



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **CNQ OLC FFT**

Introduction

This hearing was convened as a result of the Tenant's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act"). The Tenant seeks:

- an order cancelling a Two Month Notice to End Tenancy Because the Tenant does not Qualify for the Subsidized Rental Unit dated August 25, 2022 ("2 Month Notice") pursuant to section 49.1;
- an order for the Landlord to comply with the Act, *Residential Tenancy Regulations* ("Regulations") and/or the tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The original hearing of the Application was held on January 27, 2023 ("Original Hearing"). The Landlord's agents ("KA", "NL" and "KW"), the Landlord's legal counsel ("MS") and the Tenant attended at the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* ("RoP"). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The Original Hearing was scheduled for one hour and there was insufficient time to take all the parties' testimony and allow rebuttals at the Original Hearing. Pursuant to Rule 7.8 of the *Residential Tenancy Branch Rules of Procedure* ("RoP", I adjourned the hearing and issued an interim decision dated January 28, 2023 ("Interim Decision"). The Interim Decision stated the Landlord and Tenant were not permitted to serve each other or file any additional evidence with the Residential Tenancy Branch ("RTB"). The Interim Decision and Notices of Dispute Resolution for the adjourned hearing, scheduled for February 27, 2023 ("Adjourned Hearing"), were served on the parties by the RTB. The

Tenant, KA, KW and MS attended the Adjourned Hearing and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

At the Original Hearing, the Tenant stated he served the Notice of Dispute Resolution Proceeding (“NDRP”) by email on September 23, 2022. The Tenant submitted into evidence a copy of a signed Address for Service on Form RTB-51 dated December 16, 2021 in which the parties agreed that service of documents related to the tenancy may served by one party on the other at the email addresses provided therein. MS acknowledged the Landlord received the NDRP. As such, I find the NDRP was served on the Landlord in accordance with the provisions of section 89 of the Act.

At the Original Hearing, the Tenant stated he served some of his evidence on the Landlord by email on September 23, 2022. MS acknowledged the Landlord received the evidence sent by the Tenant to it by email on September 23, 2022. As such, I find the Tenant’s evidence served by email on September 23, 2022 was served in accordance with the provisions of section 88 of the Act.

At the Original Hearing, MS stated the Landlord served its evidence on the Tenant by mail on December 23, 2022 and January 9, 2023 as well as by email. MS provided the Canada Post tracking numbers for service of the Landlord’s evidence by mail on December 23, 2022 and January 9, 2023 to corroborate his testimony. I find the Landlord’s evidence was served on the Tenant in accordance with the provisions of section 88 of the Act.

Preliminary Matter – Late Service of Tenant’s Evidence

At the Original Hearing, the Tenant stated he served additional evidence on the Landlord by email on January 14, 2023. MS objected to the admission of the Tenant’s additional evidence on the basis that it was served late. Rule 3.14 of the RoP states:

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

The RoP defines “days” and “at least” as:

Days

- a) If the time for doing an act in relation to a Dispute Resolution proceeding falls or expires on a holiday, the time is extended to the next day that is not a holiday.
- b) If the time for doing an act in a government office (such as the Residential Tenancy Branch or Service BC) falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.
- c) *In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.*
- d) In the calculation of time not referred to in subsection (c), the first day must be excluded and the last day included.

[emphasis in italics added]

The Tenant served his additional evidence on the Landlord on January 14, 2023. The hearing was held on January 27, 2022. As such, the evidence was not served at least 14 days before the hearing. As the Tenant did not comply with Rule 3.14, I find the Tenant’s evidence served on the Landlord on January 14, 2022 is inadmissible for these proceedings.

Preliminary Matter – Severance and Dismissal of Tenant’s Claim

The Application included a claim for an order requiring the Landlord to comply with the Act, Regulations and/or tenancy agreement (the “Tenant’s Other Claim”).

Rule 2.3 of the RoP states:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Where a claim or claims in an application are not sufficiently related, I may dismiss one or more of those claims in the application that are unrelated. Hearings before the RTB are generally scheduled for one hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner. I find the Tenant's claim for an order to cancel the 2 Month Notice and authorization to recover the filing fee of the Application to be the primary issues before me. As such, I will sever the Tenant's Other Claim from the Application. After determining whether the 2 Month Notice should be cancelled, I will dismiss the Tenant's Other Claim, with or without leave to reapply to reapply, as appropriate.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 2 Month Notice?
- Is the Tenant entitled to recover the filing fee for the Application from the Landlord?
- If the Tenant is not entitled to cancellation of the 2 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application are set out below.

