



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL

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;

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 tenant testified, and the landlord confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenant confirmed, that the landlord served the tenant 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 Residential Tenancy Branch (the "**RTB**") 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

Is the tenant entitled to:

- 1) an order cancelling the Notice?

If the tenant fails in his 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 tenant entered into a six (6) month fixed term tenancy agreement with the previous landlord effective November 1, 2019. Rent was set at \$1300.00 per month with a security deposit of \$650.00.

On December 17, 2021, the estate of the former owner issued a Two-Month Notice to End Tenancy for Landlord's Use of Property. The effective date was February 28, 2022. The reasons provided on the notice reads, "All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit".

The tenant disputed the Notice on December 30, 2021, which was within the allowable time limitation of 15 days under the Act.

The tenant testified that he has lived at this address for two and a half years. The location is ideal, close to his children's school and the rent is reasonable. The tenant shares custody of his three (3) children, one (1) week on and one (1) week off; however, his children come to his home every day after school. This residence is the home base for the children.

The tenant alleges that this out of province landlord is not acting in good faith. He believes the landlord issued the Notice with the intention to re-rent the unit at a higher rent. He states the landlord owns three (3) units in the building. One of the units rents out on a vacation rental site for an average of \$200.00 per night. The tenant states this is arguably more than the \$1300.00 rent per month he pays. The screen shot read into evidence is as follows:

*3 Bdm & 2 Full Bath – Just show up with your suitcase!
Contact Owner for Weekly, Monthly and longer terms stays....
\$161.00 p/n*

The tenant states the landlord raised the rent in an equivalently sized rental unit from \$1338 by \$450.00. The tenant states the other resident tenant (Tenant XX) is a widowed senior. He read into evidence a signed statement from Tenant XX:

*As a tenant I was verbally instructed by my landlord over the phone
to increase my rent from \$1338 to \$1750. This took effect June 1st
2021.*

*As a tenant I was given notice by my landlord to vacate my rental on
or about May 31, 2022....*

The tenant states that he had several phone conversations and text messages from the landlord about the rent. The landlord told him and sent text messages stating that her costs exceed the rental

income, and she is not in a position to subsidize the rent. He uploaded and read the text messages into evidence.

December 23, 2021

LL: [X] – this is [XX] – I have purchased the condo you live in – I'm away until the 29th and perhaps we can talk then. I did move the natural gas, electricity and water into my name. I did not initiate any wifi or tv arrangements – would the 29th work for you and I to speak over the phone?

TT: Yes. In the notice I received it said you were wanting to move into the unit. I'm a little confused. Is this your intention because when we talked in the summer you did not mention this? Thank you.

LL: I have the opportunity to work remotely – I am contemplating it- I will be more clear when we speak.

December 30, 2021

LL: Thank you for the conversation today – here are the costs associated with the property - \$1254.48 is the mortgage \$335./month are the condo fees, water is \$535.00 per year or \$44.60 per month, taxes are about \$125.00 per month – fyi

TT: I could do \$1500 and pay for cable/internet. I really want to stay here because it is best for my kids and I.

LL: I was concerned that the costs would exceed what you were paying historically. I did look online and see a property in Penticton but it was higher than I expected – the mid \$300,000's. I'm not in a position to offset the costs related to the home. The best I could do for you is extend the month to month so I have more time to look. 30-60 days.

January 1, 2022

TT: I reread your message yesterday and I wasn't sure what you meant. Are you looking for another place for you? Do you own another unit here? Am I able to continue renting long term if you don't work remotely? Sorry for all the questions, but I am stressing out because I don't know if you are saying I can stay or not. Again, I really want to keep renting the unit because it is so good for the kids and I. There is not much available in [XX] especially so close to the school. Thank you.

