Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on September 12, 2019, wherein the Tenant requested an Order that the Landlords comply with the *Residential Tenancy Act* and the *Residential Tenancy Regulation* and to recover the filing fee.

The hearing of the Tenant's Application was conducted by teleconference on November 22, 2019 and continued on January 16, 2020.

Both parties called into the hearings and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenant was assisted at the hearing by a Legal Advocate, R.P., and a lawyer, Z.M. The Landlords were represented by two property managers: T.J. and A.Q. and on the second day of the hearing the Landlord was also represented by legal counsel, G.F.

The parties agreed that all evidence that each party provided had been exchanged. No 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, and specifically referenced by the parties, are described in this Decision.

Preliminary Matters—Parties to the Dispute

The parties entered into two tenancy agreement: the first on February 12, 2019 (hereinafter referred to as the "February Tenancy Agreement") and the second on September 26,2019 (hereinafter referred to as the "September Tenancy Agreement").

The Tenant's Advocate confirmed that the Tenant's agent as named on the Application was in fact the Tenant's mother, who is a named occupant on the September Tenancy Agreement.

The first named Respondent, M.P. Ltd., is the name of one of the Landlords as written on the February Tenancy Agreement. The Tenant's Advocate, R.P., stated that subsequent to filing the Application they discovered that M.P. Ltd. is not in fact a real company.

The second named Respondent, F.C.M.P.G. Ltd., is the registered owner of the property and one of the named Landlords on the February and September Tenancy Agreement.

Similarly, the third named Respondent, A.A.R.E.G. Ltd., is named as the Landlord's Agent on the both tenancy agreements.

The fourth named Respondent, C.P., is a director of F.C.M.P.G. Ltd. The Tenant provided a copy of the summary for the company search confirming this information. While C.P. may be exposed to personal liability as a result of being a director, he is not a party to the tenancy agreement and this proceeding.

Section 64(3)(c) allows me to amend an Application for Dispute Resolution. As such, I amend the Tenant's Application to remove the Landlord, M.P. Ltd., as I accept the Tenant's Advocate's submission this is not a legal entity. I also remove the C.P. as he is not a party to these proceedings. Finally, I remove the Tenant's Agent, E.J., from the Application as she is an occupant, not an Agent.

Issues to be Decided

1. Should the Landlords be ordered to comply with the *Residential Tenancy Agreement* and *Residential Tenancy Regulation?*

2. Should the Tenant recover the filing fee?

Background and Evidence

In support of the Tenant's Application the Tenant's legal counsel submitted 18 pages of written submissions, an amendment, and 76 pages of documentary evidence; the Tenant confirmed that he read these written submissions and amendments and swore the contents contained therein to be true to the best of his knowledge and belief.

The Tenant also provided affirmed testimony in support of his claim. He testified that he moved into the rental unit on March 1, 2019. Monthly rent is $2,400.00 per month. The Tenant confirmed that he lived at another rental unit for six years and that tenancy ended pursuant to a 2 Month notice to end tenancy for Landlord's use issued in January 2019.

In terms of the February Tenancy Agreement the Tenant testified as follows. He stated that the Landlord provided him with the February Tenancy Agreement as well as several other documents to sign at the time. The Tenant printed those documents off, signed them, and brought them to the Landlord's office.

When the Tenant went to the Landlords' office on February 12, 2019, he met with the property manager, A.Q., who also produced a "Mutual Agreement to End Tenancy" (hereinafter referred to as the "February Mutual Agreement"). The Mutual Agreement provided that the tenancy would end on September 30, 2019.

The Tenant testified that he spoke to A.Q. and expressed concerns because he did not know that the February Mutual Agreement was going to be part of the February Tenancy Agreement. He stated that he was concerned about the tenancy ending as he had just moved with his mother and his aunt, who are both elderly, and he did not want to have to move again so quickly.

The Tenant further stated that A.Q. informed him that the Landlords were waiting for permits for development of the site, and typically the process was two years, such that the tenancy would not really end on September 30, 2019, but that it would be some time in the future. The Tenant confirmed that he signed the February Mutual Agreement to End Tenancy because A.Q. stated that the only way they would get the tenancy was if they signed the document. He spoke with his mother and she said they had to sign it because they would have no where else to go.

