



# Dispute Resolution Services

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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 s. 49 cancelling a Two-Month Notice to End Tenancy signed on June 20, 2022 (the “Two-Month Notice”); and
- return of his filing fee pursuant to s. 72.

J.K. appeared as the Tenant. J.P. appeared as the Landlord and was joined by her daughter, S.H.. The Landlord was represented by counsel, F.Q..

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. 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 his 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 Tenant moved into the rental unit on July 1, 2020.
- Rent of \$2,400.00 is due on the first day of each month.
- A security deposit of \$1,200.00 was paid by the Tenant.

A copy of the tenancy agreement was put into evidence by the parties. I am told by the parties that the rental unit is an upper unit with three-bedrooms and that there is a lower rental unit, which the Landlord's daughter says is a bachelor suite.

The Landlord's daughter testified that she posted the Two-Month Notice to the Tenant's door on June 20, 2022. The Tenant acknowledged receiving it on June 20, 2022. I was provided with a copy of the Two-Month Notice by the parties. It indicates an effective date of August 31, 2022 and that it was issued on the basis that the rental unit would be occupied by the Landlord or the Landlord's spouse.

Landlord's counsel submitted that the Landlord intended to occupy the rental unit. I was directed to a letter from the Landlord's physician dated March 24, 2022, which indicates that the Landlord is of advanced age and in frail health. The letter from the physician indicates the Landlord is currently living with her daughter.

Landlord's counsel advised that one of the Landlord's daughters, who also lived with the Landlord, passed away recently. It is submitted that the Landlord wishes to reoccupy the rental unit to be away from the house in which her daughter passed away. The letter from the Landlord's physician indicates that the Landlord's mental health has deteriorated following the death of her daughter and opines that it would be of therapeutic benefit if she were to move out of her current home to avoid painful triggers which "otherwise causing severe symptoms of post-traumatic stress disorder".

It was further submitted that the three-bedroom rental unit was ideal as it would permit the Landlord space to hire a live-in caregiver. It was argued the lower suite was not suitable as it had insufficient space to accommodate a caregiver for the Landlord.

I was advised by the parties that this is not the first time the Landlord issued a two-month notice to end tenancy. Both parties provided me a copy of a decision dated July 9, 2021 with respect to a previous application in which the Tenant disputed a prior two-month notice to end tenancy. The previous notice to end tenancy was cancelled. The Landlord's written submissions argues that the arbitrator failed to consider the Landlord's position in that matter.

The Tenant argued that present Two-Month Notice was not issued in good faith and submitted that it made little sense for an elderly person to live in an upper rental unit on their own. The Tenant further argued that the present notice to end tenancy is largely a continuation of the dispute following the cancellation of the previous notice to end tenancy.

Landlord's counsel made further submissions with respect to the term of the tenancy. The tenancy agreement provided by the parties indicates that the fixed-term tenancy ends on July 1, 2024. Landlord's counsel advised that the Landlord lost her copy of the tenancy agreement and that the copy provided by the Tenant was altered. The Landlord's written submissions indicate that the tenancy agreement in evidence is a fraud. It was argued by counsel that Tenant altered his copy of the tenancy agreement. Counsel directed me to the front page of the tenancy agreement, which lists a co-tenant, and the last page, which shows that only the Tenant signed the tenancy agreement. Counsel argued that this was proof that the Tenant added the co-tenant after signing the agreement and said it was proof of an alteration. I am asked to infer that term was also changed by the Tenant.

Landlord's counsel submits that the Landlord's understanding was that the tenancy would be for a one-year fixed term lease reverting to a month-to-month tenancy after that point. I was directed to an advertisement in the Landlord's evidence for the rental unit, which advertised the rental unit on the basis that the Landlord was seeking a "Minimum 1-year lease then month-to-month". I am advised by counsel that the Landlord has limited knowledge of English and that the Tenant filed in the tenancy agreement.

The Tenant denies altering the tenancy agreement in any way and argued that it was convenient for the Landlord to have lost her copy of the tenancy agreement only to assert the copy the Tenant has is fraudulent. The Tenant testified that he and the Landlord speak Korean fluently and that when he entered into the tenancy agreement, he communicated to the Landlord in Korean. The Tenant further denied that the

Landlord's English is poor and that she is able to go about town and conduct her affairs in English.

The Tenant confirmed that his wife's name was always on the first page of the tenancy agreement, that the fixed term was not altered, and that the parties had agreed to the four-year term. The Tenant testified that when the tenancy agreement was signed, the Covid-19 Pandemic restrictions were at their height such that the Landlord had little success securing a tenant. The Tenant says that the Landlord spoke of how the rental unit is close to schools for the Tenant's young child and that she could go to a university, which is also nearby. The Tenant testified that when the tenancy agreement was signed, both he and the Landlord were looking for a longer-term tenancy.

Landlord's counsel further argued that if the term of the tenancy agreement is not found to be fraudulent, the four-year term is unconscionable as it was unfair to the Landlord. Counsel argued that the Tenant took advantage of the Landlord's limited knowledge of English.

### Analysis

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

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 required under s. 49(8). Where a tenant files to dispute the notice, the burden of proving the notice was issued in good faith rests with the respondent landlord.

