# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNL, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") to cancel a Two Month Notice to End Tenancy for Landlord's Use dated August 17, 2021 ("Two Month Notice"); and to recover the $100.00 cost of their Application filing fee.

The Tenant, her advocates, K.C. and A.T. ("Advocates"), the Landlord, and the Landlord's sister and representative, S.J.W. ("Landlord's Rep"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

When we reviewed service of the Parties' documents to each other, pursuant to the Act and Rules, the Tenant said she had served the Landlord with her Notice of Hearing documents and evidence on October 23, 2021, by registered mail. She provided the registered mail tracking number as proof of service. However, the Landlord said that she received the Notice of Hearing, but no evidence from the Tenant in the registered mail package.

The Landlord said she served the Tenant with her evidentiary submissions via registered mail to the Tenant's Advocate. The Tenant confirmed that she had received the evidence from the Landlord and had reviewed it prior to the hearing.

Rule 3.14, "Evidence not submitted at the time of Application for Dispute Resolution", states: "Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be

received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing."

I find that the Tenant failed to serve the Landlord with her evidence pursuant to the Act and Rules, and as such, I find it would be administratively unfair for the Landlord for me to consider the Tenant's evidence. As such, I will not consider the Tenant's evidentiary submissions in making my Decision.

Preliminary and Procedural Matters

The Tenant provided the Parties' email addresses in the Application and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Landlord that pursuant to Rule 7.4, I would only consider her written or documentary evidence to which she pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

The onus to prove their case is on the person making the claim. In most cases, this is the person who applies for dispute resolution. However, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy. This burden of proof is set out in Rule 6.6.

Section 55 of the Act states that if a tenant's application to cancel an eviction notice is unsuccessful and is dismissed, and I am satisfied that the eviction notice complies with the requirements under section 52, I must grant the landlord an order of possession.

Issue(s) to be Decided

- Should the Two Month Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?
- Is the Tenant entitled to recovery of his $100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed-term tenancy began on June 1, 2014, with a monthly rent of $850.00, due on the first day of each month. The Parties agreed that the Tenant

paid the Landlord a security deposit of $425.00, and no pet damage deposit. The Landlord confirmed that she still holds the security deposit in full.

The Parties agreed that the Landlord served the Tenant with the One Month Notice, which was signed and dated August 17, 2021. It has the rental unit address, and it was served via registered mail on August 20, 2021, with an effective vacancy date of November 1, 2021, at 1:00 p.m. The Parties agreed that the One Month Notice indicates that it was served on the grounds that the rental unit will be occupied by the Landlord.

In the hearing, the Tenant asked to hear what the Landlord's plans were from the Landlord, given the need for the Two Month Notice to have been served in good faith. The Tenant asked if the Landlord intends to live in the rental unit full-time or part-time. She asked if this was a permanent move or just on weekends.

The Landlord's Rep said that the Landlord will be living there part-time, which means, "…three to four days … as she segues to full retirement", she said.

The Tenant said that this means the move is not permanent; however, the Landlord said that it will be permanent in the future. The Landlord's Rep said that the Landlord's furniture is ready to move in. The Landlord said that she can work from the residential property and remotely. "I plan to be there part of every week," she said.

The Landlord's Rep said:

> [The Landlord] just wants to live in her home. She is sincere. She is sorry that [the Tenant] has to find another place to live. She has been lucky to live there for only $850.00. Some of the allegations that were made were, like she was not truthfully given a notice to end tenancy, and statements that she was not looking after her property.
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> She has been very forthright and honest. It has been very upsetting for [the Landlord], and she has worked very hard in her life. She's earned her right to retire and live in her home. We ask that the Tenant to respect that and move out with integrity.

The Advocate said:

> The Notice was presented, and it is her legal right to dispute that Notice. The

> onus is on the Landlord to prove that the Notice was given in good faith and that the events will, indeed happen. We are not questioning the integrity… it's prudent and lawful for my Client to dispute the Notice. Furthermore, it was not meant to impugn the integrity of any Party here today. It is a legal recourse to ensure that what was said on the Notice is legal in fact. It's not an insult. I believe very strongly in the law, and all we ask for is that we are provided proof that was not hearsay or via a Notice, but that was indeed what was said.
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> We have heard sworn evidence from [the Landlord] that she plans to move in on a part-time basis. That is not good enough for the Act. [The Landlord] must occupy the property permanently for a period of six months, but that does not seem to be the case. That is our answer to the Landlord and our submissions on this item.

