# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

**Dispute Codes** CNL, LRE, FFT

**Introduction**

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

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property (the "**Notice**") pursuant to section 49;
- an order to suspend or set conditions on the landlords' right to enter the rental unit pursuant to section 70;
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenants (JC and GH) attended the hearing and were represented at the hearing by counsel (KB). The landlord (RF) attended the hearing. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. Neither the landlord nor the tenant called witnesses. Landlords (BF, GF) did not attend the hearing.

The tenant 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*.

At the outset, I advised the parties of Rule 6.11 of the Rules of Procedure (the "**Rules**") which prohibits participants from recording the hearing. The parties confirmed that they were not recording the hearing.

I also advised the parties that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

I note s. 55 of the *Act* requires that when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is

entitled to an order of possession, and/ or a monetary order if the application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

**Issues to be Decided**

Are the tenants entitled to:

1) an order cancelling the Notice;
2) an order suspending or setting conditions to the landlord's access to the rental unit;
3) recover the filing fee?

If the tenants fail in their application, is the landlord entitled to:

1) an order of possession?

**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 parties entered into a written fixed term tenancy agreement starting June 1, 2020, through June 30, 2021, at which point the tenancy transitioned to a month-to-month periodic tenancy. Monthly rent is $2000.00, payable on the first of each month. The tenant paid the landlord a security deposit of $1000.00. The landlord still retains this deposit in trust.

There are three structures on the property. The house is currently rented to the tenants; the other structures rented out as vacation rentals or used as a caretaker suite when BF and GF are onsite. The tenants have exclusive possession of the 3 bedrooms upstairs and the landlord has exclusive possession of the basement suite, which is only used for storage purposes.

There are 3 registered owners of this property, the attending landlord (RF) owns an undivided 2/3 interest and the attending landlord's parents (BF and GF) own an undivided 1/3 interest, as joint tenants.

The first Two Months' Notice, served July 28, 2021, was the subject of a December 16, 2021, arbitration hearing. The Notice was issued under s. 49(4) "family corporation". The evidence showed a "partnership" agreement not a "family corporation". The first Notice was found invalid under the *Act* due to insufficient evidence that the issuer was a family corporation. The tenants' application seeking cancellation was successful. Counsel for the tenants submits this is evidence of the landlord's dishonesty. The file number is recorded on the cover sheet.

A second Two Months' Notice was issued, signed, and dated December 16, 2021, with an effective date of February 28, 2022. The Canada Post Registered Letter receipt is dated December 16, 2021. Pursuant to s 90 of the *Act* a document mailed is deemed served on the fifth day after it is mailed.

The tenants are deemed to have received the registered letter on December 21, 2021. The tenants disputed the Notice on December 31, 2021, which was within the allowable time limitation under the *Act* of 15 days.

The reason given for issuing the Notice to end tenancy was "the rental unit is to be occupied by the landlord or the landlord's spouse, or a close family member of the landlord."

Attached to the second notice is a typewritten unsigned addendum that reads in part: *"We want to update you with this information to ensure there is no confusion relating to who the Landlords (owners) of the rental property are. The Two Month Notice to End Tenancy dated December 16, 2021, is being served for the same consistent purpose that the Landlord owning 2/3 of the property, [XX], intends to occupy the rental unit for his own use*."

The Landlord RF testified that he intends to occupy the rental unit because his business interests have significantly expanded in city[2] requiring him to shuttle between his primary residence in city[1] and a secondary residence in city[2]. [1]

Counsel for Tenants GH and JC dispute that the Landlord RF intends to occupy the rental unit and further questions whether the intention is held in good faith. The tenants provide the following testimony.

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[1] City[1]=city of primary residence and business; City[2]= secondary city that the LL has burgeoning business interests in

The tenants testified the terms of the rental agreement allowed the landlords use of the basement suite in the rental unit for storage and gave the tenants exclusive possession of the upstairs and three parking spots. The tenants were assured that the single-family dwelling was a quiet space conducive to GH's needs for her home -based business. The landlords were looking for long-term rental tenants.

