



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding LOUGARVE ENTERPRISE LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

### **Dispute Codes**

DRI MNDC OLC

### **Introduction**

This hearing dealt with the Tenant's Application for Dispute Resolution, received at the Residential Tenancy Branch on October 5, 2016 (the "Application"). The Tenant applied for the following relief pursuant to the *Residential Tenancy Act* (the "Act"):

- an order cancelling a rent increase;
- a monetary order for money owed or compensation for damage or loss; and
- an order granting recovery of the filing fee.

The Tenant attended the hearing on his own behalf and was capably assisted by his advocate, Z.M., and his agent, P.L. The Tenant called one witness, M.D., his father. The Landlord was represented at the hearing by K.C. All parties giving evidence provided a solemn affirmation.

On behalf of the Tenant, P.L. advised that the Tenant's Application package, including the Notice of a Dispute Resolution Hearing, was served on the Landlord by registered mail on October 6, 2016. The Landlord acknowledged receipt on October 12, 2016. In addition, P.L. advised that a further package of documentary evidence was served on the Landlord by registered mail on November 9, 2016. The Landlord acknowledged receipt on November 10, 2016.

The Landlord's documentary evidence was received at the Residential Tenancy Branch on November 18, 2016. On behalf of the Tenant, P.L. confirmed the Landlord's documentary evidence was received by the Tenant before the hearing. No further issues were raised with respect to service or receipt of the parties' documents.

The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer to only the relevant facts and issues in this Decision.

### Preliminary and Procedural Matters

At the outset of the hearing, the Tenant's advocate, Z.M., raised the issue of a request by the Tenant's agent, P.L., under Rule of Procedure 5.3. P.L. made a written request to the Residential Tenancy Branch seeking a summons requiring the Landlord to provide copies of the tenancy agreements between the parties for the period from October 1, 2009 to April 1, 2013. They had not been received at the time of the hearing.

In response, the Landlord advised that these documents are not available and could not be provided. Z.M. made no further submissions with respect to the requested documents.

### Issues to be Decided

1. Is the Tenant entitled to an order cancelling a rent increase?
2. Is the Tenant entitled to a monetary order for money owed or compensation for damage or loss?
3. Is the Tenant entitled to an order that the Landlord comply with the *Act*, a regulation or a tenancy agreement?

### Background and Evidence

The Tenant testified that the tenancy began on a month-to-month basis on or about October 1, 2009. At that time, rent was \$420.00 per month. There were rent increases of \$15.00 per month in each of 2011 and 2012, which the Tenant paid. On March 3, 2014, the parties entered into the first of a series of one-year fixed-term tenancy agreements. Each of the fixed-term agreements included a rent increase of \$50.00, which the Tenant paid. Currently, rent of \$600.00 per month is due on the first day of each month.

The Tenant provided oral testimony in support of his Application to recover what his advocate, Z.M., submitted was an overpayment of rent since April 1, 2014. The Tenant further testified that he has a cognitive disability that makes some things more difficult for him. For example, he stated he did not understand the rent increases, particularly as articulated in the fixed-term tenancy agreements submitted into evidence. In addition,

the Tenant also testified that he did not understand the clause that requires him to move out at the end of each fixed term.

Further, the Tenant testified that his father, M.D., and an agent of the Landlord, had a conversation at the time the Tenant moved into the rental unit in 2009. The Tenant testified that the Landlord's agent was advised of the Tenant's disability and that anything to do with the Tenant should be discussed with M.D. According to the Tenant, his father has not been contacted to discuss rent increases.

The Tenant also provided oral testimony regarding the impact of the rent increases on him. He stated he receives \$907.00 per month in disability benefits. From this, he pays rent to the Landlord directly. The Tenant testified that once rent is paid, there is very little left over for daily living expenses.

The Tenant's father, M.D., also provided oral testimony. He confirmed that the Tenant has trouble concentrating and that his mind tends to wander. M.D. testified that he discussed the Tenant's disability with the Landlord's agent in 2009 and that it was agreed any issues would be brought to his attention. He confirmed the Landlord did discuss some issues with him during the tenancy, such as television volume and cleanliness in the rental unit. M.D. testified that the rent increases have limited the Tenant's ability to participate in social activities, and that the Tenant has lost weight and has become withdrawn.