The Tenant submitted into evidence a copy of the tenancy agreement and addenda (collectively the "Tenancy Agreement") between the parties dated October 17, 2018. The Tenancy Agreement states the tenancy commenced on November 1, 2018 for a fixed term ending January 31, 2019, with rent of \$817.00 payable on the 1st day of each month. The Tenant was required to pay a security deposit of \$402.50 to the Landlord. MS confirmed the Tenant paid the security deposit and that the Landlord was holding it in trust. Based on the foregoing, I find there was a residential tenancy between the parties and that I have jurisdiction to hear the Application.

Paragraph 2 of the Tenancy Agreement states:

2. BEGINNING AND TERM OF THE AGREEMENT (please fill in the dates and times in the spaces provided)

This tenancy created by this agreement starts on: 01 November 2018
day month year

Check ☐ A) and continues on a month-to-month basis until ended in accordance with the Act.
A, B or C ☐ B) and continues on another periodic basis, as specified below, until ended in accordance with the Act.
☐ weekly ☐ bi-weekly ☐ other: _____

☒ C) and is for a fixed term ending on 31 January 2019
day month year *3 month probationary lease to start*

IF YOU CHOOSE C, CHECK AND COMPLETE D OR E

Check ☐ D) At the end of this time, the tenancy will continue on a month-to-month basis, or another fixed length of time, unless the tenant gives notice to end tenancy at least one clear month before the end of the term.
D or E ☒ E) At the end of this time, the tenancy is ended and **the tenant must vacate the rental unit.**
This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act.

Reason tenant must vacate (required): tenant will not need to vacate. As we are a third party agent for the [redacted] all leases are subject to board approval prior to renewal or extension after the fixed term.

Residential Tenancy Regulation section number (if applicable): _____

• If you choose F both the landlord and tenant must initial here

The tenant must move out on or before the last day of the tenancy.

Landlord's Initials	Tenant's Initials
MS	[redacted]

One of the addenda to the Tenancy Agreement states in part:

What is Rent Geared To Income?

Accommodation provided by [redacted] Housing Society [redacted] requires a certain income criteria to qualify. If you meet the qualifications, your rent rate is set in one of two ways:

☐ Option A - Set by the [redacted] Board of Directors at _____

☒ Option B - Geared to your income

Option B, your rent is set at \$817/month as a result of your reported annual income of \$28,386.

Your income will be reviewed upon all lease renewals to assess if alterations are required.

Above all, the Tenants clearly understand a condition of living in affordable housing residence is having combined annual tenant income under \$65,000.00. Rent rates are set by the [redacted] Housing Society Board of Directors and are subject to change annually following a rental review. At minimum, rents will increase annually by the allowable rates set by the Provincial Government, which are currently 4.0%.

MS stated the Landlord is the agent for a housing society ("Society") that oversees the operation of the residential property ("Property") in which the rental unit ("Rental Unit") occupied by the Tenant is located. The parties agreed the Society is public "housing body" as that term is defined in section 49.1 of the Act and the Rental Unit is a

“subsidized rental unit” as that term is defined in section 49.1 of the Act. MS submitted into evidence a copy of the Affordable Rental Housing Initiative Operating Agreement (“Operating Agreement”) between the Society and the British Columbia Housing Management Commission dated July 21, 2014. Paragraph 5 of Schedule “C” to the Operating Agreement states:

5. **Approved Residents.** All Residents must be selected in accordance with the Specific Purpose and must be placed in a Residential Unit appropriate to their household size in accordance with the Occupancy Standards. Exceptions may be made for:
 - a. persons designated by mutual agreement between BC Housing and the Society; or
 - b. staff or other authorized personnel required to operate and maintain the Development and who are bona fide employees of the Society. The maximum income threshold/limitation does not apply to this type of residency.

Paragraph 12 of Schedule “A” to the Operating Agreement defines Occupancy Standards as:

12. **Occupancy Standards** means the standards for household sizes of a Resident relative to the number of bedrooms in a Residential Unit. Unless otherwise agreed in writing by BC Housing, the following standards apply:
 - a. No more than two (2) and no less than one(1) person per bedroom.
 - b. Spouses and couples share a bedroom.
 - c. Parents do not share a bedroom with their children.
 - d. Dependents aged eighteen (18) or over do not share a bedroom.
 - e. Dependents of the opposite sex aged five (5) or over do not share a bedroom.