LL: Thank you for asking. I am not in a position to offset the ongoing costs of the home you are living in. As you can see by the numbers the costs exceed the rent. The best I could do is extend your notice by 30 or 60 days (from the notice from [C]) to give you more time to look. I thought those town homes in [XX] might be affordable and I would purchase one

and move u in there – there is nothing available at the moment unless u hear of something thru the grapevine.

I thought they would run \$220,000 but I had to pinch myself because I don't think they are selling for that low.

TT: I understand. Sorry, but I have put in a dispute for the evict because at the time I wasn't.....

The tenant summarized his argument into three (3) key statements:

1. The landlord does not intend to move into the unit but re-rent the unit at a higher rent because her costs exceed the rent as per the text messages.
2. The evidence shows she is not acting in good faith as per *Gichuru* and has attempted to end other tenancies.
3. The landlord has comparable properties, one occupied for short term, rented out primarily as a vacation rental. The tenant states the landlord does not want to occupy that rental unit because the daily rate she charges exceeds the monthly rental income.

The tenant asks that the Two Month Notice be set aside. He states that he is willing to negotiate a rent increase with the landlord that exceeds the 1.5% permitted under Residential Tenancy. He attempted to negotiate rent with the landlord but was unsuccessful. If the Notice is upheld, the tenant asks that he be allowed to remain in the rental unit until the end of the school term.

The landlord testified that she confirmed with the seller that the tenant received the Two Month Notice. She stated that she can work remotely and has uploaded a letter from her employer confirming as such. She states she purchased the property with an honest intention to move into it stating she contacted a flooring company to change the flooring out. She wants to move to BC permanently and chooses no longer to live in Alberta. She can make the move in 2 weeks.

The tenants in the vacation rental unit are there for a fixed term – through June 30, 2022.

The landlord “takes offence” to being characterized as a “bad landlord”. She states she tried to be flexible and transparent with the tenant about costs. She tried to work with the tenant and even considered purchasing an additional rental property, but the price was higher than she realized.

The landlord denies issuing a Two Month Notice to the tenant who provided the signed the statement. The landlord states that Tenant XX is elderly, has health issues, and memory issues. The landlord states that she checks in on Tenant XX often especially since the death of the tenant's husband.

The landlord said that she is not willing to negotiate a settlement with the tenant. She was open to negotiating but the tenant chose to file a dispute. She rents in Alberta and can relocate to British Columbia in two (2) weeks. She will leave the decision to the arbitrator.

Analysis

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 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.

The Act s. 49(5) allows a landlord to end a tenancy if the landlord intends in good faith to sell the unit and after all the conditions of sale are removed, the purchaser requests the seller issue the Two Month Notice because they or a close family member intends to move in. I am satisfied the condo sold and the purchaser requested the seller give notice on December 17, 2021 after the conditions of sale were removed.

Both parties were aware that the landlord bears the onus to prove that the reason for ending the tenancy is valid and sufficient. In other words, s. 49(5) is a two-part test. The landlord must show:

- 1) she truly intends to personally use or occupy the rental unit for herself;
- 2) she has shown that she does not have an ulterior motive for seeking to have the tenant vacate the rental unit.

Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord gives a statement of the policy intent of the legislation based on the court ruling in *Gichuru*¹ that illustrates the concept of one's honest intention. This court ruling is binding. In sum, the court looked at whether bad faith on the part of the landlord was the motivation driving the Notice to end tenancy; and if the suspicious actions of the landlord were intended to make the tenant move.

The key points as set forth in the Policy Guideline are:

When the issue of a dishonest motive or purpose for end of 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

¹ *Gichuru v. Palmar Properties Ltd.*, 2011 BCSC 827, cited in the *Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupant by Landlord, Purchaser or Close Family Member*.

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.

.....

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 ulterior motive.

Further, 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 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]

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).

E. Consequences for not using the property for the stated purpose:

Residential Tenancy Act

A tenant may apply for an order for compensation under section 51 of the RTA if a landlord (or purchaser) who ended their tenancy under section 49 of the RTA has not:

- accomplished the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy.
- or used the rental unit for the stated purpose for at least six months beginning within a reasonable period after the effective date of the notice.