At the end of the hearing, Z.M. made closing submissions on behalf of the Tenant, which are included in the Tenant's written submissions. First, it was submitted that the primary reason the Landlord entered into a series of fixed-term tenancy agreements with the Tenant was to avoid the rent increase provisions of the *Act*. Z.M. relied on a previous arbitrator's decision, dated December 24, 2014, for the proposition that the *Act* cannot be avoided by the use of series of back-to-back fixed-term tenancies.

Second, it was submitted that the Tenant has not entered into multiple "new" tenancies but has had one continuous tenancy since 2009. In support, Z.M. submitted that the Tenant has never vacated the rental unit, removed his belongings, returned his keys, completed a condition inspection or had his security deposit returned to him. According to Z.M., the absence of these markers of the end of a tenancy militate in favour of a finding that there was one continuous tenancy.

Third, Z.M. submitted the use of a series of fixed-term tenancy agreements is unconscionable, particularly in light of the Tenant's cognitive disability and fixed income.

Finally, Z.M. submitted that the fixed-term agreements do not clearly communicate the rights and responsibilities under it and are therefore unenforceable.

In reply, and on behalf of the Landlord, K.C. testified to his belief that the Landlord has done things correctly. He stated that while he has compassion for the Tenant, the current rent paid by the Tenant is not unreasonable and is below market rent which he stated to be \$850.00. Further, K.C. advised the Landlord is aware of the right under the *Act* to apply for a rent increase that is greater than the amount calculated in the regulations, but does not wish to do so out of consideration for the Tenant's circumstances.

Further, K.C. testified that he did not exert any pressure on the Tenant to sign the fixed-term tenancy agreements, and that roughly 200 other tenants have signed similar fixed-term agreements that reflect a reasonable rate of rent and provide certainty to the parties. K.C. stated that he never told the Tenant he had to sign the fixed term agreement or move out. Rather, the Landlord wants the tenancy to continue. K.C. described the one-page fixed-term tenancy agreements as easy to read and understand.

Finally, K.C. testified that the Tenant has had almost three years to discuss any concerns about the fixed-term tenancies with him but that he was never approached.

### Analysis

In light of the oral and documentary evidence submitted by the parties, and on a balance of probabilities, I find:

First, and on behalf of the Tenant, Z.M. submitted that the fixed-term tenancy agreements were attempts by the Landlord to avoid the rent increases provisions of the *Act*. Fixed-term tenancies are permitted under the *Act*. Section 1 of the *Act* confirms that a "fixed term tenancy" means a tenancy under a tenancy agreement that specifies the date on which the tenancy ends. Section 13 of the *Act* requires that a fixed-term tenancy set out whether the tenancy may continue as a periodic tenancy or for another fixed term after that date, or whether the tenant must vacate the rental unit on that date. Further, section 43(1) of the *Act* permits landlords to impose rent increases if the amount is agreed to by the tenant in writing.

Z.M. submitted that an analysis regarding the use of successive fixed-term tenancies, contained in an arbitrator's decision, dated December 24, 2014, should apply. Although section 64(2) of the *Act* confirms that I am not bound to follow the decisions of other

arbitrators, I will briefly address the decision relied upon by the Tenant. In that decision, which I distinguish, the tenant sought to end a fixed-term tenancy before the end of the tenancy. Accordingly, the landlord sought to enforce a liquidated damages clause. After proceeding through the analysis, the arbitrator concluded it would have been inconsistent with the *Act* to suggest the tenant would not be charged for the cost to re-rent at the end of each previous fixed-term tenancy, but would be charged in the middle of the fifth fixed term tenancy. The Landlord's behaviour was an important factor in the arbitrator's decision. The arbitrator also noted the decision was limited to the circumstances of those parties.

In this case, the Tenant signed a series of three fixed-term tenancy agreements that specified the date on which the tenancy would end if the Tenant did not enter into a new tenancy agreement. I find the fixed-term tenancy agreements were not an attempt to avoid the rent increase provisions of the *Act*. Rather, the Tenant signed the fixed-term agreements and paid rent for no less than 30 months before making his Application. There is insufficient evidence before me to conclude that the Tenant, his family members or advocates expressed any concern about the amount of rent due until the Tenant expressed limitations with respect to daily living expenses and opportunities to participate in social activities, at which time the Application was made.