Counsel states since Tenant GH and her husband moved into the rental property a little over a year ago, Tenant GH has built up a solid home business with an established reputation in the local community. Moving locations would involve significant expense, disrupt GH's established business, and result in lost income.

Counsel submits that in July 2021, the tenants advised Landlord BF that the furnace was leaking and arranged to have Landlord BF make the required repairs while they were out of province on personal business. When they returned, the repair had not been made. Tenant GH and Landlord BF agreed on a specific date and time for Landlord BF and a contractor to attend to the repairs (confirmed in a text message submitted into evidence) and based on this agreement, Tenant GH scheduled her appointments accordingly.

Landlord BF and the contractor arrived earlier than the agreed to time. Landlord BF started "forcefully banging" on the front door. Tenant GH was with a client. At first, she thought it may have been an Amazon delivery but when the pounding did not stop, she excused herself and went to the door.

Landlord BF was at the back of the house, swearing and angry. Landlord BF grabbed a hammer from the workshop and came up to Tenant GH and stood so close, hammer in hand, his spittle hit her in the face. Tenant GH asked Landlord BF to calm down or she'd call the police he replied, "go ahead" and "if you don't like it -move the fuck out". The incident caused Tenant GH upset, stress, and triggered memories of past trauma. The interaction was so intense, that Tenant GH's client did not leave, fearing for her safety and the contractor remained behind and apologized for Landlord BF's behavior.

Tenant GH reached out to Landlord GF, Landlord BF's wife, and told Landlord GF what had happened expecting an apology and compensation for lost revenue (Tenant GH did not charge her client for the disrupted session). Instead of an apology, Landlord GF told the tenants they were no longer permitted to use the dock to launch their kayaks because of an insurance issue.

The tenants state that Landlords BF and GF have an established pattern of bullying and harassment. Entered into evidence is a letter from former tenants attesting to verbal abuse, angry outbursts, unfounded accusations, and intimidation tactics that ultimately led to the former tenants receiving an eviction notice.

Counsel maintains that Landlord RF has no intention to live in the rental unit pointing out that the landlord's business and primary residence is located in city[1]. Counsel argues that "personal use" is a smoke screen used as an excuse to evict the tenants. Pointing to Landlord RF's multi-million-dollar mansion sale in the local area, counsel stated it was highly unlikely Landlord RF is seriously considering moving into the old $2000 per month rental unit. Not only is Landlord RF unaccustomed to this standard of living, but the furnishings from the 6000+ square foot mansion would never fit in the rental unit. Further, Landlord RF has provided no evidence that he plans to "move in". Counsel points out there are other "cabins" on the property that the landlord rents out as vacation rentals that can easily meet Landlord RF's needs.

Counsel states the Landlords will pretend the house is "for family" but rent the property on vacation rental sites, including the basement suite, which cannot be rented at this time as the tenants occupy the upstairs. The tenants also state that as soon as they filed their application for dispute, the landlord removed all of the vacation rental listings. The tenants submitted into evidence several of the listings with pictures of the cabins and the descriptions.

The tenants state that since the July 2021 incident, Landlords BF and GF have been spreading rumors about the tenants to at least one renter, possibly more. Tenant GH was told about these alleged rumors through one of her clients.

Also, since the July 2021 incident the tenants state Landlords BF and GF have been accessing the storage and property often and making loud noise in the basement such as slamming doors often and forcefully.

Landlord RF testified that the first Notice misidentified the family business structure as a family corporation. Landlord RF stated that he honestly believed that the correct designation was "family corporation". He is the majority 'shareholder' owning a 2/3$^{rd}$ interest in the property and his parents own the lesser 1/3$^{rd}$ interest in the property. He stated it was an honest mistake, with no intention to deceive.