The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under section 49 of the RTA and that they used the rental unit for its stated purpose for at least 6 months.

Rent Increase

41 A landlord must not increase rent except in accordance with this Part.

Timing and notice of rent increases

42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first payable for the rental unit;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

Amount of rent increase

43 (1) A landlord may impose a rent increase only up to the amount

(a) calculated in accordance with the regulations,

(b) ordered by the director on an application under subsection (3), or

(c) agreed to by the tenant in writing.

Residential Tenancy Regulation 23, "**Additional rent increase other than for eligible capital expenditures**" reads as follows:

23 (1) A landlord may apply under section 43 (3) [*additional rent increase*] of the Act for an additional rent increase, other than for eligible capital expenditures, if one or more of the following apply:

(a) the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the residential property;

(b) the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the residential property, if the financing costs could not have been foreseen under reasonable circumstances;

.....

A landlord may apply to the director for an order approving a rent increase that is greater than the annual rent increase in the circumstances set out in regulation and further explained in

Policy Guideline 37, "Rent Increases" subsection D.²

I have considered the oral testimony and the documentary evidence presented by both the landlord and tenant. I find the landlord failed, on the balance of probabilities, to prove the Two-Month Notice was issued for a valid reason. My finding has two components that form the basis for my conclusion.

First, I find as fact, to support my conclusion that the landlord did not have a good faith intention to use the rental unit for the purpose stated in the Two Month Notice.

In the summer of 2021, the tenant and the landlord spoke, and the landlord indicated that she was purchasing the rental unit but did not intend to occupy the rental unit. After the conditions of sale were removed, the purchaser requested the seller issue a Two Month Notice to the tenant. The Notice was issued on December 17, 2021. On December 23, the landlord texts the tenant setting up a time to speak with him. She told the tenant she had transferred the "*natural gas, electricity and water*" but not wifi or cable. Confused about the mixed messages, the tenant asks the landlord if her intention is to move into the unit. The landlord replied that she was "*contemplating*" working remotely.

After discussions and text messages with the landlord, the tenant, alarmed at the prospect of eviction half-way through the school year and disruption to his children's established routine, filed a notice for dispute resolution. In the hearing the landlord articulated her disapproval and disappointment with the tenant's decision to file application for dispute resolution. The landlord stated she was simply trying to be upfront and transparent about the situation (costs) with the tenant and tried to work with him. She investigated the possibility of purchasing another property as a rental option with a closer monthly rent equivalent to the \$1300 he was paying. This option was not viable because of the purchase price.

In the conversations with the tenant the landlord makes no mention of plans to move into the rental unit. Rather, she is clear about the problem: "I am not in a position to offset the ongoing costs of the home you are living in."

The landlord further writes, "The best I could do is extend your notice by 30 or 60 days (from the notice from [C]) to give you more time to look."

Policy Guideline 2A (e) requires the landlord to use the rental unit for the stated purpose (landlord's use, in this case) "for at least six months beginning within a reasonable period after the effective date of the notice". [emphasis added] The effective date of the Notice was February 28, 2022 . The landlord was willing to extend the notice by an additional 30-60 days to give the tenant the opportunity of look for a different rental property again, demonstrating no clear intention to occupy the rental unit "within a reasonable period after the effective date of the notice" or, if in fact, she was planning to move into and occupy the rental unit ever. It is only after the tenant files for dispute

² <https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/policy-guidelines>

resolution that the landlord decides that she wants to move into the rental unit and states she can move to BC within two (2) weeks.

I find that the Notice was issued to the tenant, not because the landlord intended to occupy the rental unit; she was only "contemplating" doing so. Rather the Two Month Notice was a fail-safe mechanism that left her options open should she find that she was "not in a position to offset the ongoing costs of the home" the tenant was living in. Based on the evidence presented, I find on a balance of probabilities, that the landlord fails to meet the burden to show a "good faith" intention.

