



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

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## **DECISION**

Dispute Codes: CML FFT

### **Introduction**

The tenants dispute a Two Month Notice to End Tenancy For Landlord's Use of Property (the "Notice") pursuant to section 49(8) of the *Residential Tenancy Act* ("Act"). The tenants also wish to recover the cost of the application filing fee.

A dispute resolution hearing was convened June 13, 2022. One of the tenants, the landlord, and the landlord's friend (who assisted the landlord, as her first language is not English), attended the hearing. The tenant and landlord were affirmed, and Rule 6.11 of the Residential Tenancy Branch's *Rules of Procedure* was explained to the parties.

### **Preliminary Issue: Tenants' Video Evidence**

Other than a copy of the Notice, five videos were submitted to the Residential Tenancy Branch by the tenant. He testified that he provided these to the landlord on a USB thumb drive. The landlord and her friend explained that they could not open the videos or otherwise make them work. (The landlord briefly remarked that she could not access these with her iPad.)

Rule 3.10.5 of the [Rules of Procedure](#) states that "The format of digital evidence must be accessible to all parties.) Further, the rule requires that "Before the hearing, a party providing digital evidence to the other party must confirm that the other party has playback equipment or is otherwise able to gain access to the evidence." This does not appear to have occurred.

The rule also states that "If a party or the Residential Tenancy Branch is unable to access the digital evidence, the arbitrator may determine that the digital evidence will not be considered." In this case, as the tenants did not obtain confirmation from the respondent landlord that they could access the video evidence, it is my finding that this evidence shall not be accepted or considered. (That said, the tenant raised a few issues during the hearing which were related to what was contained in the videos.)

### Issues

1. Are the tenants entitled to an order cancelling the Notice?
2. If not, is the landlord entitled to an order of possession?
3. Are the tenants entitled to recover the cost of the application filing fee?

### Background and Evidence

Relevant evidence, complying with the *Rules of Procedure*, was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issues of this dispute, and to explain the decision, is reproduced below.

The tenancy began on January 1, 2016. Monthly rent is \$1,050. There is a copy of a written tenancy agreement in evidence. The rental unit is in the lower part of the house.

The tenant testified that they were served a copy of the Notice in person on February 28, 2020. A copy of the first two pages of the Notice were in evidence.

The landlord testified that she and her husband are retired. They purchased the house in 2013. There are two legal suites in the house. There's also a very small mother-in-law suite. Regarding the Notice, the landlord testified that it was given because they intend to take the rental unit back for their own personal use. The landlord's husband has Alzheimer's and is unable to do many of the things that he used to. A few things that he is still able to do include wine making and gardening.

Previously, the winemaking took place in the garage. However, the garage gets quite hot in the summer and is not an ideal place for the husband to be in. It is the landlord's intention to move the winemaking into the rental unit. In addition, the landlord would like to be able to use the kitchen in the rental unit for baking, cooking, and canning, and would like to keep an eye on her husband through the window into the garden. The landlord enjoys making perogies and cabbage rolls for the local Polish deli. Also, the landlord would like to have additional room for her family to stay in when they're visiting. Last, the landlord would simply like to have less people in the house overall.

The tenant disputed that the garden could be seen through the window. He said that perhaps only one quarter of the garden was in fact viewable, and that the stairs obstructed the rest of the view. The tenant further submitted that the rental unit is very small, and that it would be very hard for the landlord and her husband to move down into and live in the rental unit.

It is the tenants' position that the landlord is simply attempting to evict them to increase the rent. The tenant testified that the landlord tried to increase the rent by \$50 in January 2020. Without having provided any proper notice, this rent increase never took place. In March 2020, the landlord again attempted to increase the rent by \$50, but there was a rent freeze in place at the time. In late 2020 the landlord advised the tenant that the rent was going up \$50 or else they would have to evict the tenants. It was then in late February 2022 that the landlord served the Notice on the tenants.

The tenant testified that his rental unit is paying the lowest rent of all the landlord's rental units. This is mostly because they have been there the longest. In summary, the tenant argued that the notice is not being issued in good faith because the landlord is "attempting to capitalize on the rent boom."

By way of brief rebuttal, the landlord justified that they intend to use the rental unit for personal use, primarily that of winemaking. She also reiterated that she intends to make cabbage rolls in the downstairs kitchen; the smell is particularly not nice in the upstairs kitchen when this occurs.