Landlord RF stated that he can appreciate the tenants are upset. The property in question has been in the family for three (3) generations. He states the Two Months' Notice was issued in good faith. He intends to occupy the rental unit with his common-law spouse, when in town for business. Landlord RF explained he resides in city[2] about two (2) weeks out of each month spending approximately 2-3 to 7 days per stay. RF also referenced his travel itinerary which show he traveled between the cities several times.

Landlord RF states that he works with investors in both cities but recently has secured more projects in the city[2] location. A written submission provided by the landlords reads: "he requires accommodations in both regions in order to oversee developments, attend meetings and engage with stakeholders". Further, Landlord RF wants to be closer to his family which includes caring for his nieces and nephews.

Landlord RF stated that the sold property the tenants referenced was listed June 17, 2021, had an accepted offer on July 5, 2021, with a possession date of August 13, 2021. Landlord RF testified that the timing of the 1st Notice was coincidental to the incident with his father, Landlord BF, pointing to the timeline, specifically Exhibit 4, which showed the completion date for the sale amended from September 15 to August 13. Landlord RF also pointed out that the new property owners purchased the majority of the furniture with the home; hence, his need for a small storage unit.

Landlord RF stated that he contacted the RTB to inquire about options and was told he could issue a Two Months' Notice for Landlord's Occupancy.

Landlord RF stated that the rental unit occupied by the tenant is a three-bedroom unit. He states he often hosts his nieces and nephews for visits. While he is not the primary caretaker of his nieces and nephews, they have always visited frequently and have overnight sleepovers. They are ages 3, 7, and 9. The cottage is built over the water, with sliding glass doors, and is unsafe for children. The children cannot be expected to wear life vests on overnight visits. Further water to the cottages is shut off in winter.

Landlord RF states that the Notice was served in good faith with no ulterior motives and no intention to re-rent the home.

## Analysis

Section 49(3) of the *Act* sets out that a landlord 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.

Section 55 of the *Act* provides that I must grant to the landlord an order of possession if the Two-Month Notice complies with the s. 52 form and content requirements, and I dismiss the tenant's application or uphold the landlord's notice.

Both parties are familiar with Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, which gives a statement of the policy intent of the legislation. The key points, as set out in the guidelines, are:

> 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.
>
> 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 [*Act*] or the tenancy agreement.

In this matter, the landlord bears the onus to prove that the reason for ending the tenancy is both valid and sufficient. Black's Law Dictionary defines "valid" as "1) legally sufficient; binding 2) *meritorious, a valid conclusion based on the facts presented in this case*" and "sufficient" as "*adequate of such quality, number, force, or value as it necessary for a given purpose*"[2] [emphasis added]

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

> 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

[2] Black's Law Dictionary, Eighth Edition

> situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

I find the landlord has not met the burden of showing the Two-Months' Notice was issued for a valid and sufficient reason. This finding has two components that form the basis for my conclusion.

In affirmed testimony, Landlord RF states the Two Months' Notice was issued to accommodate his increased business interests and dealings in city[2]. Landlord RF testified he stays in city[2] on average twice per month staying 2-3 to a maximum of 7 days per stay. He submitted into evidence some partial and some complete travel itinerary details between the cities. The itineraries are reproduced below:

| **Arrival City[2]** | **Return City[1]** |
|---|---|
| October 26, 2021 (XXX846) | |
| | November 26, 2021 (XXX436) |
| December 13, 2021 (XXX143) | December 16, 2021 (XXX144) |
| December 24, 2021 (XXX628) | |
| January 25, 2022 (XXX408) | January 28, 2022 (XXX409) |

The one-way itineraries provide limited evidence of stay durations and simply confirm that Landlord RF makes trips between the cities some for business and others likely for personal reasons. The frequency of these trips is approximately once per month. The duration of one December trip was three (3) days as was the January trip.

Based on the itinerary evidence submitted and the oral testimony from the landlord, I accept as fact Landlord RF travels between the two cities approximately once per month for about a 3-day duration (based on return the return tickets provided) for both business and personal reasons. I assign significant persuasive weight to Landlord RF's evidence that his business interests require him to travel between the two cities.

