# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Protech Construction Ltd., Penny Lane Property Management Ltd and [tenant name suppressed to protect privacy]

## DECISION

**Dispute Codes** CNL FFT

**Introduction**

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

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (" 2 Month Notice"), pursuant to section 49; and
- authorization to recover the filing fee for this application from the respondent, pursuant to section 72.

RG and CM represented the landlords in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's application. In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's 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*.

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As the tenant confirmed receipt of the 2 Month Notice dated August 25, 2021, which was posted on the tenant's door on the same date, I find that the 2 Month Notice deemed served on the tenant in accordance with sections 88 and 90 of the *Act,* 3 days after posting.

**Issues(s) to be Decided**

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlord?

**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 began on September 1, 2017. Monthly rent is currently set at $994.00, payable on the first of the month.

The landlord served the tenant with a 2 Month Notice on August 25, 2021, with an effective move-out date of December 31, 2021, for the following reason:

- 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).

The landlord testified that their daughter, KG, plans on occupying the rental unit. KG submitted a statement, and also attended the hearing to give sworn testimony that she plans on moving into the rental unit. KG testified that she currently resides with her parents, and had just completed her Nursing degree in May 2021. KG obtained full-time employment upon graduation, and is in a long-term relationship. KG wishes to move out of the home, and was offered the rental unit by her father.

The landlord testified that the rental property consists of two buildings, with a total of sixteen rental units. The landlord testified that there is currently no vacancy, and the tenant resides in the best unit in the building with the nicest view, which the landlord called the "penthouse". The rental unit is a three bedroom rental unit, which the landlord testified provides plenty of room for KG who would require an office as well as extra accommodation for guests and friends. The landlord testified that the rental unit would allow KG to save up money for her own home.

The tenant questioned the true motive of the landlord as they are paying below market rent, and notes that the landlord has a history of serving tenants with 2 Month Notices, which are then subsequently withdrawn after the tenants offered to pay more rent. The tenant testified that they had inquired about paying more rent in order to cancel the 2

Month Notice, which the landlord was willing to consider. The tenant submitted an email from the landlord's former agent LW, dated August 25, 2021 which stated "the owner wants to know what rent you would offer to stay in the unit? He does not want to sell at this time".

The tenant submitted two statements from other tenants who were served with a 2 Month Notice, which were cancelled after the tenants offered to pay more rent. BD is a current tenant in the building, whom the tenant testified was too fearful to attend the hearing as a witness. BD stated in their statement that they were served with a 2 Month Notice on August 25, 2021, but after agreeing to a 59% rent increase, the landlord withdrew the 2 Month Notice. BD states that they had accepted the rent increase under duress as they feared homelessness. BD states that they feared retaliation from the owner, and believes that several other tenants were also served with a 2 Month Notice on the same day.

The second statement was from CF, who attended the hearing as a witness. CF testified that they were served a 2 Month Notice in February 2019, which was cancelled after the tenant agreed to pay 36% more in rent.

The owner confirmed that CF was served the 2 Month Notice in 2019 as the landlord and their family needed alternative accommodation while they were building their new home. The owner notes that this was several years ago, and was unrelated to the current 2 Month Notice. The landlord also disputes that they had ever requested or solicited the rent increases, and testified that this was initiated by the tenants as was the case with this current tenant. The landlord's agent testified that the tenant did not respond to the email about the rent increase, after the initial proposal by the tenant.

**Analysis**

Subsection 49(3) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit where the landlord or a close family member of the landlord intends in good faith to occupy the rental unit. The landlord states that her daughter intended to occupy the suite

*Residential Tenancy Policy Guideline* 2: Good Faith Requirement When Ending a Tenancy states:

> *"If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest*

*purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.*

*If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy."*

As the tenant had raised doubt as to the true intent of the landlord in issuing the 2 Month Notice, the burden shifts to the landlord to establish that they do not have any other purpose to ending this tenancy.