In his brief closing remarks, the tenant reiterated that he disagrees with the meaning of occupy as intended by the landlord. He argued that in his mind, "occupied" means to be living there on a regular basis.

### Analysis

In this dispute, the Notice was issued under section 49(3) of the Act, which 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." This is also the reason stated on page two of the Notice. The tenants dispute that the Notice is being issued in good faith.

"Good faith" is a legal concept and means that a party is acting honestly when doing what they say they are going to do, or are required to do, under the Act. It also means there is no intent to defraud, act dishonestly or avoid obligations under the legislation or the tenancy agreement.

In *Gichuru v. Palmar Properties Ltd.* (2011 BCSC 827) the Supreme Court of British Columbia held that a claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the notice to end tenancy. To reiterate, when the issue of an ulterior motive or

purpose for ending a tenancy is raised, the onus is on the landlord to establish that they are acting in good faith (see *Baumann v. Aarti Investments Ltd.*, 2018 BCSC 636). In disputes where a tenant argues that the landlord is not acting in good faith, the tenant may substantiate that claim with evidence.

In this case, the tenant argued that the eviction is being driven by the landlord's intention to rent out the rental unit at a higher price. He referred to three previous attempts by the landlord to increase the rent: in January 2020, in March 2020, and in late 2021. There is no evidence of any other attempts throughout the entire tenancy, which is now almost six-and-a-half years old, by which the landlord attempted to raise the rent. (The tenants agreed to a rent increase in 2017 and did not otherwise dispute this increase; as such this rent increase is of little evidentiary weight in terms of the tenants' argument.)

The tenant explained that the landlord's husband's health cannot be quite as bad as it is being described, as the husband has been seen moving the lawn and trimming the lawn with a weed wacker. The landlord or her friend very briefly said that the husband is still able to do these activities, notwithstanding his disease.

In carefully considering the parties' evidence, I am not persuaded that the landlord has issued the Notice in bad faith. The previous attempts to raise the rent are infrequent and not, in my mind, sufficiently persuasive for me to find that the landlord intends to evict the tenants merely to then re-rent the rental unit at a higher rent. On this point, the tenant spoke about their rental unit being the lowest paying of the landlord's rental units, but he did not provide any evidence to show what the other rental units' rents are. Last, simply because the landlord's husband can cut and trim the grass does not, by itself, negate the fact that he has Alzheimer's and will undoubtedly require additional care and observation. To summarize: I find that the landlord and her spouse intend to occupy the rental unit in good faith.

Next, I turn to the meaning of "occupy." The tenant argued that occupancy ought to mean that the landlord and spouse are actively living in the property, if not staying there overnight. He disputed that occupancy includes simply doing hobbies like winemaking and cooking. With respect, I must disagree.

*Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member* (version July 2021) on page 3 speaks to the situation as it is in this dispute, where a landlord is reclaiming a rental unit to be used as a living space. This section of the policy states the following:

If a landlord has rented out a rental unit in their house under a tenancy agreement, the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor, and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room or using a carriage home or secondary suite on the residential property as a recreation room.

In other words, that the landlord and her husband intend to use the rental unit for cooking, canning, baking, and winemaking are fully acceptable uses and wholly within the meaning of “occupy” as contemplated by the Act. They are not required to actively live and sleep within the rental unit.

Taking into careful consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find that the landlord has proven the ground on which the Notice was issued. Accordingly, the Notice is upheld, and the landlord is, pursuant to section 55(1) of the Act, granted an order of possession. It is noted that the Notice complies with section 52 of the Act in form and content.

The order of possession is issued in conjunction with this Decision, to the landlord. It is the landlord’s responsibility to serve a copy of this order on the tenants.

Accordingly, the tenants’ application is dismissed, without leave to reapply. They are not entitled to recover the cost of the application filing fee.

Pursuant to [section 51\(1\) of the Act](#), the tenants are 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.

Last, the landlord should be aware that she is required to use the rental unit for the reason stated in the Notice, and that she must do so for a period of at least 6 months’ duration, beginning within a reasonable period after the tenants vacate the rental unit. Failure to do so may give rise to a claim for compensation by the tenants under section 51(2) of the Act.

Conclusion

**The application is hereby dismissed, without leave to reapply.**

**The Notice, served on February 28, 2022, is hereby upheld and the landlord is issued an order of possession of the rental unit.**

This decision is final and binding on the parties, and it is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal this decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

Dated: June 13, 2022

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Residential Tenancy Branch