Landlord RF argues the tenants' rental unit best meets his needs. The cabins on the property do not.

The tenants argue that Landlord RF, for his purposes, could occupy one of the cabins on the property. They point to Policy Guideline 2A, subsection B "Good Faith" , which

reads: “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”.

Landlord RF testified that he often has his nieces and nephews visiting. He is not their primary caregiver but does spend time with them. The cabins do not have enough space and the cabins sit over water, which is a safety concern given the ages of the children (ages 3, 7, 9).

The tenants submitted into evidence the vacation rental website description of the property which reads in part as follows: “This accommodation is ideal for families, as there are three pull-out sofas ideal for children…. ”.

I assign little persuasive weight to Landlord RF’s argument that the cabin is unsafe for his nieces and nephews and is not spacious enough for overnight visits. The vacation rental write up states there are three pull out sofas suitable for children.

Regarding safety concerns, the vacation rental description does not stipulate the cottage is only suitable for children ages X and up, it states “the accommodation is ideal for families” [emphasis added]. To assign significant persuasive weight to the landlord’s argument that the cabin is unsafe for young children, the obvious corollary is that the landlords are unconcerned about the safety of their guests’ children and any associated liability issues, which as a business owner is unlikely. Further, given the frequency of his trips and the duration, there is insufficient evidence about how often his nieces and nephews visit.

Considering the frequency and duration of the trips, I have reviewed the description of the cabins. I note the cabin has a “fully equipped kitchen” and “an open loft bedroom on the top floor with a king-sized bed”. The cabin provides more space, equivalent or more amenities (full kitchen) than the average hotel room and is suitable for short term stays of 2-3 days and up to 7 days.

Landlord RF argues that the water is shut off to the cabins in the winter. The tenants , however, provided video evidence showing a cabin in use over the winter holidays. This suggests that while the water may be shut off in the winter it may also be turned on for temporary usage. I therefore assign no persuasive weight to the landlord’s argument that there is no water to the cabins in the winter.

In conclusion, on the balance of probabilities, I assign no persuasive weight to Landlord RF's argument that the tenants' rental unit is better suited to his needs because of its size and location as compared to the cabins on the property. Based on the frequency and duration of Landlord RF's trips between cities, Landlord RF has not sufficiently demonstrated why the tenants' rental unit is preferable over one of the vacation rentals cabins.

In the landlords' (RF, BF, GF) written submission, they cite Policy Guideline 2A. Specifically, they reference Schuld v. Nui, 2019 BCSC 949 quoting "the implication is that "occupy" means "to occupy for a residential purpose" and argue RF will be occupying the rental unit for "residential purposes".

I concur with the landlords. The intent of the legislation is for the rental unit to be "occupied" for a "residential purpose" when a Two Month Notice is issued under s. 49(3). I would also point out that in Schuld v. Nui, the court referred the decision back to the RTB "for reconsideration on the basis of the proper principles including, in particular, the *proper contextual definition of "occupy" for the purposes of s. 49(3) of the Act*.[3] [emphasis added]

Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser, or Close Family Member speaks to the spirit and intent of s. 49(3).

Subsection **"B. Good Faith"** talks about the requirement for the landlord giving notice to end tenancy to occupy the rental unit. The landlord must live there for a duration of at least 6 months.

Subsection **C. Occupying the Rental Unit** reads:

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 section 49(3), (4) or (5) if they or their close family

[3] https://www.can .org/en/bc/bcsc/doc/2019/2019bcsc949/2019bcsc949.htm ?searchUr Hash=AAAAAAAAAAEAHVNCQyAyMDAyLCBjIDc4LCBTZWN0aW9uIDQ5KDMpAAAAAQAVLzIwMTU5LWN1cnJ bnQtMSM0OS0zAQ&resu tIndex=2

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. [emphasis added]

What then is meant by "occupy"? Subsection C further parses out the term "occupy", providing context.