The Landlord said:

> I would like to live in my home, as is my retirement plan. I have had three jobs in the last few years to pay for the rising property taxes. I would like to enjoy my dream of living in my home.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 49 of the Act states that 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. As noted above, the burden of proof in this matter is on the Landlord to prove the validity of the Two Month Notice on a balance of probabilities.

Policy Guideline 2A ("PG #2A"), "Ending a Tenancy for Occupancy by Landlord…" is intended to help the parties understand issues that are likely to be relevant to their situation. It may also help parties know what information or evidence is likely to assist them in supporting their position.

Section 49 of the Act 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". Section B of PG #2A explains the meaning of "good faith", as follows:

**B. GOOD FAITH**

In *Gichuru v Palmar Properties Ltd*., 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann*, 2019 BCCA 165.

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 purpose for ending the tenancy, and they are not trying to avoid obligations under the RTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (section 32(1)).

If a landlord gives a notice to end tenancy to occupy the rental unit, but their intention is to re-rent the unit for higher rent without living there for a duration of at least 6 months, the landlord would not be acting in good faith.

If evidence shows the landlord has ended tenancies in the past to occupy a rental unit without occupying it for at least 6 months, this may demonstrate the landlord is not acting in good faith in a present case.

If there are comparable vacant rental units in the property that the landlord could occupy, this may suggest the landlord is not acting in good faith.

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 dishonest motive.

The Tenant raised the issue of the Landlord's plan to move in on a part-time basis initially. She asserts that this is inconsistent with the intent of section 49 of the Act. Part C of PG #2A helps interpret this matter for the Parties:

**C. OCCUPYING THE RENTAL UNIT**

Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see

> Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). 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) The result is that a landlord can end a tenancy sections 49(3), (4) or (5) if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space.
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> **Vacant possession**
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> 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. .
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> [emphasis added]

Based on the evidence before me overall, I find that the Landlord sincerely intends to retire to the residential property, and that she will ultimately live there full-time. I find that PG #2A explains that a Landlord may use the rental unit as "part of their living space". I find that the Landlord is not obtaining the residential property "to hold and keep for use" as in vacant possession, but rather, that she intends to live there as much as her remaining employment activities allow, and ultimately to retire there full-time..

I find that the Landlord has met her burden of proof on a balance of probabilities, including that the Two Month Notice is compliant with section 52 as to form and content. Accordingly, I dismiss the Tenant's claim wholly without leave to reapply, pursuant to section 62 of the Act.

Given the above, and pursuant to section 55 of the Act, I find that the Landlord is entitled to an Order of Possession. I, therefore, grant the Landlord an Order of Possession for the rental unit, pursuant to section 55. As the effective vacancy date of the Two Month Notice has passed and the Tenant is overholding the rental unit, **the Order of Possession is effective two days after service of this Order** on the Tenant.

In order to provide clarity for both Parties, and in the hopes of preventing future disputes, the Parties should be aware that pursuant to section 51 of the Act, **a tenant** who receives a notice to end a tenancy under section 49 i**s 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. The Tenant may withhold this amount from the last month's rent or otherwise recover this amount from the Landlord, if rent for the last month has already been paid.

Further, in addition to the one month's compensation due to the Tenant under section 51(1), if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or if the rental unit is not used for that stated purpose for at least six months beginning within a reasonable period after the effective date, **the Landlord must pay the Tenant** an amount that is the equivalent of **12 times the monthly rent payable** under the tenancy agreement.

Conclusion

The Tenant is unsuccessful in her Application, as the Landlord provided sufficient evidence to establish the validity of the Two Month Notice on a balance of probabilities. The Tenant's Application is dismissed wholly without leave to reapply.

Pursuant to section 55 of the Act, I grant an Order of Possession for the rental unit to the Landlord **effective two days after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible. **Should the Tenant fail to comply with this Order**, this Order may be filed in the Supreme Court of British Columbia 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 31, 2022

Residential Tenancy Branch