



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Hotel Bourbon  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OLC, OPT, OPB, FF

### Introduction

This hearing dealt with two related applications. The first was an application by the tenant for orders requiring the landlord to comply with the Act, regulation or tenancy agreement; and granting the tenant an order of possession. This application was first heard and decided by another arbitrator in February 2016. In that decision the arbitrator dismissed the tenant's application. The tenant appealed to the Supreme Court for judicial review of that decision. On June 15, 2016 the Supreme Court justice quashed the arbitrator's decision and remitted the matter back to the Residential Tenancy Branch for rehearing.

The other application is the landlord's application for an order of possession. It was filed after the Supreme Court decision was rendered.

Both parties appeared and gave affirmed evidence. No issues regarding the exchange of evidence were identified.

### Issue(s) to be Decided

The issued was defined by the Supreme Court as:

“whether in these circumstances a series of three month leases was unconscionable or whether the respondent used short, fixed term agreements to avoid its' obligations under the Act.”

### Background and Evidence

The landlord is a single-room occupancy hotel. Its' tenants are low-income and many face a variety of challenges. The tenant is no exception. He is 64 years old and uses a wheel chair. As a result only certain kinds of accommodation are suitable for him. He is

scheduled for hip replacement surgery which he says will increase his mobility. He also has a cat, which further limits his rental options. This landlord does allow small pets.

The landlords testified that they have 130 rooms. Their usual practise is to start with a short fixed term tenancy agreement and then, if the tenancy appears to be going well, to convert the tenancy into a month-to-month tenancy. At the time of the hearing approximately 120 residents of the hotel were on month-to-month agreements.

It is common ground that the landlord and the tenant signed a series of five three-month fixed-term tenancy agreement. The agreements are the standard form agreements recommended by the Residential Tenancy Branch. Each agreement has a clause that says: "At the end of this fixed length of time . . .the tenancy ends and the tenant must move out of the residential unit. If you choose this option, both landlord and tenant must initial in boxes to the right." On all five agreements, the tenant initialled the box. Other than specifying a new term for the agreement the rent and all other terms of the agreements remained the same throughout.

Attached to each tenancy agreement is a page of rules that addresses guests, security, smoking illegal drugs and other illegal activity, entry to and exit from the building, and security of keys.

The landlords testified that whenever a new tenancy agreement is signed their procedure is to tell the tenant they can have a copy if they want or they can obtain a copy of the tenancy agreement at any time in the future by asking the front desk for one. They also tell tenants that they can look at their file at any time. They said there is a notice setting this out posted outside of the office. The landlords also testified that the tenant only asked for a copy of his tenancy agreement once and it was provided to him by the staff person working the desk at that time.

The tenant says that about six months into the tenancy he asked for a copy of the tenancy agreement but it was not given to him. He also testified that he only asked for a copy of his tenancy agreement to read once and it was provided to him by the desk clerk. The tenant said he never noticed if there was notice like the one described by the landlords outside the office.

The tenant testified that the hotel is a really good place to live which is why he is fighting so hard to maintain this tenancy. He testified that he appreciates the control the landlord exercises over who comes in and out of the building.

It is also common ground that at a point two to four weeks in advance of the expiry date of each fixed term the landlord would write to the tenant advising that they would like to renew the tenancy for a further three month term. However, on November 25, 2015, the landlord wrote the tenant:

“After careful consideration [the landlord] has decided that your tenancy will not be extended past the current term. Your tenancy ends on December 31, 2015. Please turn in the keys as you check out.”

The landlords testified that they had a variety of issues with the tenant from the start of the tenancy. These issues all involved violation of the rules relating to guests, illegal activity, security, drug use and keys. They recognized the tenant's special needs and knew he would have a difficult time finding alternate accommodation so they tried to work with him. Also, some of the stories they heard about the tenant seemed so improbable at first they wanted to investigate them thoroughly, which took extra time. In the hearing the tenant did acknowledge the most serious allegation and gave his explanation of that event. The landlords also testified that at the outset the tenant's behaviour did improve enough to make them want to try to work with him. For example, the tenant quit letting people from the shelter across the street stay with him.

The landlords testified that before the expiry of each term they would discuss the complaints and concerns that had been raised about the tenant. At times the tenant would tell them to put him on another three month tenancy agreement and let's see if things improve. Eventually they decided they could no longer work with the tenant and decided not to renew his tenancy agreement. At some point the tenant said he was looking for another place. They knew he would have trouble finding one and so tried to give him more time.

The tenant testified that he understood he was signing for three month terms but did not understand the purpose of the agreements, nor did he understand that he could be kicked out because he had signed a fixed term tenancy agreement.

The tenant testified that the landlord insisted he sign each new agreement even though he did not want to sign them. They told him they would not accept the rent unless he signed the tenancy agreement.

In the course of argument I asked what was the difference between the very common practise of starting a tenancy with a one year fixed term tenancy and continuing thereafter on a month-to-month tenancy, and the landlord's practise of starting the tenancy with a three-month fixed term tenancy and continuing thereafter on a month-to-

month tenancy. . The tenant's advocate argued that a one year term gives a tenant some stability and essentially reflects a more even balance of power between the landlord and the tenant. The landlords said that one year terms do not work for the clientele who are more mobile than the average tenant. They also said that they do a lot of work with the John Howard Society and the Parole Board, neither of whom wants their clients locked into a one year term.