Second, and on behalf of the Tenant, Z.M. submitted the Tenant has not entered into multiple "new" tenancies, but has had one continuous tenancy since 2009. I accept that the Tenant has had continuous occupation of the rental unit since 2009. However, in this case, I find that since April 1, 2014, the Tenant has entered into a series of three fixed-term tenancy agreements. Each of the agreements submitted into evidence confirm the amount of rent due, the date the tenancy was to end, and required the Tenant to either move out or sign a new agreement at the end of the fixed term. The Tenant has elected to sign each of the new agreements and remain in the rental unit.

Third, and on behalf of the Tenant, Z.M. submitted the fixed-term tenancy agreements are unconscionable. Policy Guideline #8 describes unconscionable terms as follows:

*Under the Residential Tenancy Act...a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*

*Terms that are unconscionable are unenforceable. Whether a term is unconscionable depends on a variety of factors.*

*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 limiting 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 burden of proving a term is unconscionable is upon the party alleging unconscionability.*

[Reproduced as written.]

The Tenant's advocate, Z.M., suggested the Landlord took advantage of the Tenant's cognitive disability by having him sign successive fixed-term tenancy agreements that contained rent increases in excess of what would be permitted if the tenancy proceeded on a month-to-month basis.

The Tenant relied on an excerpt from *Newman v. Hotel Bourbon*, 2016 BCSC 1399 ("*Newman*"), in which Justice Myers cited an excerpt from an arbitrator's decision. I find that the decision in *Newman* can be distinguished from the dispute before me. That decision involved a circumstance where the landlord required five successive fixed-term tenancies, each of which was only three months in duration. The arbitrator's decision was quashed on the basis that it was patently unreasonable because the arbitrator had failed to adequately address a central issue and because the arbitrator had misconstrued the number of successive fixed-term tenancies. The matter was remitted to the Residential Tenancy Branch for reconsideration.

In this case, I find there is insufficient evidence before me to conclude the Landlord's actions were so one-sided as to oppress or unfairly surprise the Tenant. Further, there is insufficient evidence before me to conclude the Landlord exploited or took advantage of the Tenant's cognitive disability. There are several reasons I have made this finding. The first is that the Tenant is the only party to the fixed-term tenancy agreements, which have been signed and dated by him. Further, although there may have been some discussions between an agent of the Landlord and the Tenant's father when the tenant moved into the rental unit in 2009, these arrangements were not included into any tenancy agreements submitted into evidence. In addition, although there was no *medical* evidence submitted to confirm the nature and extent of the Tenant's disability, I accept that he lives with challenges. However, the Tenant's own evidence confirms he is capable of independently managing various aspects of his daily life. One example provided by the Tenant is that he receives disability income directly, from which he pays rent and other expenses. The Tenant's father also testified the Tenant discusses issues of concern with him but did not do so in this case. Finally, section 7 of the *Act* requires

a party seeking compensation for damage or loss to do whatever is reasonable to minimize the damage or loss. In this case, the Tenant moved into the rental property in 2009. The evidence indicates there have been five rent increases during that period, most recently set out in three fixed-term tenancy agreements submitted into evidence. I find it would have been reasonable for the Tenant (or his family members) to anticipate rent increases and to make periodic enquiries to ensure the increases were in accordance with the *Act*. There was insufficient evidence before me to conclude that the Tenant took any steps to question the rent increases until filing the Application on October 5, 2016, five years after the Tenant moved into the rental unit.

Fourth, and on behalf of the Tenant, Z.M. submitted that the fixed-term tenancy agreements do not clearly communicate the rights and responsibilities under them and are therefore unenforceable. In this case, I find that the fixed-term tenancy agreements clearly communicate the rights and responsibilities of the parties. As an example, the current fixed-term tenancy agreement between the parties clearly indicates the start and end dates of the fixed term, the amount of rent due, and states: “At the end of the Tenancy, the Tenant must move out of the apartment if a new lease has not been signed one month in advance.” [Reproduced as written.]

To summarize, I find there is insufficient evidence before me to conclude the fixed-term tenancy agreements were an unconscionable attempt by the Landlord to avoid the rent increase provisions of the *Act*, or that the terms of the agreements are so vague as to be unenforceable. Accordingly, I conclude the Tenant is not entitled to the relief sought. The Tenant’s Application is dismissed.

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: December 22, 2016

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Residential Tenancy Branch