MS submitted into evidence an affidavit (“Affidavit”) of KW sworn on January 9, 2023. In paragraphs 11 to 25 of the Affidavit, KW states in part:

11. The Rental Unit has two bedrooms, and [the Tenant] has been residing in the Rental Unit by himself in a household unit of one (1) person since the date his tenancy commenced on November 1, 2018 (the “Commencement Date”).

12. As [the Tenant's] household size has at all material times been one (1) person, based solely on the "Occupancy Standards" set out in the Operating Agreement, [the Tenant] did not qualify to reside in the Rental Unit on the Commencement Date. The Occupancy Standards specify:

No more than two (2) and no less than one (1) person per bedroom.
Operating Agreement, page 5

However, as of the Commencement Date, the Society did not have any one-bedroom units available; furthermore, the Society did not have any applications for housing from household units of two or more persons that would require a two-bedroom unit under the Occupancy Standards.

13. The Operating Agreement requires the Society use "reasonable efforts to maintain full occupancy of the Development with Residents who meet the Specific Purpose" (Operating Agreement, page 13). The Operating Agreement says that "Specific Purpose" means:

[T]he operation of the Development to provide affordable housing, within the Columbia Basin, for persons who, at the date of commencement of the residency, have Low and Moderate Incomes.

-Operating Agreement, page 6

Therefore, as the Society had an obligation to maintain full occupancy of the Development, an exception was made to the Occupancy Standards allowing [the Tenant] to reside in the Rental Unit as of the Commencement Date.

14. In the years following the Commencement Date, the Society experienced a significant rise in the demand for subsidized housing from household units of two or more persons, i.e. household units that qualified to reside in the Rental Unit under the Occupancy Standards, whereas [the Tenant] did not qualify.
15. As of the date of this my Affidavit, there are over forty (40) qualified household units of two or more persons listed on the Society's waitlist for two-bedroom units such as the Rental Unit where [the Tenant] resides by himself. Given this waitlist and given the Society's legal obligations to BC Housing under the Operating Agreement, [the Tenant] has ceased to qualify for the Rental Unit.

16. Despite the fact that [the Tenant] has ceased to qualify for the Rental Unit, the Society did not request that [the Tenant] move or consider serving notice to end [the Tenant's] tenancy until the spring of 2022 when the Society had one-bedroom units available to offer [the Tenant] and other tenants of the Development in [the Tenant's] circumstances.
17. By the spring of 2022, the Society was able to offer [the Tenant] and others in his circumstances one-bedroom housing units in a brand-new housing development operated by the Society at [address of new housing development]. All of the tenants in the Development that had ceased to qualify for their subsidized rental units in the Development cooperated with the Society and moved to [the new housing development], except for [the Tenant] who declined the Society's offer of alternative subsidized housing at [the new housing development] and refused to move out of the Rental Unit when his tenancy ended on October 31, 2022.
18. On or about May 18, 2022, [the Tenant] received a letter from [the Landlord] advising him that he was "over-housed" based on the Society's policies and inviting him to move into a brand- new one-bedroom unit at [the new housing development]. This letter further invited [the Tenant] to view [the new housing development] and offered him "first choice" of which unit he wished to reside in. [...]
19. On May 18, 2022, [the Tenant] confirmed via email to [the Landlord] that he would be interested in viewing the units at [the new housing development]. [...]
20. On or about June 29, 2022, [the Tenant] took the opportunity to view the subsidized rental units at [the new housing development] that he was being offered by the Society. On June 30, 2022, via email to [the Landlord], [the Tenant] advised that he was declining the Society's offer to move into [the new housing development]. [...]
21. [The Tenant] stated reasons for declining the Society's offer to move into [the new housing development] included that "the unit was too small for him", and that he had "grown into" the Rental Unit, which he had ceased to qualify for. [The Tenant] further stated that he used the unoccupied bedroom in the Rental unit for "storage" and for his "family members and friends who have frequently needed it to stay." Unfortunately, [the

Tenant's] stated grounds for refusing to leave the Rental Unit do not change the fact that [the Tenant] has ceased to qualify for the Rental Unit.

