Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL FFT**

Introduction

This hearing was reconvened as a result of the Tenants' application for dispute resolution ("Application") under the *Residential Tenancy Act* ("Act"). The Tenants applied for:

- an order cancelling a Two Month Notice for Landlord's Use of Property dated March 24, 2022 ("2 Month Notice") pursuant to sections 49 and 55; 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 July 25, 2022 (the "Original Hearing"). The two Tenants ("MH" and "NB"), the Tenants' advocate ("MB"), the Landlord, Landlord's husband ("HZ") and the Landlord's legal counsel ("CS") attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. In addition, the Landlord's interpreter ("YC") attended the Original Hearing.

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 ("First Adjourned Hearing") and issued an interim decision dated July 28, 2022 ("First Interim Decision"). The First Interim Decision stated that Landlord and Tenants were not permitted to serve each other or file any additional evidence with the Residential Tenancy Branch ("RTB"). The First Interim Decision, and Notices of Dispute Resolution Proceeding for the First Adjourned Hearing, scheduled for August 9, 2022 at 1:30 pm, were served on the parties by the Residential Tenancy Branch ("RTB").

MH, NB, MB, the Landlord, HZ and CS attended the First Adjourned Hearing and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. In addition, the Landlord's interpreter ("YC") attended the Adjourned Hearing.

The First Adjourned Hearing was scheduled for one hour and there was insufficient time to take all the parties' testimony and allow rebuttals at the First Adjourned Hearing. Pursuant to Rule 7.8 of the *Residential Tenancy Branch Rules of Procedure* ("RoP"), I adjourned the hearing ("Second Adjourned Hearing") and issued a decision dated August 10, 2022 ("Second Interim Decision"). The Second Interim Decision stated that Landlord and Tenants were not permitted to serve each other or file any additional evidence with the Residential Tenancy Branch ("RTB"). The Second Interim Decision, and Notices of Dispute Resolution Proceeding for the Second Adjourned Hearing, scheduled for September 14, 2022 at 1:30 pm, were served on the parties by the Residential Tenancy Branch ("RTB"). The Second Adjourned hearing was rescheduled for October 14, 2022 at 1:30 pm.

MH, NB, MB, the Landlord, HZ and CS attended the Second Adjourned Hearing and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. In addition, the Landlord's interpreter ("CC") attended the Second Adjourned Hearing.

At the Original Hearing, NB stated the Tenants served the Landlord with the Notice of Dispute Resolution for the Original Hearing and the Tenants' evidence (collectively the "NDRP Package") on the Landlord in-person on July 10, 2021. CS acknowledged the Landlord received the NDRP Package. I find the NDRP Package was served on the Landlord in accordance with sections 88 and 89 of the Act.

At the Original Hearing, CS stated the Landlord served her evidence on the Tenants' door on July 13, 2022 and again on July 14, 2022 by email. NB acknowledged the Tenants received the Landlord's evidence. I find the Landlord served her evidence on the Tenants in accordance with section 88 of the Act.

Issues to be Decided

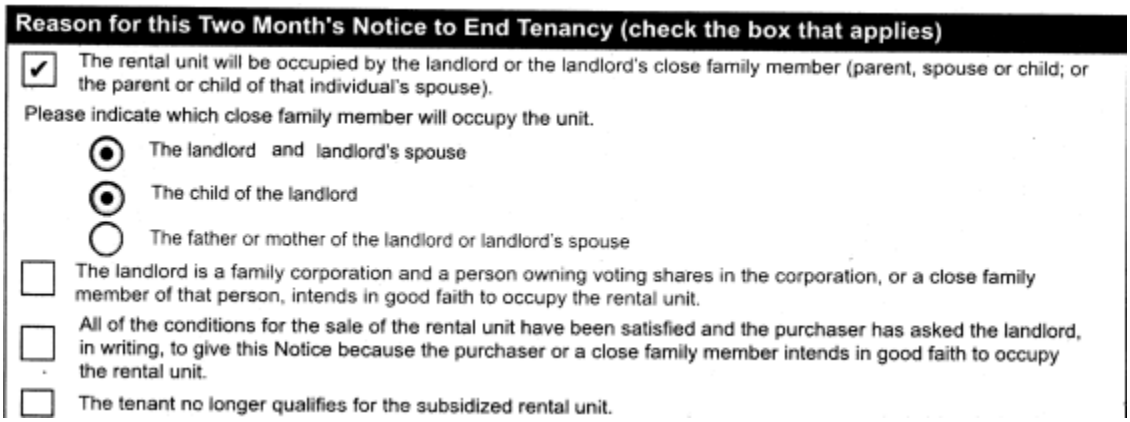
- Are the Tenants entitled to cancellation of the 2 Month Notice?
- Are the Tenants entitled to recover the filing fee for the Application from the Landlord?