Second, to support my finding that there is evidence of an ulterior motive or tenancy on the part of the landlord, I find the following as fact:

In this case, the landlord owns three (3) or more properties in the same complex. Two of the properties are long term rentals and the third property is a short-term rental rented through a vacation rental site.

The tenant argued that the landlord owns is a comparable unit in the complex that is offered as a vacation rental. He entered into evidence the vacation rental posting. The tenant asserts the vacation rental is a viable option for the landlord to occupy. The only difference is that he pays \$1300 in rent and the vacation rental rents out for at a significantly higher monthly rent.

The landlord argued that she forgot to take down the vacation rental advertisement and presently there are tenants renting until June 30, 2022. Although the landlord did not provide a tenancy agreement as evidence of the rental, this information is in keeping with her vacation rental advertisement indicating she is open to rent the property daily, weekly, monthly or for a longer term. The landlord did not dispute the tenant's assertion that the vacation rental property is a comparable rental unit that she could occupy, rather, she argues that the rental unit is not vacant – occupied in the short term under a fixed rental agreement that prohibits her from terminating the tenancy early.

As per the Policy Guideline 2A, "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". Based on the information available, I find the vacation rental is a comparable rental unit although not currently vacant. This unit is, however, offered on a short-term rental basis (daily, weekly, monthly) at a higher rent and will be available after June 30, 2021.

I note the landlord offered no explanation regarding the sudden urgency to move provinces. Evidence shows she was flexible and willing to work with the tenant - what changed was the tenant's decision to file an application for dispute resolution, which clearly incensed her. Given the facts as presented, perhaps a more reasonable or appropriate option is for the landlord to defer plans to move provinces until the vacation rental comes available rather than displace a long-term tenant with three children.

Based on the facts presented, I find that this vacation/short term rental unit is a comparable rental unit that, while not immediately available, will be vacant after June 30, 2021.

As per s. 43, rent increases are set in legislation. The *Residential Tenancy Act* and Regulations establishes the percentage of increase, timing, and notice period and a landlord must follow the correct process to ensure their increase is valid. The provincially mandated rent increase freeze expired January 1, 2022, and the 2022 maximum rent increase percentage was set at 1.5% .

The tenant stated that the landlord has a pattern of issuing Notices and submitted into evidence a written statement from Tenant XX. In her written statement, Tenant XX wrote the landlord, in a phone conversation, increased her rent from \$1338.00 per month to \$1750.00 per month effective June 1, 2021 and that the landlord issued a notice effective **May 31, 2022**.

The landlord dismissed Tenant XX's evidence stating that the tenant was elderly, had health issues, and was easily confused. I note that while the landlord denied issuing a Notice to Tenant XX, she did not deny a rent increase took effect June 1, 2021, during the rent freeze when rent increases were prohibited in the Province of British Columbia. Further, while the landlord emphatically denied issuing Tenant XX a written Notice, she did not testify that she never discussed the possibility of issuing a Notice in the phone call described by Tenant XX about the rent increase.

Notwithstanding the above, other than the written statement, the tenant provided no supplementary evidence to show the landlord either ended or threatened to end tenancies in the past on the premise to occupy the rental unit without occupying it for at least 6 months or that the other properties purchased had a similar condition of sale, for example, if it was a condition of sale for the vacation rental property. If this was the case, it may demonstrate the landlord is not acting in good faith in the present case.

While I assign little persuasive weight to written testimony that is not subject to cross examination, I am mindful of the parallels. Notably, the landlord's candid conversations regarding her concerns that the expenses exceeded the rent paid by the tenant. The landlord estimates monthly expenses run approximately \$1759.08 per month and the tenant pays \$1300.00 per month, about a \$460 shortfall between expenses and rent. Similarly, Tenant XX's rent increased on June 1, 2021 by about \$450.00.

