* states:

A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

If the good faith of a landlord is raised by a tenant in a hearing, the landlord bears the onus of proving that they are acting in good faith. If the landlord cannot prove that they are acting in good faith, then the Two Month Notice is cancelled, and the tenancy would continue. In this case, the tenants did not dispute the notice and are not seeking the tenancy to continue. Section 51 of the *Act*, around which this claim is centered, does not contain a “good faith requirement”.

Section 51 of the *Act* states:

**51** (1)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.

(1.1)A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2)If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(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.

Both parties agreed that N.B. did not move into the subject rental property. Counsel for N.B. submitted that the landlord occupied the unit in that N.B. left it vacant as a back up plan. M.S. submitted that the definition of “occupy” stated in the new Residential Tenancy Policy Guideline #2A should not be used because it was not available to the parties at the time the Two Month Notice was given to the tenants.

Residential Tenancy Policy Guideline #2A states:

Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that “occupy” means “to occupy for a residential purpose.” (See for example: *Schuld v Niu*, 2019 BCSC 949)

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.

I do not accept M.S.’s submissions that I cannot rely on the definitions found in Policy Guideline #2A. The Policy Guidelines are developed in accordance with evolving caselaw. The caselaw gives us guidance on how the courts interpret the *Act*. Section 51 of the *Act* is the same now as it was in on May 28, 2018. I will not and cannot pretend caselaw has not developed and elect not to follow it.

I find that leaving a property vacant as a back up plan is not occupying the subject rental property. I find that while I am permitted to use Policy Guideline #2A for guidance, I do not require Policy Guideline #2A to come to my above finding as the plain meaning of the word occupy, means that the property is not left vacant. I find that to reach any other finding would circumvent the intent of sections 49, 50 and 51 of the *Act*.

As the subject rental property was left vacant until February 2019, I find that the rental unit was not used for the purpose stated on the Two Month Notice for at least 6 months' duration, beginning within a reasonable period after the effective date of the Two Month Notice, contrary to section 51(2)(b) of the *Act*. Based on N.B.'s June 29, 2018 email to K.C., in which N.B. informs K.C. that he wants to rent the subject rental property again, I find that N.B. took no steps to accomplish the stated purpose for ending the tenancy after the effective date of the Two Month Notice, contrary to section 51(2)(a) of the *Act*. Therefore, the tenants are entitled to 12 months' rent compensation unless I find that extenuating circumstances prevented N.B. from using the rental unit for that stated purpose.

N.B. testified that he received a verbal job offer in an interview which occurred on May 16, 2018. While I accept that N.B. had an interview on May 16, 2018, I find that N.B. has not provided any documentary proof to support his testimony that he received a job offer. I find that N.B. has not proved that his circumstances, aside from a single interview, changed between March 2018, when he lost his job, and the effective date of the Two Month Notice. I therefore find that the landlords have not proved that exceptional circumstances prevented N.B. from moving into the subject rental property.

M.S. submitted that the Policy Guidelines do not provide guidance on how to remedy a situation like this other than uprooting the landlord's life and forcing the landlord to live in the subject rental property for six months. The *Act* makes it very clear that the landlord will have to pay the tenants 12 months' rent if they do not do what they say they are going to do on the Two Month Notice. The solution is to only serve the Two Month Notice if you know that you will actually reside in the subject rental property. A Two Month Notice should not be served if the owner may live at the subject rental property or may sell. I find that a single interview without a written job offer does not provide enough certainty upon which to build the argument that exceptional circumstances occurred which prevented N.B. from moving in.

I note that section 51(3) of the *Act* does provide remedy to the landlord if extenuating circumstances prevented the landlord from complying with the Two Month Notice;



however, I have found, in this case, that exceptional circumstances have not been proved.

Pursuant to sections 51 of the *Act*, I find that the tenants are entitled to 12 months' rent in the amount of \$24,000.00 from the landlords.

As the tenants were successful in this application for dispute resolution, I find that they are entitled to recover the \$100.00 filing fee from the landlords.

### Conclusion

I issue a Monetary Order to the tenants in the amount of \$24,100.00.

The tenants are provided with this Order in the above terms and the landlords must be served with this Order as soon as possible. Should the landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: December 16, 2020

---

Residential Tenancy Branch