



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNETC, FFT

### Introduction

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

- a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord called witness A.W.

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

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Both parties confirmed their email addresses for service of this Decision.

### Preliminary Issue- Service

Both parties agree that the tenant served the landlord with the tenant's application for dispute resolution and evidence via registered mail. I find that the above documents were served in accordance with sections 89 and 88 of the Act.

The landlord testified that the landlord's evidence was posted on the tenant's door on June 14, 2022. The tenant confirmed receipt of the landlord's evidence. I find that the landlord's evidence was served on the tenant in accordance with section 88 of the *Act*.

### Issues to be Decided

1. Is the tenant entitled to a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 1, 2015 and ended on September 30, 2021 pursuant to a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). Monthly rent in the amount of \$900.00 was payable on the first day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the Notice was personally served on the tenant on July 2, 2021. The Notice states that the landlord is ending the tenancy because the landlord or the landlord's spouse will occupy the unit.

The tenant is seeking 12 months' rent compensation under section 51 of the *Act*. The tenant testified that the landlord or the landlord's spouse did not move into the subject rental property.

Both parties agree that the landlord owns a house (the "main house"), which the landlord uses as a vacation property, and that the subject rental property is a coach house on the same property as the main house.

The landlord testified that she and her husband use the main house as a vacation property and normally reside in Alberta. The landlord testified that her husband has progressive multiple sclerosis and is declining rapidly. The landlord testified that her husband requires a private caregiver to help with day-to-day functioning. The landlord testified that she served the tenant with the Notice so that her husband's caregiver, who resides in Alberta, could stay in the coach house while she and her husband used their vacation property.

The landlord testified that while she had initially hoped her husband's caregiver would travel with them, when the caregiver was asked, the caregiver declined because of family commitments in Alberta.

The landlord testified that sometime in the Spring of 2022, though she was not sure on the date, she asked her nephew, witness A.F., who is a registered nurse, to move into the subject rental property to help care for her husband when they use their vacation home.

Witness A.F. testified that he is a registered nurse, and that in June of 2022 the landlord has him and his girlfriend, who is also a nurse, to move into the subject rental property. Witness A.F. testified that the agreement was for him and his girlfriend to pay the landlord \$900.00 per month in rent and to care for the landlord's husband whenever the landlord and her husband used their vacation property.

Witness A.F. testified that he moved into the subject rental property on July 1, 2022. The landlord testified that the subject rental property remained vacant from September 30, 2021 until July 1, 2022.

The landlord entered into evidence medical documentation stating that the landlord's husband has multiple sclerosis.

### Analysis

Section 51 of the *Act* states:

**51** (1)A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is 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.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2) If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

- (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

- (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Residential Tenancy Policy Guideline #50 states:

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. A landlord cannot reclaim the rental unit and then reconfigure the space to rent out a separate, private portion of it. In general, the entirety of the reclaimed rental unit is to be occupied by the landlord or close family member for at least 6 months. (See for example: *Blouin v. Stamp*, 2021 BCSC 411)

Residential Tenancy Policy Guideline #2A states:

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 sections 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.

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.

Based on the testimony of the landlord I find that at the time the Notice was served, the landlord and the landlord’s spouse had no intention of residing in the subject rental property or using it as part of their living accommodation. Based on the testimony of the landlord I find that the landlord and the landlord’s spouse have not used the subject rental property as part of their living accommodation and have not resided in the subject rental property.

I find that using the subject rental property for occasional use by a caretaker does not meet the occupancy requirement set out in PG #2A, as the landlord and/or the landlord spouse never resided in the subject rental property or to used it for their own use. Allowing a caretaker to use the subject rental property is not using the subject rental property for their own use as they are not residing in the subject rental property or using it as additional living space, the caretaker is.

Residential Tenancy Policy Guideline #50 states:

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.

Section 51(2) of the RTA is clear that a landlord must pay compensation to a tenant (except in extenuating circumstances) if they end a tenancy under section 49 and do not take steps to accomplish that stated purpose or use the rental unit for that purpose for at least 6 months.

Based on the testimony of the landlord and witness A.W., I find that the subject rental property was left empty and was not used for the purpose stated on the Notice, for nine months. Even if using the subject rental property for occasional use by a caregiver met the definition of occupy under the *Act*, I find that the nine-month vacancy was longer than was fairly required in the circumstances to accomplish the stated purpose for ending the tenancy. I find that the use stated on the Notice could have reasonably occurred sooner than nine months.

I find that the landlord's failure to make proper enquiries with her husband's caregiver about the caregiver's willingness to accompany the landlord and her husband on vacation, does not constitute an extenuating circumstance under section 51(3) of the *Act*. Failure to complete due diligence before serving a notice to end tenancy is not an extenuating circumstance.

As I have found that the landlord and the landlord's spouse did not occupy the subject rental property and that the landlord's caretaker (witness A.W.) did not move into the subject rental property within a reasonable period of time after the tenancy ended, pursuant to section 51(2) of the *Act*, I find that the tenant is entitled to a monetary award equivalent to 12 months' rent, in the amount of \$10,800.00.

As the tenant was successful in this application for dispute resolution, I find that the tenant is entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

### Conclusion

I issue a Monetary Order to the tenant in the amount of \$10,900.00.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that 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 *Residential Tenancy Act*.

Dated: November 17, 2022

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Residential Tenancy Branch