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 and my findings are set out below.

The Tenants submitted into evidence a copy of a tenancy agreement dated July 25, 2020 between the Landlord, NB and a third party ("BH") and an addendum. The Tenants submitted into evidence an assignment agreement pursuant to which the Landlord consented to an assignment of the lease from BH to MH. The tenancy commenced on August 15, 2022, with a fixed term until August 14, 2021, with rent of $3,000.00 payable on the 15th day of each month. The Tenants were to pay a security deposit of $1,500.00 and a pet damage deposit of $1,500.00 by July 25, 2020. The Landlord acknowledged she received the security and pet damage deposits and that she was holding them in trust for the Tenants. Based on the foregoing, I find there is a tenancy between the Landlord and the Tenants and that I have jurisdiction to hear the Application.

HC submitted into evidence a copy of the 2 Month Notice and stated it was served on each of the Tenants by registered mail on March 29, 2022. HC provided the Canada Post tracking numbers for service of the 2 Month Notice on each of the Tenants. I find the 2 Month Notice was served on each of the Tenants pursuant to section 88 of the Act. The 2 Month Notice stated the reason for ending the tenancy was:



Reason for this Two Month's Notice to End Tenancy (check the box that applies)

☑ 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).

Please indicate which close family member will occupy the unit.

- ◉ The landlord and landlord's spouse
- ◉ The child of the landlord
- ○ The father or mother of the landlord or landlord's spouse

☐ The landlord 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.

☐ All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit.

☐ The tenant no longer qualifies for the subsidized rental unit.

The Landlord stated she and her family are currently living on the 3rd floor of the residential property but there is insufficient room to comfortably accommodate them all. The Landlord stated the Tenants are currently occupying the 1st and 2nd floors of the residential property. The Landlord stated she has a teenage son who attends private school. The Landlord stated her adult daughter, who left Vancouver in 2017 to attend university in Ontario, has recently returned to Vancouver, BC. The Landlord stated that her husband, HZ, who has in recent years spent significant periods of time in China, returned to Canada in late 2021 and is now living full time with her and their family. The Landlord provided extensive testimony to demonstrate that she was acting in good faith.

MH and NB provided extensive testimony to demonstrate the Landlord was not acting in good faith when she served the 2 Month Notice on them. NB stated the Landlord had served the Tenants with an earlier Two Month Notice for Landlord's Own Use of Property ("First 2 Month Notice"). NB stated the Tenants applied for dispute resolution ("First Application") to dispute the First 2 Month Notice. NB submitted into evidence a copy of the decision dated February 27, 2022 ("First Decision") for the First Application. In the First Decision, the arbitrator cancelled the First 2 Month Notice on the basis that she did not find "the Landlord has proven cause specified in the First 2 Month Notice. I note that that arbitrator stated:

> The reason noted in the Landlord's Two Month Notice was that the Landlord or the Landlords spouse will occupy the unit

MB argued that, as the legal doctrine of *res judicata* applied, I could not adjudicate the Application. HC argued that the doctrine of *res judicata* did not apply because the current circumstances were different from those relied upon for the First Decision.