I accept that the Two-Month Notice was posted to the Tenant's door and was received by the Tenant on June 20, 2022. I find that the Two-Month Notice was served in accordance with s. 88 of the *Act* and was received on June 20, 2022 as acknowledged by the Tenant. Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Tenant filed his application on July 3, 2022. Based on when the Two-Month Notice was received, I find that the Tenant filed his application within the 15-days permitted under s. 49(8) of the *Act*.

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.

The Landlord submits that she is looking to occupy the rental unit after her daughter passed away. I have been provided with a letter from the Landlord's physician that indicates her mental health has deteriorated following the loss and recommends moving out of her current home such that painful memories are not triggered by the house she resides.

The parties have previously been before the Residential Tenancy Branch on a Two-Month Notice that was cancelled. In that decision, the notice was found to be invalid on the effective date that did not correspond with s. 49(2)(a) as it was found that the tenancy ended on July 1, 2024.

Strictly speaking, the issue of when the tenancy ended has already been adjudicated such that res judicata, particularly issue estoppel, applies. Res judicata is a legal doctrine which prevents parties from relitigating matters that have already been decided. The parties are the same, the previous decision was final, and the question, namely when the fixed term tenancy ended, is the same. *Khan v Shore*, 2015 BCSC 830 further makes clear, at para 33, that res judicata need not be applied mechanically and is ultimately a discretionary decision, considering the public's interest in the finality of litigation and the interest in seeing justice be done on the facts of a case.

I am not persuaded on this case that the Landlord should be permitted to reopen this issue. The Landlord raises the prospect of fraud, which if would likely result in my finding that res judicata ought not be applied. However, the argument that the tenancy agreement was fraudulently altered by the Tenant, is based on bare submissions by counsel. I was referred to an advertisement that listed it for a minimum of a one-year lease. The Tenant rightly pointed out that it was a "minimum" one year, and the tenancy was for a fixed four-year term.

Further, the Landlord has the obligation under s. 13 to prepare the tenancy agreement. I place no weight on the argument that the Tenant filled out the tenancy agreement as the Landlord has the obligation of doing so under the *Act*. Fraud is a serious allegation, one that ought to be supported by clear and compelling evidence. I agree with the Tenant that it is convenient for the Landlord to allege the tenancy agreement was altered by the Tenant and that the Landlord did not have a copy of the tenancy agreement herself.

I am not persuaded on the evidence presented before me that the fraud is present. I would not disturb the previous finding that the tenancy is for a fixed term ending on July 1, 2024, as found by the previous arbitrator.

I provide this context because the landlord-tenant relationship has soured. This point is made clear by the Landlord's physician, who states the following in their letter of March 24, 2022:

I have noted that she is stressed out severely as she is facing an unfortunate situation of not able to move into her own home that she had rented out.

There has been some contention regarding the terms of agreement or its manipulation and [REDACTED] told me that she is taking the help of a lawyer to bring justice.

I have redacted the Landlord's name in the interest of her privacy. I note that the letter from the physician was prepared some three months prior to the Two-Month Notice being served.

Policy Guideline #2A states that good faith requires evidence of an intention to follow through with the stated purpose in the notice to end tenancy without ulterior purpose. I am not convinced that the Landlord has demonstrated there is no ulterior motive present. The physician's letter, prepared months before the Two-Month Notice being served, clearly demonstrates that the Landlord is seeking, in part, to address a perceived injustice with respect to the terms of the tenancy agreement she had signed.

I would further add that since the tenancy was previously found to have ended on July 1, 2024, the practical effect of it would mean that the even if I were to agree with the Landlord has demonstrated good faith, the effective date for the end of the tenancy would be automatically corrected to July 1, 2024 as per ss. 49(2)(a) and 53 of the *Act*. In other words, it is difficult to conceive how the Landlord intends to demonstrate her intention to occupy the rental unit 19 months from now based on what I have been told at the hearing, which if I accept the Landlord's evidence is more urgent.

Landlord's counsel submitted that the term be found to be unconscionable. However, I am not persuaded that it is grossly unfair to have a long-term tenancy. Under those circumstances, both a landlord and a tenant have certainty in the long-term nature of the tenancy. From the Landlord's perspective, the Tenant is stuck in the term until 2024, which prevents him from providing notice until then as per s. 45(2) of the *Act*. If he were to leave earlier than that, he would likely be in breach of the tenancy agreement and the notice requirement under s. 45(2), which may lead to a claim for damages by the Landlord.

Further, I am persuaded by the Tenant's testimony, which were not directly contradicted by the Landlord at the hearing, that the Landlord told him of the schools nearby for his young child. I accept that both parties intended this to be a long-term tenancy. I find this is more a case akin to buyer's remorse on the part of the Landlord.

All of this is to say that I find that the Landlord has failed to demonstrate her good faith intention to occupy the rental unit without ulterior motive. The Two-Month Notice is hereby cancelled and is of no force or effect.

### Conclusion

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

I find that the Tenant was successful in his application such that he is entitled to the return of his 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 his 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: November 21, 2022

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Residential Tenancy Branch