The Tenant then received an email from the Landlord's Property Manager, A.Q., on February 25, 2019, attaching further documents; in the email A.Q. wrote that he made a mistake and needed the Tenant to digitally sign the corrected documents.

The Tenant then went on "Docusign" and signed right away. He confirmed that he was not provided with a copy of those corrected documents.

The Tenant, his mother and his aunt moved into the rental property on March 1, 2019.

The Tenant's written submissions include material relating to the condition of the rental unit. Counsel for the Tenant confirmed that there was no repair order requested, and this information was only provided to show the Landlord was attempting to contract out of the *Act* by not repairing or maintaining the property.

The Tenant's written submissions also include reference to the Tenant's view that the Landlord did not use the previous rental unit for the stated purpose. Counsel confirmed that a separate application was before the Branch (the file number is included on the unpublished cover page of this my Decision). As this was not relevant to the issues before me, I did not hear testimony from the Tenant in this regard.

The Tenant filed the within Application for Dispute Resolution on September 12, 2019 seeking an Order that the February Mutual Agreement be set aside.

The Tenant then received a text message from A.Q. on September 25, 2019 informing him that the owners were prepared to sign a new tenancy agreement with an end date of April 30, 2020. These text messages were provided in evidence at page 50 and 51 of the Tenant's evidence package.

In those text messages, A.Q., acknowledged the Tenant's Application to the Residential Tenancy Branch and wrote as follows:

> "I understand you filed an application to set aside mutual agreement to end the tenancy, if the hearing is in your favour then this agreement will be void. Until then you will have to sign the agreement. Let me know if you have any question."

In a text message sent on September 26, 2019 A.Q. informs the Tenant that if he does not sign the new tenancy agreement the Landlords would pursue an Order of Possession based on the February Tenancy Agreement and February Mutual

Agreement; A.Q. further writes that he would file for the Order of Possession the next day.

The Tenant testified that after this text exchange, he sought legal advice from a Tenant's Advocacy group following which he responded to A.Q. as follows:

> "Hi [A.],
>
> "I would like it in writing that if the hearing is in my favour this will be void, I will be sending it shortly to be signed by you. After that I am happy to sign for the lease extension. What email would you like the documents to be sent to?
>
> Regards,
> [Tenant]"

The Tenant then signed the September Tenancy Agreement and the September Mutual Agreement. He testified that as with the February agreements he again felt he had no choice but to sign.

When the hearing reconvened on January 16, 2020, the occupant, E.J., testified. She confirmed that she lives in the rental unit. She further confirmed that she has had communication with the Landlord's representatives; copies of her text communication with A.Q. were also provided in evidence.

In the text communication, E.J. requests repairs to the rental unit; A.Q.'s replies suggest the Landlord is not prepared to make the repairs. A.Q. and E.J. also discussed the September Tenancy Agreement via text; in one such text A.Q. wrote as follows:

> "…the lease is ending in September and if there is no new lease you will have to move out
>
> Tell the RTB that your son has signed the form "mutual agreement to end tenancy"
>
> And as per that form the lease is ending September 30th
>
> And as per that form, you will have to move out, confirm this with your son and also confirm this with RTB, show them the lease agreement if necessary"

In response E.J. informed A.Q. that she felt bullied; during her testimony, E.J. reiterated that she felt bullied by the Landlord's representatives.

In cross examination, E.J. confirmed that A.Q. told her to talk the Residential Tenancy Branch if she had any questions. Further, E.J. confirmed that she knew the Landlord is a real estate development company and intended to tear the buildings down and build new ones.

Counsel for the Landlord asked E.J. to confirm that the rent charged to the Tenant, which is her son, is significantly below market value; in response she stated that she was not aware of this. E.J. also stated that he was not aware that her son had signed a mutual agreement to end the tenancy thereby creating an end date to her tenancy. E.J. also stated that she was not aware the Landlord had leased the property to her son on an "as is, where is basis".

In response to the Tenant's claim, the Landlord's property manager, A.Q. testified as follows. He stated that he has been in this position for about a year. A.Q. stated that the Landlord, M.P.L., is a real development company. The rental unit is a single-family dwelling and it is the Landlord's intention is to convert the property to a multi-family dwelling.