I noted that the 2 Month Notice indicated that under the heading “Please indicate which close family member will occupy the unit”, the Landlord had checked off not only that the Landlord or Landlord’s spouse would occupy the rental unit, but also that a child will occupy the unit. I asked HC whether the 2 Month Notice failed to comply with the form and content requirements of section 52 of the Act because the Landlord had indicated more than one type of family member would occupy the rental unit on the 2 Month Notice. HC argued the 2 Month Notice complied with the content requirement. In support of his submission, HC submitted into evidence a prior decision (“Past Decision”) of an arbitrator of the RTB that found a notice that stated the landlord or a close family member would occupy the rental unit, did not specify which type of family member would occupy the rental unit, did not invalidate the Two Month Notice to End Tenancy. NB stated the Tenants could not tell if the Landlord or her husband was moving into the rental unit or if it was the Landlord’s adult daughter who would occupy the rental unit.

Analysis

Subsections 49(1), 49(2), 49(3), 49(7) and 49(8) of the Act state in part:

> 49(1) In this section:
> […]
> "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;
> […]

(2) Subject to section 51 *[tenant's compensation: section 49 notice]*, a landlord may end a tenancy

(a) for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be

(i) not earlier than 2 months after the date the tenant receives the notice,

(ii) 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

(iii) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or

[…]

(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.

(7) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]* and, in the case of a notice under subsection (5), must contain the name and address of the purchaser who asked the landlord to give the notice.

(8) A tenant may dispute

(a) a notice given under subsection (3), (4) or (5) by making an application for dispute resolution within 15 days after the date the tenant receives the notice, or

(b) a notice given under subsection (6) by making an application for dispute resolution within 30 days after the date the tenant receives the notice.

The 2 Month Notice was served on the Tenants on March 29, 2022. Pursuant to section 49(8)(a) of the Act, the Tenants had 15 days to dispute the 2 Month Notice, or April 13, 2022. The records of the RTB disclose the Tenants filed the Application to dispute the 2 Month Notice on April 4, 2022. As such, I find the Tenants filed the Application to dispute the 2 Month Notice within the 15-day dispute period required by section 49(8)(a) of the Act.

The parties gave extensive testimony and submitted significant evidence. MB and HC made very capable submissions on behalf of their respective clients. However, I find the only relevant issue for me to determine is whether the 2 Month Notice complied with the form and content requirements of section 52 of the Act.

Section 49 (7) of the Act requires a Two Month Notice to End Tenancy to comply with section 52 of the Act. Section 52 of the Act states:

52 In order to be effective, a notice to end a tenancy must be in writing and must

(a) be signed and dated by the landlord or tenant giving the notice,
(b) give the address of the rental unit,
(c) state the effective date of the notice,
(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
(d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
(e) *when given by a landlord, be in the approved form*.

[emphasis in italics added]

In the Past Decision, the arbitrator noted that the landlord had not checked of the specific family member which would be occupying the rental unit in the Two Month Notice to End Tenancy. However, the arbitrator noted the Two Month Notice to End Tenancy nevertheless indicated the landlord or a close family member of the landlord would occupy the rental unit. In that decision, the arbitrator found that the omission of a specific circle being checked off to indicate which family member of the landlord who would occupy the rental unit was not a fatal error that invalidated the Two Month Notice to End Tenancy. The arbitrator further stated the “specificity called for in the Two Month Notice, while perhaps helpful, is not a requirement under section 49(3) of the Act.

Section 64(2) of the Act states:

64(2) The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.

I have read the Past Decision and I respectfully disagree with the finding of the arbitrator who wrote that decision. Based on section 64(2), I am not bound to follow the Past Decision.

