



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNDCT, FFT

### Introduction

The tenants applied to the Residential Tenancy Branch [the 'RTB'] for Dispute Resolution. The tenants ask me for the following orders against the landlords.

1. Compensation for failing to accomplish the landlords' stated purpose for ending the tenancy under section 49 (3) of the *Residential Tenancy Act* [the 'Act'].
2. Reimbursement for the \$100.00 filing fee for this application.

The landlords appeared at the hearing on 6 June 2023. The tenants also appeared.

### Issues to be Decided

Did the father or mother of the landlords occupy the rental unit for at least six months?

Should the landlords reimburse the tenants for the cost of filing this application?

### Background and Evidence

This tenancy ended in the spring of this year. While it existed, the tenants were paying the landlords \$954.00 each month for rent.

But at some point the tenants received an e-mail from the landlords, asking to raise their rent. The tenants declined. And then in March 2022, the tenants received from the landlords a Two-month Notice to End Tenancy for Landlord's Use [the 'Notice']. The

move-out date was to be 1 June, and the reason for the Notice was that the father or mother of the landlords would occupy the unit.

In response to this Notice, the tenants moved out on 6 April. But they kept in touch with another tenant in the building [now deceased], who told them that he saw some furniture moved into the unit, and saw the landlords' parents stay there only a few nights. This caused the tenants to suspect that the Notice was really just an excuse to find new tenants who would pay a higher rent.

The landlords told me that their parents moved in on 9 April. They also told me the following about their parents' stay there:

1. they paid the landlords \$950.00 rent each month, until the end of October (and the landlords corroborated these payments with bank statements);
2. they paid utility bills for the unit, which bills were in their name, for the period from April to November (and the landlords corroborated this with utility bills for the rental unit in the names of the parents);
3. they moved in because they were selling their house, and wanted a place to stay while looking for a new house to buy;
4. they lived in the unit part-time from April to August, and the other part of the time, in the house they were selling; and
5. they bought a new house in June, but did not move into it until November, so as to comply with the Act.

The tenants told me that in August the landlords started advertising the unit as up for rent. But the landlords deny this, and told me that they didn't advertise the unit for rent until October. The tenants submitted copies of the ad, which show the unit available as of 1 November. The ad also notes that the unit was, 'Listed about a day ago' (*i.e.* 31 October).

One of the parents, the mother, testified. She told me the following:

- she and her husband listed their house for sale in March, and moved into the unit in April;
- they had possession of the unit, and had stuff in there, but they were 'all over';
- for the seven-month period when they had possession of the unit, they spent about 40 to 50 *per cent* of their time at the unit;
- they bought their new house in June, and sold their previous house in August.

## Analysis

I have considered all the statements made by the parties and the documents to which they referred me during this hearing. And I have considered all the arguments made by the parties.

The Notice relies upon section 49 (3) of the Act. And that section permits a landlord to end a tenancy if a close family member intends in good faith to occupy the rental unit. And the basis for the tenants' application is section 51 (2), which entitles tenants in these circumstances to 12 months of rent if their landlords cannot not establish that they accomplished having a close family member occupy the unit for at least six months.

It is worth noting that the 'good faith' element of section 49, which deals with the issuance of the notice to end tenancy for landlord's use, does not apply to section 51. That is, I am not to consider whether the landlords had their parents occupy this unit 'in good faith', only whether the parents *actually occupied* the unit. While I may have doubts about the 'good faith' in which the landlords issued the Notice, that is not now a factor for me to consider.

So, the question in this dispute becomes, 'Have the landlords established (on a balance of probabilities) that their parents occupied the unit for at least six months?'

There is no real dispute about the time frame involved: the tenants did not argue that, while the parents may have occupied the unit, they only did so for less than six months. Essentially what the tenants argue, and what the landlords bear the burden of disproving, is that the parents never truly occupied the unit at all.

Thus, the issue turns on whether the parents 'occupied' the unit. And so, what does it mean to 'occupy'?

The Act does not define 'occupy'.

A few years ago, the Provincial Court of British Columbia considered the definition of 'occupy' in the context of a city bylaw (see *R. v. Fournogerakis*, 2008 BCPC 410).

In doing so, the court canvassed several other judicial interpretations of 'occupy', and noted that, 'It would seem from the cases that there needs to be actual residence or at

least some committed preparation by the intended occupant to use the premises for their intended purpose, which in this case is residency.'

The court went on to find that, 'The presence of trappings of residency including couches, kitchen utensils on the counter and in the sink, keys, artwork, furniture and kitchen garbage, those kinds of things...', along with the presence of a person on the premises who had an interest in the condition of the premises (a 'tenant'), supported a finding of occupancy.

A case before the Supreme Court of British Columbia (*Chamberlain v. Jodoin*, 2011 BCSC 739) considered occupy in the context of different legislation. But in doing so, the court noted that occupancy requires 'some degree of physical presence on the property' [emphasis added].

It is also worth noting that the comparable section of Ontario's legislation [*Residential Tenancies Act*, 2006, SO 2006, c 17, s. 48 (1)] requires, in such circumstances, 'possession of the rental unit for the purpose of residential occupation' [emphasis added]. Arguably, this creates a higher standard of occupation than what is contemplated in our Act.

Taking the above together, I now ask, short of actual full-time residence in the unit, did the parents make at least some committed preparation to use the unit as a residence? Did they have some degree of physical presence in the unit?

The landlords' mother was very careful in her choice of words: she repeatedly used the word 'possession' when I asked her if she had lived in the unit. I inferred from this that she was reluctant to agree that she and her husband truly lived in the unit. And she estimated that she and her husband spent half or a little-less-than half their time at the unit. But absent any evidence to contradict this testimony, I see no reason to not accept the mother's evidence as to her and her husband's presence at the unit.

Also, I note that the tenants themselves conceded that the parents moved 'some' furniture in after the tenants moved out. This echoes the 'presence of trappings of residency' that the Provincial Court considered when assessing occupancy. So, too, do the utility bills and rental payments indicate 'committed' use of the unit as a residence.

So, I accept the mother's evidence that they had some degree of physical presence in the unit, and made some preparation to use it as a residence. This aligns with the landlords' position that their parents lived in the unit 'part-time' for seven months.

In sum, I am satisfied that the parents probably 'occupied' the unit for at least six months, which is all that the Act requires.

### Conclusion

I dismiss this application without leave to re-apply.

I make this decision on authority delegated to me by the Director of the RTB *per* section 9.1(1) of the Act.

Dated: 4 July 2023

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Residential Tenancy Branch