



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to ss. 49 and 62(2) cancelling a Two-Month Notice to End Tenancy signed on April 30, 2022 (the “Two-Month Notice”); and
- return of her filing fee pursuant to s. 72(1).

C.O. appeared as the Tenant. L.H. appeared as Tenant’s counsel. X.L. appeared as counsel for the Landlord.

The Landlord did not attend the hearing. J.S. attended and was identified as the Landlord’s agent. Tenant’s counsel raised issue with J.S.’s attendance as a witness as she had been provided notice prior to the hearing. The issue was addressed by Landlord’s counsel when she confirmed that J.S. would not be providing direct evidence during the hearing and was merely attending as an observer. Based on Landlord’s counsel submission, J.S. provided no evidence during the hearing. However, at the end of the hearing after submissions had concluded J.S. attempted to speak to the matter. Both due to submissions from Landlord’s counsel and as the hearing had concluded, I did not permit J.S. to provide submissions.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to

s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

- 1) Should the Two-Month Notice be cancelled?
- 2) If not, is the Landlord entitled to an order of possession?
- 3) Is the Tenant entitled to the return of her filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The current tenancy agreement started on July 15, 2020.
- Rent of \$4,000.00 is due on the first day of each month.

A copy of the tenancy agreement was put into evidence. I was advised by the Tenant that she had originally moved into the rental unit on July 15, 2017 and that as part of the original tenancy she was a co-tenant with her former husband. I was further advised by the parties that Landlord's mother formerly owned the property and was the original landlord.

Landlord's counsel advised that the Two-Month Notice was served on the Tenant by way of regular mail sent on May 26, 2022 and that a copy was also delivered to the property on May 30, 2022 by an agent for the Landlord. The Tenant confirmed receiving a copy by way of mail on May 30, 2022 but denied that a paper copy was brought to the property by an agent.

A copy of the Two-Month Notice was put into evidence by the parties. It indicates that it was issued on the basis that "[t]he rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)". The effective date in the Two-Month Notice provided by the Tenant is listed as July 31, 2022.

Landlord's counsel submitted that the Landlord is a university student in the United States and that she was taking a break from her studies beginning in January 2023 until June 2023, after which point she would be returning to the United States to finish her degree. I was directed to evidence provided by the Landlord from her university, which indicates she is on leave from January 4, 2023 until June 6, 2023. It was submitted that the Landlord intended to occupy the rental unit during the gap in her studies.

Landlord's counsel did not specify why the Landlord was taking a break in her studies nor is there a statement from the Landlord explaining the circumstances upon which she seeks to end the tenancy. Landlord's counsel further confirmed that the Landlord is, as of the date of the hearing, in the United States for her classes and that she has not purchased plane ticket to Canada. Landlord's counsel further directed me to evidence from the summer of 2022 in which the Landlord flew to BC and stayed in a hotel while visiting.

I am further advised by Landlord's counsel that the Landlord's sister would be attending secondary school in BC beginning in September 2023. At that time, I am told the Landlord's mother (and the former owner) would be occupying the rental unit with the Landlord's sister. The Landlord's evidence includes documents pertaining to her sister's current enrollment and her application to study in BC.

Tenant's counsel argues that the Landlord is acting in bad faith in issuing the Two-Month Notice. Tenant's counsel directed me to an affidavit from the Tenant. It was submitted that issues arose in the tenancy following water ingress into the basement in December 2020. Counsel submitted that at that time the Landlord raised issue with respect to the Tenant's rent and the cost of the repairs.

I am told by Tenant's counsel that the Landlord issued a 10-Day Notice to End Tenancy, with the Tenant's affidavit indicating that occurred in March 2021. I was directed a decision from the Residential Tenancy Branch dated July 14, 2021 respecting the Tenant's application to dispute the 10-Day Notice as well as seek other relief.

Tenant's counsel argued that the 10-Day Notice was successfully disputed and that no arrears in rent were ordered. I am advised that the Landlord filed for judicial review of that decision, with the reasons for judgement respecting the judicial review, dated April 4, 2022, being put into evidence by the Tenant. Tenant's counsel advised that the matter was remitted to the Residential Tenancy Branch for reconsideration but that that

has not been done as the parties have not been able to agree to the terms of the order made by Madam Justice Fitzpatrick on April 4, 2022.

Tenant's counsel held up the repair issues, the 10-Day Notice, the rent demand from the Landlord, and the hold up in finalizing the terms of the order following the judicial review as proof to the Landlord's bad faith in issuing the Two-Month Notice.

Tenant's counsel further argued that the Landlord has not provided proof that she has the legal status to reside within Canada during the gap in her studies. I am told that Tenant's counsel requested this disclosure from the Landlord but that none was provided. Landlord's counsel submitted at the hearing that the Landlord is a Canadian citizen. Tenant's counsel argued that that was a bare submission without support of evidence.

Tenant's counsel also argued that the Landlord's sister does not qualify as a "close family member" and that submissions with respect to the sister are a red herring. I was directed to the Landlord's evidence respecting the sister's application to secondary school, which shows it was signed by the sister and the Landlord's mother on 10/04/2022. Tenant's counsel further argued that there was no evidence to support that the Landlord's sister has, in fact, been accepted for secondary studies.

Analysis

The Tenant seeks an order cancelling the Two-Month Notice.

The Landlord advises and I accept that the Two-Month Notice was served via regular mail sent on May 26, 2022, which the Tenant acknowledged receiving on May 30, 2022. I find that the Two-Month Notice was served in accordance with s. 88 of the *Act* and was received by the Tenant on May 30, 2022 as acknowledged at the hearing.

