



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **CNL, FFT**

### Introduction

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

1. Cancellation of the Landlord's Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") pursuant to Sections 49 and 62 of the Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Property Manager and Legal Counsel, and the Tenants attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Landlord's Two Month Notice served by registered mail on May 3, 2022, Tenants confirmed receipt on May 7, 2022;
- the Tenants' Notice of Dispute Resolution Proceeding package and evidence served by registered mail on June 3, 2022, Canada Post Tracking Number noted on cover sheet of decision, Landlord confirmed receipt, deemed served on June 8, 2022; and,

- the Landlord's evidence package was personally served on September 16, 2022, Tenants confirmed receipt.

Pursuant to Sections 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

### Issues to be Decided

1. Are the Tenants entitled to cancellation of the Landlord's Two Month Notice?
2. If the Tenants are unsuccessful, is the Landlord entitled to an Order of Possession?
3. Are the Tenants entitled to recovery of the application filing fee?

### Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this periodic tenancy began on July 1, 2007. Monthly rent is \$1,009.93 payable on the first day of each month. A security deposit of \$437.50 was collected at the start of the tenancy and is now held by the Property Management company.

The reason to end tenancy noted on the Landlord's Two Month Notice was that the child of the Landlord or the Landlord's spouse will occupy the unit. The effective date on the Two Month Notice was July 31, 2022. The Tenants' uploaded Two Month Notice was not signed or dated by the Landlord, and I permitted the Landlord to upload their copy of the Two Month Notice.

The Landlord testified that the owner assigned the premises to a family corporation. The assignment commencement date was December 1, 2020 and the Shopping Centre Lease (the "Lease") has a ten-year term with options to extend.

The Landlord provided the BC Company Summary which lists the name of the company and the incorporation number. Director information is provided on the company summary and lists the husband and wife as the sole directors, and as Legal Counsel submits, shareholders. The Landlord relies on Clause B and Section 3.4 of the Lease showing that the numbered company, which is a family corporation, is acting as the owner's agent for this tenancy. Those provisions state:

**BACKGROUND:**

...

- B. *The Vendor has agreed to demise and lease to the Tenant, and the Tenant has agreed to lease from the Landlord, the Centre (as defined below) on the terms and subject to the conditions provided in this Lease, such that the Tenant will be the sole tenant of the Centre, and become the sublandlord and/or head-tenant in relation to the existing and future retail commercial tenants and residential tenants during the Term (as defined below).*

...

**3.4 Interposition of Tenant as Sublandlord / Head Tenant**

*Further to Recital B. above, as and from the Commencement Date, the Landlord assigns to the Tenant, and the Tenant assumes from the Landlord, all of the Landlord's right, title and interest, and landlord, both at law and in equity in and to all of the existing retail commercial leases and residential tenancy agreements affecting the Centre or any portions thereof, in accordance with the provisions of Article 3 of Schedule J.*

Landlord's Legal Counsel submits that the Landlord fits the definition of 'landlord' in Section 1 of the Act. She also submits that the Landlord encompasses the definition of a 'family corporation' under Section 49 of the Act.

The Tenants testified that the Landlord does not have owner's privilege, as they note there are many sections of the Lease where they cannot act "*without the prior written consent of the Landlord.*" They say the Landlord does not have absolute control and all rights. The Tenants pointed out that many sections of the Lease are intentionally deleted or about 48 pages are omitted which to them represents that the Landlord is not dealing with them in good faith.

The Tenants stated that they were intentionally misled by the property management company as fraudulently representing themselves as "*agents of the new owners*". The Tenants said when they received the Two Month Notice, they contacted the owner to ask if he had sold the property. He assured them that the property was not purchased. In the past, the Tenants have always dealt with property management companies, so a

new property management company announcing their presence did not send up red flags to them.

The Tenants are the only family living in the building. Their son has an obvious disability and uses a service dog. The Tenants said they experienced a lot of issues with noise when the commercial space below them was doing renovations. At the same time, they were installing a PA system and there was a lot of music and noise. The Tenants stated the Landlord was breaking the city bylaws and the Tenants did call the police. The Tenants said they tried working with the property management company to get them to follow the bylaws. They were going to have a meeting about the noise, but instead of coming back to the Tenants with a response to the noise problem, the Landlord issued the Two Month Notice. That was their solution to the noise and of the Tenants complaining.

The Landlord uploaded documentary evidence from one of the directors of the company to the property manager indicating the plans for a close family member to be moving into the rental unit. The husband director reports that *"It is family practice and the Landlords expect all of their children to become independent after graduating."* The son of the Landlord also wrote a letter indicating his desire and need to live in the rental unit. The Landlord believes it is reasonable to move their son into the rental unit above the store as this will make it easier for him to balance work and university tasks. Legal Counsel submits that an agent of the Landlord does not need to purchase the residential property to function as an agent.