Sections 51(2) and 51(3) of the Act state:

> 51(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 the landlord or purchaser, as applicable, does not establish that
>
> (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and
>
> (b) the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
>
> 51(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 applicable, from
>
> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
>
> (b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Amendments to section 51(2) were made, and the addition of section 51(3), were proclaimed in force on May 17, 2018. The revisions to section 51(2) of the Act increased the compensation payable by a landlord from 2 times the amount of rent to 12 times the amount of rent, if the landlord or purchaser, as applicable, does not establish that the stated purpose for ending the tenancy was accomplished within a reasonable period

after the effective date of the notice. The amendments to section 51(2) are remedial in nature and are intended protect tenants from being wrongfully evicted by landlords and to compensate tenants who have been evicted by a landlord pursuant to a Two Month Notice to End Tenancy who does not intend to use the rental unit for the purpose stated in the Two Month Notice. Section 51(3) allows the director to excuse a Landlord from accomplishing the stated purpose in extenuating circumstances.

The director revised the Form RTB-32 on February 14, 2020 to require that, when a Landlord indicates that the rental unit will be occupied by the landlord's close family member, the Landlord must indicate *which close family member* will occupy the unit, namely:

- The landlord or the landlord's spouse
- The child of the landlord or landlord's spouse
- The father or mother of the landlord or the landlord's spouse

Form RTB-32 was again revised on March 22, 2021 but it still requires a Landlord to indicate which close family member will occupy the unit. I note that when a landlord completes the fillable digital version of the form, the form does not allow a landlord to choose more than one type of family member. The purpose for the revision to the Two Month Notice to End Tenancy introduced on February 14, 2020 was to better inform a tenant, at the time the Two Month Notice to End Tenancy is served on the tenant, on the identity of the close family member who will be occupying the rental unit. With this information, a tenant is in a better position to monitor whether a member of that family group has occupied the rental unit within a reasonable period of time after the effective date of the Two Month Notice and has occupied the rental unit for a minimum period of six months after occupancy. If the tenant believes that the rental unit has not been used for the purpose stated in the Two Month Notice, then the tenant has the option of making an application for dispute resolution to seek compensation from the landlord pursuant to section 51(2) of the Act. If a landlord chooses more than one type of family member under "Please indicate which close family member will occupy the unit", it defeats the intent of the legislative amendments. It also decreases the potential for a tenant to determine whether the rental unit was used for the purpose stated in the Two Month Notice to End Tenancy and makes it more unlikely a tenant will seek the compensation pursuant to section 51(2).

I find it notable that the Original Two Month Notice served on the Tenants indicated only that the Landlord or the landlord's spouse would be using the rental unit. The Previous Arbitrator did not take issue with the form and content of the Original Two Month Notice but stated the reason for cancelling the Original Two Month Notice was:

> The Landlord has not provided more, and more is needed to prove that [the Landlord] has the good faith intention that she will be occupying the rental unit when the Tenants leave. I find that the Landlord has not provide that she has the good faith intention or honesty that she intends to do what she is stating in the Two Month Notice.

In the present case, the Landlord marked off both "the Landlord or the landlord's spouse" as well as "The child of the landlord or landlord's spouse" would occupy the unit on the 2 Month Notice. The confusion that can arise when a landlord does not correctly indicate the identity of the party who will be occupying the rental unit in a Two Month Notice is demonstrated by the current case. During the hearing, the Landlord testified that her adult daughter had recently returned to Vancouver after attending university in Ontario. As the 2 Month Notice indicate that the Landlord or her spouse as well as a child of the Landlord would be occupying the rental unit, the Tenants were unable, at the time the 2 Month Notice was served on them, whether it would be the Landlord or her spouse would be occupying the rental unit or her adult daughter would be occupying the rental unit, after the effective date of the 2 Month Notice.

Based on the foregoing, I find the Landlord was not entitled to select more than one type of family member would be using the rental unit. As such I find the 2 Month Notice does not comply with the form and content requirements of section 52 of the Act. Based on the foregoing, I order the 2 Month Notice to be cancelled. The tenancy continues until ended in accordance with the provisions of the Act. As I have found the 2 Month Notice did not comply with the requirements of section 52 of the Act, I find it is unnecessary for me to consider whether the doctrine of *res judicata* applies to the dispute before me.

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

Conclusion

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

The Tenants are ordered to deduct $100.00 from next month's rent in satisfaction of their monetary award for recovery of the filing fee for the Application.

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 6, 2022

Residential Tenancy Branch