The tenant's advocate argued that the procedure followed by landlords was all about tenant behaviour and landlords are not allowed to use a fixed term agreement as a probationary term. She pointed to the Supreme Court Decision which stated that:

“Previous Branch decisions have held that a series of short-term leases are unconscionable when the expectation of the parties is that the tenant will be in a long-term occupation. This is so because short-term leases are seen as a way to circumvent the required of the Act that requires sufficient reasons to terminate a non-fixed term tenancy for cause.”

The Court quoted from two 2013 Residential Tenancy Branch decisions; one of which held that a landlord cannot use a move out clause in a fixed term tenancy agreement to evict a tenant because the clause was unconscionable and was an attempt by the landlord to bypass provisions of the *Residential Tenancy Act* which required landlords to justify evictions, and one which held that when a landlord appears to be using a series of fixed term tenancy agreements as a probationary period this exposes the landlord to criticism of bullying and unfair tactics, as well as raising the issue of the legality of the conduct. The Court also quoted from a 2015 Residential Tenancy Branch decision that held that a situation where parties were signing one-month fixed term tenancy agreements month after month was grossly unfair.

The tenant's advocate also argued that if the tenant's behaviour was not proper the remedy provided by the legislation to the landlord was to serve 1 Month Notice to End Tenancy for Cause.

### Analysis

Section 44 sets out the circumstances in which a tenancy may end. One is subsection 44(b) which states that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. This is the section upon which the landlord relies.

Section 6(3) provides that a term of a tenancy agreement is not enforceable if the term is unconscionable. Section 3 of the *Residential Tenancy Regulation* states that a term in a tenancy agreement is unconscionable when it is oppressive or grossly unfair to one party. This is the section upon which the tenant relies.

*Residential Tenancy Policy Guideline 8: Unconscionable and Material Terms* provides some guidance as to when a term will be considered unconscionable as follows:

“A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limited damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.”

The *Guideline* also sets out that the burden of proving a term is unconscionable rests upon the party making that allegation.

With regard to the cases cited in the Supreme Court decision, section 64 (2) of the *Residential Tenancy Act* provides that an arbitrator “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” in other dispute resolution proceedings. Decisions by other arbitrators in cases where the facts are similar are useful guidance but they are not binding on arbitrators. Arbitrators are bound to follow specific rulings of the Supreme Court and the Court of Appeal.

In this case, the Supreme Court did not specifically state that short term tenancy agreements are unconscionable. In paragraph 16 of the decision where it sets out the central issue that is before the arbitrator it frames the questions as whether in these circumstances the series of short-term tenancy agreements was unconscionable or an effort by the landlord to avoid its’ obligations under the *Act*.

Not only does the passage quoted by the court from the 2013 case not give me sufficient information determine whether the facts of either of those cases is similar to the facts of this case, it does not give any indication of the eventual outcome of the August case. The 2015 decision cited by the Supreme Court dealt with a set of facts that are substantially unlike this case and so it not useful.

For the purposes of this decision it is not necessary to decide whether the landlord’s practise of starting each tenancy with a three month probationary tenancy is contrary to

the legislation. If I were deciding that issue one of the factors I would consider is whether the clients of the hotel are typically able to provide references from previous landlords.

In this situation the factors that make the tenant a more vulnerable party to any negotiation with a landlord are the state of the rental market in this community and his special accommodation needs.

The tenant's age is not so advanced as to be a factor nor did he appear unable to follow the nuances of the hearing. I find that the tenant understood the terms of each agreement. I also find that he could have obtained a copy of his tenancy agreement at any time. Even if he only obtained a copy of the tenancy agreement six months into his tenancy, as he testified at one point, he signed three more just like it after that. The tenant had ample time to read this fairly simple document and obtain advice if he needed any.

The factor that tips this situation against the landlord is that this tenancy went on so long before the landlord took action to try to end it. Even if the landlord's intentions were as described, and I have no reason to think they were not, their actions had created a situation where the tenancy was, in reality, a long term tenancy. By the time the fifth tenancy agreement was signed the tenant no longer believed or expected that his tenancy would not automatically be renewed a sixth time. After all, it had been renewed on four previous occasions, regardless of his behaviour.

I find that by using a series of short-term agreements the landlord was trying to manage the tenant's behaviour and his tenancy without the effort required by sections 44(1)(a)(iii) and 47, which relate to ending a tenancy for cause.

The tenant's application is granted; the landlord's application is dismissed. This tenancy continues as a month-to-month tenancy until ended in accordance with the legislation. As the tenant did not pay a fee to file his application, no further order is required.

## Conclusion

For the reasons set out above, the tenant's application is granted; the landlord's application is dismissed. This tenancy continues as a month-to-month tenancy until ended in accordance with the legislation.

*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 07, 2016

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Residential Tenancy Branch