Although the landlord stated that they had issued the 2 Month Notice in order for the daughter KG to occupy the rental unit, I find that the tenant has raised doubt as to the true intent of the landlord in issuing this notice.

Although the landlord disputes that they had ever initiated the past rent increases following the issuance of the 2 Month Notices to End Tenancy, I find that there is clearly a history of tenants being served with 2 Month Notices to End Tenancy, which were then subsequently cancelled after the parties negotiated rent increases. Whether the landlord had initiated these conversations or not, it is obvious that these tenants agreed to pay these rent increases after they were served with a 2 Month Notice to End Tenancy. I find that in the two cases presented by the tenant, the rent increases were significant, and exceeded the standard allowable rent increase after a proper Notice of Rent Increase is served. Secondly, I find that although the tenants may have voluntarily agreed to these rent increases, the tenants accepted these rent increases with the understanding that the only other alternative would be to accept the 2 Month Notice and move out. Although the owner did provide an explanation for why the CF was served with the 2 Month Notice in 2019, the undisputed fact is that the 2 Month Notice was cancelled after CF's offer to pay 36% more rent.

Section 3 of the Residential Tenancy Regulation gives the following definition of "unconscionable":

> **3** For the purposes of section 6 (3) (b) of the Act *[unenforceable term]*, a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

> **Unconscionability**
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> [28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (***Fountain v. Katona***, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:
> (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
> (b) proof of substantial unfairness of the bargain obtained by the stronger. ***Morrison v. Coast Finance Ltd***. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).
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> [29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (***Warman v. Adams***, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).
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> [30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (***Morrison***, at713).
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> [31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (***Warman*** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in ***Morrison*** has also

> been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (***Harry v. Kreutziger*** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

Although the tenants may had initiated the conversation and negotiations about the rent increases, these conversations and agreements only took place after the tenants were served with a Notice to End Tenancy. It is clear that the owner has been successful in obtaining significant rent increases through this method, and on at least two occasions. Although the landlord denies that there has ever been an ulterior motive in serving tenants with 2 Month Notices, I find that the method by which these rent increases were obtained could be considered unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenants and the landlord in these circumstances where the tenants had no alternative but to propose an enticing and significant rent increase, or find a new home in difficult circumstances. Although the tenant in this case may have initiated the conversation about a rent increase in order to stay in the rental unit, I find the evidence clearly shows that the landlord was agreeable to consider this option, as they were in the past with the previous tenants.

I find that the landlord has not met their burden of proof to show that KG would be occupying this rental unit, and that is the only reason for ending this tenancy. I find that the testimony and evidence presented for this hearing raised questions about the landlord's good faith, and in particular the fact that the landlord has obtained significant rent increases after serving tenants with similar 2 Month Notices, which are then subsequently withdrawn after agreements were made.

Despite the explanation provided about why KG would be moving into this specific rental unit, I find that the landlord has not met their burden of proof to show that they do not have any other purpose in ending this tenancy. Although the landlord testified that this specific unit would be ideal due to the size and location of the rental unit, I am not convinced that the landlord truly required this specific rental unit for occupation by KG. I find that the current tenant is paying substantially much lower rent, and that the landlord was willing to consider a proposal for more rent in order for the tenant to stay, as supported by the correspondence sent by the landlord's agent at the time. In this case, the conversation ended after the tenant decided to dispute the 2 Month Notice instead of negotiating a rent increase in order to stay. I do not find that this 2 Month Notice was issued in good faith. I therefore allow the tenant's application to cancel the 2 Month Notice. The 2 Month Notice dated August 25, 2021 is hereby cancelled, and is of no force or effect. The tenancy will continue until ended in accordance with the *Act*.

I allow the tenant to recover the filing fee for this application.

**Conclusion**

The tenant's application to cancel the landlord's 2 Month Notice is allowed. The landlord's 2 Month Notice, dated August 25, 2021, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of $100.00 for recovery of the filing fee by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of $100.00, and the landlord(s) must be served with **this Order** as soon as possible. Should the landlord(s) 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: January 21, 2022

Residential Tenancy Branch