



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNDCT, FFT

### Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on July 12, 2018, wherein the Tenant requested compensation from the Landlord pursuant to section 51(2) of the *Residential Tenancy Act* and to recover the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on November 8, 2018.

Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

At the conclusion of her testimony the Landlord claimed that she did not receive the Tenant's hearing package until October 22, 2018: 17 days prior to the hearing. The Tenant testified that she sent the package to the Landlord by registered mail to the rental unit in July of 2018. She further advised that the package was returned to sender having been undeliverable. The Landlord confirmed that she was out of Canada when the package was delivered.

*Residential Tenancy Policy Guideline 12—Service Provisions* provides that service cannot be avoided by refusing or failing to retrieve registered mail and reads in part as follows:

Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

Section 90 of the *Act* also provides that documents sent by registered mail are deemed served five days later.

In any event, I find that the Landlord received the documents 17 days prior to the hearing and was afforded adequate time to review and respond to the Tenant's materials.

No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

#### Issues to be Decided

1. Is the Tenant entitled to monetary compensation pursuant to section 51(2) of the *Act*?
2. Should the Tenant recover the filing fee?

#### Background and Evidence

The Tenant testified that this tenancy began October 2014.

The tenancy ended pursuant to a 2 month Notice to End Tenancy for Landlord's Use issued on December 31, 2016. The reasons cited on the Notice were as follows:

REASON FOR THIS TWO MONTH NOTICE TO END TENANCY (check the box that applies)	
<input checked="" type="checkbox"/>	The 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).

Also introduced in evidence was an email, dated December 31, 2016, from the Landlord's agent confirming that the Landlord intended to reside in the rental unit.

The Tenant exercised her right to end the tenancy early pursuant to section 50 of the *Residential Tenancy Act* and moved out January 27, 2017 (prior to the effective date of February 28, 2017).

The Tenant alleged that although the Landlord claimed that a “close family member” would reside in the rental unit, persons who did not meet this definition moved into the rental unit such that the Tenant is entitled to two month’s rent as compensation pursuant to section 51(2) of the *Residential Tenancy Act*.

The Tenant stated that the neighbour told her that people moved into the rental unit a couple days after she moved out. The Tenant also stated that she could see patio furniture on the deck of the rental unit.

The Tenant testified that in April of 2017 she contacted the Landlord’s agent about picking up her mail and that the Landlord’s agent told the Tenant she could pick up the mail from the Landlord’s cousin at the rental unit.

The Tenant stated that when she went to the rental unit to pick up her mail she recognized their faces as this couple came and looked at the rental unit during her tenancy in June of 2016. The Tenant stated that the Landlord did not introduce this couple to her as family members at that time; further she stated that she is employed as a realtor, and the manner in which the Landlord was showing the rental unit to this couple felt very much like a “showing”.

In response to the Tenant’s submissions, the Landlord testified as follows.

She testified that no one moved into the rental unit. She stated that all of the furniture the Tenant observed was hers. She further stated that she was supposed to be back in Canada but there was a problem with her husband’s immigration to Canada such that they could not come back. She claimed that the rental unit was vacant for 10 months until her cousin, R.K., moved in in October of 2017.

In written submissions provided by the Landlord she stated that her cousin, R.K., brought some of her items to Canada in January of 2017. She also stated that R.K. obtained the fob from the real estate agent and moved the Landlord’s items from the storage area into the rental unit.

In her written submissions the Landlord further wrote that R.K. attended the rental unit regularly to pick up the Landlord’s mail,

The Landlord also stated that she did not show the rental unit to a couple in June of 2016, rather she showed her cousin, R.K., and her husband her unit as it was her intention to personally move back into her home.

Introduced in evidence by the Tenant were photos of two packages sent to the Landlord's cousin's husband, S.S. at the rental unit. The Landlord claimed the packages were actually for her but were in S.S.'s name as he has preferred shipping from the company from which the packages were sent.

The Landlord confirmed that she is currently living outside of Canada.

The Landlord claimed that from January –June 2017 no one lived in the rental unit as it was always her intention that she would personally be able to live in her unit.

The Landlord further stated that her cousin attended the rental unit to give the Tenant mail, but she was not living there, only helping the Landlord while the Landlord was out of Canada.

Documentary evidence submitted by the Landlord confirms her husband's immigration hearing was scheduled for May 25, 2017.

The Landlord stated that when she realized she was not going to be able to return to Canada, her cousin moved into the rental unit in October 2017.

Introduced in evidence was an email from the Landlord's former real estate agent dated July 4, 2017 wherein the agent writes that the Landlord's "close family member" is [leaving] there. The Landlord stated that she doesn't know why her real estate agent would write this as her intention was to move back into her unit and this was clearly communicated to the real estate agent.