### Analysis

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 49 of the Act is the relevant part of the legislation for this matter. It states:

### ***Landlord's notice: landlord's use of property***

**49** (1) *In this section:*

***"close family member" means, in relation to an individual,***

- (a) *the individual's parent, spouse or child, or*
- (b) *the parent or child of that individual's spouse;*

**"family corporation"** means a corporation in which all the voting shares are owned by

- (a) *one individual, or*
- (b) *one individual plus one or more of that individual's brother, sister or close family members;*

**"landlord"** means

- (a) *for the purposes of subsection (3), an individual who*
  - (i) *at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and*
  - (ii) *holds not less than 1/2 of the full reversionary interest, and*
- (b) *for the purposes of subsection (4), a family corporation that*
  - (i) *at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and*
  - (ii) *holds not less than 1/2 of the full reversionary interest;*

...

(2) *Subject to section 51 [tenant's compensation: section 49 notice], a landlord may end a tenancy*

- (a) *for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be*
  - (i) *not earlier than 2 months after the date the tenant receives the notice,*
  - (ii) *the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and*
  - (iii) *if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or*

...

- (3) *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.*
- (4) *A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.*
- ...
- (7) *A notice under this section must comply with section 52 [form and content of notice to end tenancy] and, in the case of a notice under subsection (5), must contain the name and address of the purchaser who asked the landlord to give the notice.*
- (8) *A tenant may dispute*
  - (a) *a notice given under subsection (3), (4) or (5) by making an application for dispute resolution within 15 days after the date the tenant receives the notice, or*
- ...

The Tenants were served with the Two Month Notice on May 7, 2022. The Tenants applied for dispute resolution on May 18, 2022 which was within 15 days after the date they received the Two Month Notice.

Legal Counsel for the Landlord submitted that the Landlord is a family corporation, and its sole directors and shareholders are husband and wife. She also submitted that the Landlord satisfies the definition of landlord under Section 1 of the Act. As this is a Section 49 notice to end tenancy, I prefer to focus my analysis on the meanings within that section. I do not find that the Landlord fits the definition of landlord under Section 49 as the Landlord is not an individual. I find that the Landlord is a family corporation pursuant to Section 49(4) of the Act.

Form #RTB-32, the Two Month Notice, requires the Landlord to state the grounds for ending the tenancy. The property management company inputted that the child of the landlord would be occupying the rental unit. I find the property management company inadvertently entered the reason as the Landlord's close family member would be occupying the rental unit rather than '*The landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person,*

*intends in good faith to occupy the rental unit'*. Pursuant to Section 68(1)(b) of the Act, I amend the notice as I am satisfied that in the circumstances, it is reasonable to make this amendment.

Section 52 of the Act states:

***Form and content of notice to end tenancy***

- 52** *In order to be effective, a notice to end a tenancy must in writing and must*
- (a) be signed and dated by the landlord or tenant giving the notice,*
  - (b) give the address of the rental unit,*
  - (c) state the effective date of the notice,*
  - (d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,*
    - (d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and*
  - (e) when given by a landlord, be in the approved form.*

The Landlord's Two Month Notice uploaded by the Landlord was signed and dated. Further to my amendment, I find that the Landlord's Two Month Notice complies with the form and content requirements of Section 52 of the Act.

The Tenants made claims that they did not believe the Landlord was acting in good faith. RTB Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member, assists parties to understand issues that are likely to be relevant in this regard.

***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.*

*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. 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 Landlord submits that a close family member intends to move into the rental unit. In Legal Counsel's submissions, the husband director reports that *"It is family practice and the Landlords expect all of their children to become independent after graduating."* The son is an employee in the family-owned grocer downstairs, and the Landlord believes it is reasonable to move their son into the rental unit above the store as this will make it easier for him to balance work and university tasks. The Tenants' thoughts that the issuance of the Two Month Notice was the Landlords way to deal with the Tenants complaining of noise coming from the grocery store renovations may be true, but right now, that is just conjecture.

I find based on the totality of evidence from both parties, and on a balance of probabilities, that the Landlord meets the good faith requirement that their son will be moving into the rental property, and consequently I dismiss the Tenants' application to cancel the Two Month Notice without leave to re-apply.

As the Tenants were not successful in their application, I must now consider if the Landlord is entitled to an Order of Possession.

### ***Order of possession for the landlord***

- 55** (1) *If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if*

- (a) *the landlord's notice to end tenancy complies with section 52 [form and content of notice to end tenancy], and*
- (b) *the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.*

I previously found that the Two Month Notice submitted into documentary evidence complies with Section 52 of the Act and I uphold the Landlord's Two Month Notice. Pursuant to Section 55(1) of the Act, I grant an Order of Possession to the Landlord which will be effective on October 31, 2022 at 1 p.m. after service on the Tenants.

As this tenancy has ended based on the Two Month Notice served, the Tenants are entitled to one month's rent payable under the tenancy agreement. Also, I caution the Landlord to regard Section 51(2) of the Act regarding: **Tenant's compensation** after a Section 49 notice, which comes into play when the Landlord does not fulfil the stated purpose in their notice.

As the Tenants were not successful in their claim, I do not grant them recovery of the application filing fee.

### Conclusion

I dismiss the Tenants' application to cancel the Landlord's Two Month Notice.

The Landlord's Two Month Notice is upheld, and I grant an Order of Possession to the Landlord effective on October 31, 2022 at 1 p.m. The Landlord must serve this Order on the Tenants as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the British Columbia Supreme 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 Act.

Dated: October 18, 2022

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Residential Tenancy Branch