As per s. 49(1)(c) tenants and landlords can agree to rent increases in excess of the 1.5% rent increase that took effect January 1, 2022. That agreement, however, must be in writing and signed by both parties. If the agreement is not signed and in writing, the affected tenant has the option to file an application for dispute resolution.

In sum, to raise rent above the legal standard (annual) amount, the landlord must either have the tenant's written agreement **or**, in the alternative, apply to the RTB for either an Additional Rent Increase for Expenses (ARI-E) or an Additional Rent Increase for Capital Expenditures (ARI-C). I have attached a link for the landlord's review.³ The legislation provides the landlord with a legal mechanism to request a rent increase in excess of the legislated annual amount.

³ <https://www2.gov.bc.ca/gov/content/housing/tenancy/resident/tenant/tenant/during-a-tenancy/rent-increases/additional-rent-increase?keyword=andord&keyword=rent&keyword=increases>

The tenant offered to increase his monthly rent to \$1500.00 and pay for cable and internet. The landlord declined. At the hearing the tenant asked the landlord to negotiate a settlement, the landlord refused. In her words, the time for negotiation passed when the tenant filed for dispute resolution.

Based on a balance of probabilities, I find the landlord had an ulterior motive in issuing the Two-Month Notice. The landlord wanted to increase rent to cover her expenses. The tenant offered to increase the rent by \$200.00 per month and pay for cable and internet but the landlord declined the offer because the amount did not offset the landlord's expenses. The Two-Month Notice gives the landlord 'justification' for ending tenancy for a reason not tied to rent increases outside the allowable legislated increase.

In sum, my findings are based on the two considerations –where a landlord has a good faith intention and no dishonest motive to end tenancy as per *Gichuru*. After careful regard to 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 discharged the onus proving the reason for ending the tenancy is both valid and sufficient.

The landlord acknowledged she was simply "contemplating" working remotely. The landlord offered a one- or two-month extension to allow the tenant time to find a new rental unit.

The landlord considered the purchase of another property for the tenant to move into – one that she could rent to the tenant for a similar rent because she *"[I] was concerned that the costs would exceed what [you] were paying historically"*.

There is no urgency for the landlord to move provinces and come July 1, 2022, the vacation rental unit, a comparable unit in the same complex, comes available. Again, given the facts, it seems an appropriate option open to the landlord if she truly intends to permanently relocate. The landlord was not resolved to relocate; again, her resolve came after the tenant filed for dispute resolution.

I am also aware of the wording used by the landlord's employer in the letter. The letter dated February 14, 2022, states, "This position has the flexibility to perform work remotely." [emphasis added] The wording is vague leaving out key information such as, for example, if this flexibility is limited to one day per week or five days per week. I find this significant since the landlord testified that she currently rents and could relocate to British Columbia within two weeks suggesting the landlord does not have to provide notice to her landlord or, that she possibly intends to retain her rental unit in Alberta because of onsite work commitments.

I must caution the landlord, the intent of s. 49(5) is not to displace a tenant so a landlord can "hold and keep for use" a rental unit, for example, as a part-time residence. The intention of s. 49(5) is for a landlord "to occupy", in other words, "live there" [in the rental unit] "for residential purposes" on a permanent basis.

Section 51 sets out tenant compensation if the landlord fails to use the property as stated in the Two Month Notice. Specifically, s. 51(2) states that the landlord (or purchaser) must compensate the

tenant “an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement” if the landlord does not establish the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice.

The Two Month Notice is cancelled. I order the tenancy to continue until ended in accordance with the *Act*.

Conclusion

The Two Month Notice issued by the landlord is cancelled due to insufficient evidence the reason for ending the tenancy is valid and sufficient.

For the benefit of both parties, I am including a copy of *A Guide for Landlords and Tenants in British Columbia* with my decision⁴.

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 30, 2022

Residential Tenancy Branch