***Vacant possession***

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. [emphasis added]

Landlord RF was candid about the frequency and duration of his trips. He did not embellish. He provided itinerary evidence showing business trips approximately once per month for short durations. In his affirmed oral testimony, he said the duration of his trips varied between 2-3 and could be up to 7 days and as such requires the occasional use of a rental unit when he is in city[2] on business. There is no dispute that the landlord's primary residence and primary place of business is in city[1]. He is not arguing that this rental unit is his permanent residence.

As stated above, s. 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused. When the landlord is not in city[2], which is most of the month, the rental unit would be left "vacant and unused". The landlord intends to use the tenants' rental unit on a part-time basis whenever he is in city[2] to attend meetings or host a sleep over with his nieces and nephews.

The intention of Section 49(3) is not to displace tenants so a landlord can "hold and keep for use" a rental unit for his convenience, as a part-time second home or to meet his temporary accommodation needs. The intention of s. 49(3) is for a landlord "to occupy" to "live there" [in the rental unit] "for residential purposes". Temporary accommodation or part time use does not meet the definition of "occupy" or the intent of s. 49(3). Based on the evidence presented, I find on a balance of probabilities, "there are comparable vacant rental units in the property that the landlord could occupy" for his purposes.

Taking into careful consideration all of the oral testimony and documentary evidence presented and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus proving that the reason for ending the tenancy is both valid and sufficient.

The tenants applied for an order suspending or setting conditions to the landlord's access to the rental unit. Evidence from both sides show that the landlord-tenant relationship is acrimonious. I find, however, that the tenant has only provided allegations of Landlord BF's misconduct, most of which are unsupported based on the evidence provided.

The tenant testified that a client told her he was told by another tenant on the site that the landlord was spreading rumors about GH. This information is unverified and hearsay.

The tenants' case is built on an alleged assault incident in July 2021. The tenant neither called witnesses nor provided witness statements to the incident.

The Tenant GH stated that she went to the police but did not submit a copy of the police file/report. The tenants and their counsel did provide phone numbers of witnesses to the July incident; however, I must point out that it is not the role of the arbitrator to be an independent investigator. Rather, the arbitrator's role is to weigh the relevant evidence and authorities presented by the parties, make findings of fact, and apply these facts to the applicable laws. If the tenants relied on this evidence, it is incumbent upon the tenants to call witnesses to provide affirmed testimony and are available for cross examination.

Similarly, I note Landlord RF did not call witnesses; specifically, he did not have his father, Landlord BF, testify about the July 2021 incident knowing the ground upon which the tenants were relying. Landlord RF did not call his mother , Landlord GF, to provide testimony or insurance evidence regarding why permission to use the dock to launch the kayaks was suddenly rescinded.

The tenants allege that the landlords are attending the basement suite more frequently, making a lot of noise but provided no record of specifics: dates, times, photos, audio confirmation etc . The tenants are requesting an order restricting the landlords access to the rental unit. I accept as fact that the tenancy agreement gives the landlords' exclusive possession of the basement suite. The tenants have provided insufficient evidence showing that the landlords are accessing the tenants' rental unit. In light of the above,

I find there is insufficient evidence upon which to issue an order to suspend or set conditions on the landlords' right to enter the rental unit pursuant to s. 70 of the *Act*.

Notwithstanding having said that, if the landlords are, in fact, disrupting the tenants' right to quiet enjoyment of the rental property, which includes "freedom from unreasonable disturbance", pursuant to s. 28 of the *Act,* the tenants may have grounds to apply to the RTB for an order that the landlords provide the tenants with quiet enjoyment of the rental unit.

Pursuant to section 72(1) of the *Act*, as the tenants are partially successful in the application, they may recover $50.00 of their filing fee from the landlord in a one-time deduction from the rent.

**Conclusion**

The tenants' request to cancel the two Months' Notice, dated December 16, 2021, is granted. The tenancy will continue until ended in accordance with the *Act*.

Pursuant to s. 72(1) the tenants may make a one time $50.00 deduction from rent owing to the landlord.

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: March 14, 2022

Residential Tenancy Branch