A.Q. confirmed he signed the February and September Residential Tenancy Agreements as well as the related Mutual Agreements to End the Tenancy. He also claimed he was present when the Tenant signed these documents.

A.Q. testified that the Tenant and his mother used to rent a home two houses down on the same block as the subject rental unit. The Landlord purchased the entire block, and the previous owner asked the Tenant to move out of the previous home.

A.Q. stated that the Tenant was fully aware that the property was owned by a developer and the property would be torn down within a year. A.Q. further stated that they informed the Tenant the Landlord would not make any cosmetic improvements because the property was going to be torn down. In that respect, he described the property as being rented "as is, where is" basis.

A.Q. stated that the rent charged is "significantly lower", at $2,400.00 per month, than the market rate of $3,000.00-$4,000.00, even in the condition it was in. A.Q. further stated that the rent was lowered to accommodate the short term.

A.Q. also stated that when the Tenant was moving out of the previous home, A.Q. showed them another property for tenants with low income two houses down. A.Q.

confirmed that they are also the property manager for that low-income property. A.Q. stated that this other building was brand new, included utilities etc. A.Q. stated that the Tenants were given an option for alternate housing, but they chose to stay in the subject rental property for a short term and for a lower rate.

A.Q. noted that the lease addendum included provisions relating to the fact the property was owned by a developer and they Tenants were getting to live there for a reduced rate and a shorter term.

Counsel for the Landlord submitted that the Tenant's mother, the occupant of the rental unit, was a sympathetic witness; however, the actual Tenant, H.E., is sophisticated and knew what he was doing when he signed the tenancy agreement and should not be able to back out of the deal. The Landlord further submitted that the Tenant agreed to move into this property knowing it was slated for demolition, was rented at a reduced price and would not be cosmetically improved.

Counsel also noted that section 4 of "Additional Terms" (for both Tenancy Agreements) provides that the Tenant specifically agreed to the payment of damages in the event the Tenant did not vacate the rental unit as provided for in the agreement. These damages included four months extra interest, and penalties under the partnership agreement.

Counsel for the Landlord confirmed that the Landlord does not have its demolition permit. If necessary, once they get their permits in place, they will issue the 4 Month Notice, but this will further delay the development as the permit may not be issued until September.

In recognition of this possible delay, the Landlord negotiated with the tenants. Counsel for the Landlord characterized the subject Tenancy Agreements as a "sweetheart deal" offered to sellers and tenants, to avoid the four-month delay inherent in a 4 Month Notice to End Tenancy for Landlord's Use.

Counsel submitted that the Tenant agreed to this "sweat heart deal" and should be estopped from using "a technicality" to get out of the deal, as this results in unjust enrichment.

In closing, counsel for the Tenant submitted that the February Tenancy Agreement was canceled by consent when the parties entered into the September Tenancy Agreement.

Counsel further submitted that if I find that it is not canceled, it is unenforceable for the same reasons as the September Tenancy Agreement, which are:

- it is unconscionable;
- it is contrary to section 13.1 of the *Regulation;*
- it is ambiguous; and,
- it is an attempt by the Landlord to contract out of the *Act,* and in particular is contrary to the provisions regarding demolition and vacate clauses in section 49.

Analysis

The Tenant seeks an Order that the Landlord comply with the *Residential Tenancy Act* and the *Residential Tenancy Regulation* pursuant to section 62(3) of the *Act,* which reads as follows:

> **62**…(3)The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

In particular, the Tenant seeks a declaration that the move out clauses in the tenancy agreements, the addendums, and the mutual agreements to end tenancy be declared of no force and effect.

The evidence confirms the parties entered into two tenancy agreements. I agree with counsel for the Tenant that the February Tenancy Agreement was canceled by consent when the parties entered into the September Tenancy Agreement. I will therefore only deal with the enforceability of the vacate clauses in the September Tenancy Agreement, the September Tenancy Agreement Addendum, and the September Mutual Agreement to End Tenancy.

The relevant provision of the September Tenancy Agreement read as follows:

4. **RENTAL PERIOD AND TERMS OF TENANCY.**

The tenancy created by this Agreement STARTS ON **October 1st 2019**.

☐ **A.** and continues on a month to month basis until cancelled in accordance with the Act.