Pursuant to s. 49(3) of the *Act*, a landlord may end a tenancy with two months notice where the landlord or a close family member intends, in good faith, to occupy the rental unit. Section 49(1) of the *Act* defines a close family member as an individual's parents, spouse, or child or the parent or child of that individual's spouse. When a tenant receives a notice issued under s. 49(3) of the *Act*, they may either accept the end of the tenancy or may file an application disputing the notice within 15 days of receiving it as per s. 49(8). Where a two-month notice to end tenancy has been disputed, the burden of demonstrating that it was issued in compliance with the *Act* rests with the landlord.

Upon review of the information on file and in consideration of the Rule 2.6 of the Rules of Procedure, I find that the Tenant filed her application disputing the Two-Month Notice on June 2, 2022. Accordingly, I find that the Tenant filed her application within the 15-day window imposed by s. 49(8) of the *Act*.

As per s. 49(7) of the *Act*, all notices issued under s. 49 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the Two-Month Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date as July 31, 2022, sets out the grounds for ending the tenancy, and is in the approved form (RTB-32).

In this instance, I have little difficulty in cancelling the Two-Month Notice. The effective date of the Two-Month Notice is clearly set out as July 31, 2022. Despite this, the Landlord submits that she wishes to occupy the rental unit during a gap in her studies, which is to start on January 4, 2023. Though not explicitly stated within s. 49(3) of the *Act*, establishing that a notice issued under s. 49 was properly issued has secondary considerations as set out under s. 51(2) of the *Act*, namely in that the rental unit be occupied by the Landlord within a reasonable period of the effective date of the notice and for at least 6 months. I add that these are secondary considerations because failure on the Landlord's part to comply with the requirements set under s. 51(2) of the *Act* would likely result in the Tenant being entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement.

This interpretation is supported by Policy Guideline #2A, which provides guidance with respect to notices issued under s. 49(3) of the *Act*, where there is explicit mention of the 6-month occupancy requirement set by s. 51(2) of the *Act*, despite s. 49 being silent on the 6-month occupancy requirement. In other words, when a notice under s. 49(3) of the *Act* is issued, a landlord is required to demonstrate their good faith intention to occupy the rental unit within a reasonable period of the effective date of the notice and for at least 6 months.

Policy Guideline #50 provides guidance for what may be considered a reasonable period and stresses that this is context dependent but states the following:

A reasonable period for the landlord to begin using the property for the stated purpose for ending the tenancy is the amount of time that is fairly required. It will

usually be a short amount of time. For example, if a landlord ends a tenancy on the 31st of the month because the landlord's close family member intends to move in, a reasonable period to start using the rental unit may be about 15 days. A somewhat longer period may be reasonable depending on the circumstances. For instance, if all of the carpeting was being replaced it may be reasonable to temporarily delay the move in while that work was completed since it could be finished faster if the unit was empty.

In this instance, the Landlord has provided no evidence why the effective date of July 31, 2022 was set, which would appear to run contrary to the narrative that she was to occupy the rental unit during a gap in her studies from January to June 2023. There is no explanation from the Landlord why such a long period from August to December 2022, a period totalling 5 months, would be required for her to move into the rental unit. The Landlord's evidence indicates that she temporarily visited Vancouver in late August and early September 2022, but she has admittedly returned to the United States to continue her studies for the fall 2022 semester. I find that the Landlord has failed to demonstrate she would be occupying the rental unit within a reasonable period of the Two-Month Notice's effective date.

Based on the Landlord's evidence alone, the Two-Month Notice cannot be upheld. However, I would also note that the Two-Month Notice was not issued in a vacuum. The parties in this matter have been in the midst of a long-running dispute beginning in late 2020 or early 2021, the particulars of which have been adjudicated by the Residential Tenancy Branch, sent for judicial review, and were to be remitted to the Residential Tenancy Branch for reconsideration as per the order of Madam Justice Fitzpatrick from April 4, 2022. This context draws into question the Landlord's good faith in issuing the Two-Month Notice.

Policy Guideline #2A provides the following guidance with respect to the good faith requirement imposed by s. 49:

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.

I am cautious to discuss the prior dispute as it has yet to be determined, though Madam Justice Fitzpatrick herself notes the judicial review was of mixed success. No sooner had the review been granted, which did not go entirely in the Landlord's favour, the Landlord signed the Two-Month Notice on April 30, 2022 and served it via regular mail on May 26, 2022. It seems more likely than not that there is an ulterior motive to end the tenancy as soon as is practicable given the soured landlord-tenant relationship given the wider context in which the Two-Month Notice was issued.

Further, the Landlord has provided no explanation or rationale for why she would, out of the blue, take precisely 6 months out of her studies in the United States to move to Canada and occupy the rental unit. Was she stressed from her studies and needed a break? Did she wish to enjoy a mild winter? Was she going to pursue her passion of downhill skiing? I do not know as no explanation was provided other than she was taking a break from her studies.

I re-emphasize that the Landlord bears the burden of demonstrating her good faith intention to occupy the rental unit, which Policy Guideline #2A clarifies “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”. I find that the Landlord has failed to show her good faith intention to occupy the rental unit without ulterior motive.

Based on my findings that the Landlord has failed to demonstrate occupancy within a reasonable period of the effective date of the Two-Month Notice and failed to demonstrate her good faith intention, I find that the Two-Month Notice is of no force or effect.

I grant the Tenant’s application and hereby cancel the Two-Month Notice. The tenancy shall continue until ended in accordance with the *Act*.

Conclusion

The Two-Month Notice is cancelled and is of no force or effect. The tenancy shall continue until ended in accordance with the *Act*.

The Tenant was successful in her application. I find that she is entitled to the return of her filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant’s \$100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold \$100.00 from rent due to the Landlord on one occasion in full satisfaction of her filing fee.

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: October 14, 2022

Residential Tenancy Branch