### Analysis

After consideration of the testimony, evidence and submissions of the parties, and on a balance of probabilities I find as follows.

The Tenant seeks monetary compensation pursuant to sections 49 and 51 of the *Act*; at the time the Notice was issued sections 49 and 51 read as follows:

#### **Landlord's notice: landlord's use of property**

49 (1) In this section:

**"close family member"** means, in relation to an individual,

- (a) the individual's parent, spouse or child, or
- (b) the parent or child of that individual's spouse;

**"family corporation"** means a corporation in which all the voting shares are owned by

- (a) one individual, or
- (b) one individual plus one or more of that individual's brother, sister or close family members;

**"landlord"** means

- (a) for the purposes of subsection (3), an individual who
  - (i) at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and
  - (ii) holds not less than 1/2 of the full reversionary interest, and
- (b) for the purposes of subsection (4), a family corporation that
  - (i) at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and
  - (ii) holds not less than 1/2 of the full reversionary interest;

**"purchaser"**, for the purposes of subsection (5), means a purchaser that has agreed to purchase at least 1/2 of the full reversionary interest in the rental unit.

(2) Subject to section 51 [*tenant's compensation: section 49 notice*], a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date that must be

- (a) not earlier than 2 months after the date the tenant receives the notice,
- (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.

(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.

(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.

(5) A landlord may end a tenancy in respect of a rental unit if

- (a) the landlord enters into an agreement in good faith to sell the rental unit,
  - (b) all the conditions on which the sale depends have been satisfied, and
  - (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
    - (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
    - (ii) the purchaser is a family corporation and 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.
- (6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
- (a) demolish the rental unit;
  - (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;
  - (c) convert the residential property to strata lots under the *Strata Property Act*;
  - (d) convert the residential property into a not for profit housing cooperative under the *Cooperative Association Act*;
  - (e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;
  - (f) convert the rental unit to a non-residential use.
- (7) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (8) 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.
- (9) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (8), 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.

#### **Tenant's compensation: section 49 notice**

- 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) In addition to the amount payable under subsection (1), if

(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

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

the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

The Tenant alleges the Landlord, or a "close family member" of the Landlord, as defined by section 49 did not move into the rental unit; rather, she alleges that the Landlord's cousin moved into the unit.

The Landlord testified that it was her intention to move into the rental unit; however due to her husband's immigration issues she was not able to return to Canada. She claimed that the rental unit remained vacant, until October 2017 when her cousin moved into the rental unit.

While the Tenant speculates that the Landlord's cousin moved into the rental unit sooner, I find the Tenant failed to provide sufficient evidence to support such a finding.

I accept the Landlord's testimony that the furniture which was moved into the rental unit was hers.

I also accept the Landlord's testimony although packages were delivered to the rental unit in her cousin's husband's name, they were packages for the Landlord and only sent to her cousin's husband as he had preferred shipping from the company from which the packages were sent. I note as well, that having mail sent to a residence does not, in and of itself, prove the Landlord's cousin and her husband *resided* in the unit.

A letter from the Landlord's realtor indicated that a close family member was residing in the rental unit. The realtor did not attend the hearing and as such the letter is hearsay. The extent of the realtor's knowledge was not tested in cross examination and it is possible the realtor simply reiterated the wording used on the Notice.

Documentary evidence submitted by the Landlord confirmed the Landlord had difficulty returning to Canada due to her husband's immigration issues. I accept her evidence that at all material times it was her intention to move back into her rental unit, and that only when it became clear she was not going to be able to return to Canada, did she allow her cousin to move in. Notably, this was in October of 2017 such that it was beyond the six months provided for in section 51(2).

The Notice indicated that the Landlord, the Landlord's spouse or close family member were to "*occupy*" the rental unit. Similarly, section 49(3) provides that "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." Neither the Notice nor the *Act* use the words "reside" or "live in".

Meaning must be given to the words actually used in the legislation. "Occupy" and "reside" have different meanings. Since the *Act* does not require the Landlord to "reside" in the rental unit, whether the Landlord actually resided or lived in the rental unit is not relevant.

As for the meaning of "occupy", the *Act* does not define the word "occupy" or "occupied" and I have turned to the meaning provided by Black's Law Dictionary. "Occupy" is defined as: "to take or enter upon possession of; to hold possession of; to hold or keep for use; to tenant; to do business in; to possess; to take or hold possession."

I find that no other person took possession of the rental unit from the Landlord during the six months following the effective date of the Notice.

In light of the above, I am satisfied the Landlord fulfilled the stated purpose on the Notice and I find the Tenant is not entitled to compensation under section 51(2) of the *Act*. I therefore dismiss her claim against the Landlord.

### Conclusion

The Tenant's Application is dismissed.



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, 2018

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Residential Tenancy Branch