22. On or about July 28, 2022, [the Tenant] received a letter from RPS advising him that his "request" to stay in the Rental Unit had been denied by the Society, because the Society had experienced an increased need for "affordable housing for families with children who require 2-bedroom units". The letter went on to outline [the Tenant's] options, which included moving into a new subsidized rental unit at [the new housing development]. This letter also notified [the Tenant] that as he had ceased to qualify for the Rental Unit, he could be served with a Two Month Notice to End Tenancy under section 49.1 of the Act. [...]
23. On August 24, 2022, [the Tenant] sent an email to [the Landlord] confirming his use of the unoccupied bedroom at the Rental Unit as a bedroom for guests. [...] Unfortunately, accommodating [the Tenant's] guests does not fall within the "Specific Purpose" of the Development, the Specific Purpose being the provision of affordable housing for persons of low and moderate incomes; nor does using an unoccupied bedroom in the Rental unit to accommodate [the Tenant's] guests accord with the Society's legal obligation under the Operating Agreement to maintain full occupancy of the Development.
24. On August 26, 2022, on the Society's instructions, our solicitors at [Name of Law Firm] sent a letter via email to [the Tenant] enclosing a Two Month Notice to End Tenancy in Form #RTB 32 (the "Two Month Notice") requiring [the Tenant] to move out of the Rental Unit by October 31, 2022. A copy of the Two Month Notice has been submitted as evidence on behalf of the Respondent in the within matter. In the letter from our solicitors to [the Tenant] dated August 26, 2022 enclosing the Two Month Notice, [the Tenant] was once again offered a subsidized rental unit at [the new housing development] that he did qualify for as opposed to the Rental Unit that he did not qualify for. [...]
25. On August 29, 2022, on the Society's instructions, our solicitors sent [the Tenant] an email, once again, offering [the Tenant] a subsidized rental unit at [the new housing development] that he did qualify for as opposed to the Rental Unit that he did not qualify for. [...] Unfortunately, [the Tenant] once again declined the Society's offer of a one-bedroom unit at the [new housing development].

MS stated the 2 Month Notice was served by the Landlord on the Tenant by email on August 26, 2022. The 2 Month Notice stated the reason for ending the tenancy was that Tenant no longer qualified for the subsidized rental unit. MS submitted into evidence a signed and witnessed Proof of Service on Form RTB-34 to corroborate his testimony on service of the 2 Month Notice on the Tenant. The Tenant acknowledged receipt of the 2 Month Notice. Based on the foregoing, I find the 2 Month Notice was served on the Tenant in accordance with the provisions of section 88 of the Act.

The Tenant stated that, at the time he entered the Tenancy Agreement, the Landlord's agents did not mention that he would be over housed. The Tenant stated he was told that the second bedroom would give him more room to store his personal possessions. The Tenant stated he qualified for the rental unit on the basis of his income and that there have been no changes to his income that would disqualify him from subsidized housing pursuant to Income Addendum to the Tenancy Agreement. MS did not dispute this testimony. The Tenant stated he would not have entered into the Tenancy Agreement if he had known the Landlord could terminate the tenancy on the basis of over housing. The Tenant stated that, although the Income Addendum specifically referred to his income, the Tenancy Agreement did not contain any term that permitted the Landlord to terminate the lease on the basis of over housing. The Tenant stated his understanding of paragraph 2(e) of the Tenancy Agreement meant he would not be required to vacate the rental unit at the end of the fixed term on January 31, 2019. The Tenant confirmed he declined the Landlord's proposal to move him into a one-bedroom rental unit in the Society's new housing development as it was too small to accommodate his personal possessions. The Tenant dispute there is a waiting list of more than 40 eligible tenants who qualify for the Rental Unit pursuant to paragraph 12 of Exhibit "a" to the Operating Agreement.

Analysis

Section 49.1 of the Act states:

49.1(1) In this section:

"public housing body" means a prescribed person or organization;

"subsidized rental unit" means a rental unit that is

- (a) operated by a public housing body, or on behalf of a public housing body, and

- (b) occupied by a tenant who was required to demonstrate that the tenant, or another proposed occupant, met eligibility criteria related to income, number of occupants, health or other similar criteria before entering into the tenancy agreement in relation to the rental unit.
- (2) Subject to section 50 *[tenant may end tenancy early]* and if provided for in the tenancy agreement, a landlord may end the tenancy of a subsidized rental unit by giving notice to end the tenancy if the tenant or other occupant, as applicable, ceases to qualify for the rental unit.
- (3) Unless the tenant agrees in writing to an earlier date, a notice under this section must end the tenancy on a date that is
 - (a) not earlier than 2 months after the date the notice is received,
 - (b) 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
 - (c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.
- (4) A notice under this section must comply with section 52.
- (5) A tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.
- (6) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (5), the tenant
 - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit by that date.

[emphasis added in italics]

MS stated the Tenant was served with the 2 Month Notice by email on August 26, 2022. Pursuant to section 44 of the *Residential Tenancy Regulations*, the Tenant was deemed to have received the 2 Month Notice on August 29, 2022, being three days after it was sent to the Tenant by email. Pursuant to section 49.1(5) of the Act, the Tenant had until September 13, 2023, being 15 days after deemed receipt of the 2 Month Notice, to

make an application for dispute resolution to dispute the 2 Month Notice. The records of the RTB indicate the Tenant made the Application on September 9, 2022. As such, the Application was made within the 15-day dispute period.

MS stated that, as the Tenant was a single person occupying a two-bedroom rental unit, the Tenant was over housed on the basis of the provisions of the Operating Agreement. MS stated the Landlord was entitled to end the tenancy pursuant to section 49.1(1) of the Act. MS argued that section 49.1(1) did not require the Tenancy Agreement to contain a specific provision regarding over housing as a precondition to the Landlord serving the Tenant with the 2 Month Notice. MS stated the terms of the Operating Agreement set out the required qualifications that must be satisfied for subsidized housing in the Property and, as the Tenant did not meet those qualifications, the

Landlord was entitled to end the tenancy pursuant to the 2 Month Notice. MS referred to other provisions of the Act that permit a Landlord to end a tenancy, such as a landlord giving a Two Month Notice for Landlord's Use of Property pursuant to section 49 of the Act.

Sections 49(3) and 49(4) state:

- 49(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.
- 49 (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.

In contrast to section 49.1(2) of the Act, neither sections 49(3) or 49(4) of the Act include the expression "and if provided for in the tenancy agreement". As such, I infer that the legislative intent is that it is a precondition that, in order for a public housing body to give a tenant a notice to end tenancy pursuant to section 49.1(2) of the Act, the tenancy agreement must specifically include a term or terms that give the public housing body the right to end the tenancy of a subsidized rental unit if the tenant, or other occupant, ceases to satisfy one or more criteria stipulated in the tenancy agreement.

In the present case, the Tenancy Agreement makes reference to a rent subsidy based on the Tenant's income. However, the Tenant Agreement does not clearly state the tenancy would end on the basis of the Tenant's failure to qualify for the Rental Unit in the event he was considered over housed pursuant to the provisions of paragraph 12 to Exhibit "A" to the Operating Agreement. Furthermore, the Tenancy Agreement does not incorporate reference to the provisions of paragraph 12 to Exhibit "A" to the Operating Agreement as being a reason upon which the Landlord may end the tenancy with the Tenant. I find the Tenant does not qualify for the Rental Unit based on the provisions of section 12 to Exhibit "A" to the Operating Agreement. I also find there is a waiting list of prospective tenants who do qualify for the Rental Unit. However, in the absence of a specific provision in the Tenancy Agreement that provides the Landlord may to end the

tenancy on the basis of overholding, I find the Landlord did not have the right to give the Tenant the 2 Month Notice under section 49.1(2). As such, I order the 2 Month Notice to be cancelled. The tenancy continues until it is legally ended in accordance with the provisions of the Act.

As the Tenant has been successful in the Application, I grant the Tenant recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act. Pursuant section 72(2)(a) of the Act, the Tenant is allowed to enforce this order by deducting \$100.00 from the next months' rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenant.

As the 2 Month Notice has been cancelled, the Tenant's claim for the Landlord to comply with the Act, Regulations and/or Tenancy Agreement is dismissed with leave to reapply.

Conclusion

The 2 Month Notice is cancelled. The tenancy continues until it is legally ended in accordance with the provisions of the Act.

The Tenant may deduct \$100.00 from next months' rent in satisfaction of his monetary award for recovery of the filing fee of the Application.

The Tenant's claim for the Landlord to comply with the Act, Regulations and/or Tenancy Agreement is dismissed with leave to reapply.

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: March 6, 2023

Residential Tenancy Branch