☑ **B.** and is for a fixed term ending on **April 30th 2020**.

IF YOU CHOOSE B, CHECK C OR D

☑ **C.** At the end of this time the tenancy will continue on a month to month basis, or another fixed length of time, unless the tenant gives notice to end the tenancy at least one clear month before the end of the term.

☐ **D.** At the end of this time the tenancy is ended and the tenant **must vacate** the rental unit. This requirement is only permitted in circumstances prescribed in section 13.1 of the Residential Tenancy Regulations, or if this is a sublease agreement as defined in the Act.

Reason tenant must vacate (required):

Residential Tenancy Regulation section number (if applicable):

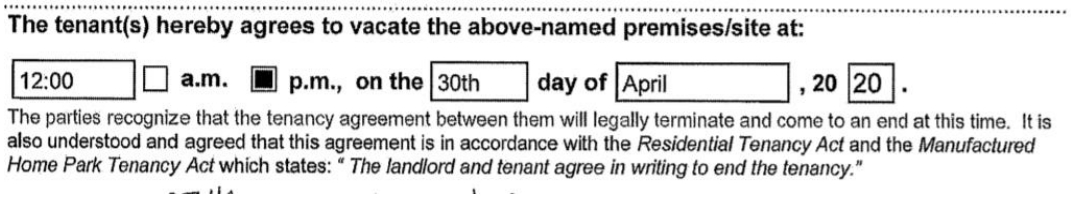
IF YOU CHOOSE D, BOTH THE LANDLORD AND THE TENANT MUST INITIAL HERE LANDLORD'S INITIALS TENANT'S INITIALS

5. **LIQUIDATED DAMAGES.** If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, if the

The September Tenancy Agreement also included an Addendum; clause 4 to the Addendum provides as follows:

> 4. If the Tenant remains in possession of the rental unit after the last day of the term as set out in the Tenancy Agreement or after any other lawful end of the tenancy, the Landlord may claim for damages against the Tenant and the Tenant will be liable for damages suffered by the Landlord. The Landlord may apply for an order of possession or a similar order from court or any arbitrator and when such an order has been obtained, eviction by the bailiff may follow. In addition, the Landlord and any incoming tenants will have a right of action against the Tenants as a result of the Tenants' failure to vacate the rental unit as lawfully required.

The evidence confirms that as a condition of the tenancy, the Tenant was required to sign the September Mutual Agreement to End Tenancy; the relevant portions of that document read as follows:



The tenant(s) hereby agrees to vacate the above-named premises/site at:

12:00 ☐ **a.m.** ■ **p.m., on the** 30th **day of** April **, 20** 20 **.**

The parties recognize that the tenancy agreement between them will legally terminate and come to an end at this time. It is also understood and agreed that this agreement is in accordance with the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* which states: *" The landlord and tenant agree in writing to end the tenancy."*

I find the above provisions, requiring the Tenant to vacate the rental unit by 12:00 p.m. on April 30, 2020 to be of no force and effect. My reasons follow.

A tenancy may only be ended in accordance with the *Residential Tenancy Act.* Section 44 of the *Act* sets out the circumstances in which a tenancy may be ended and reads as follows:

> **44** (1)A tenancy ends only if one or more of the following applies:
>
> (a)the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i)section 45 *[tenant's notice]*;

(i.1)section 45.1 *[tenant's notice: family violence or long-term care]*;

(ii)section 46 *[landlord's notice: non-payment of rent]*;

(iii)section 47 *[landlord's notice: cause]*;

(iv)section 48 *[landlord's notice: end of employment]*;

(v)section 49 *[landlord's notice: landlord's use of property]*;

(vi)section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(vii)section 50 *[tenant may end tenancy early]*;

(b)the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

(c)the landlord and tenant agree in writing to end the tenancy;

(d)the tenant vacates or abandons the rental unit;

(e)the tenancy agreement is frustrated;

(f)the director orders that the tenancy is ended;

(g)the tenancy agreement is a sublease agreement.

(2)[Repealed 2003-81-37.]

(3)If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Previously, parties were able to enter into a fixed term tenancy with a move out clause at the end of the fixed term. In December of 2017 the *Act* was changed to significantly restrict vacate clauses.

Section 97 of the *Act* allows the Director to prescribe circumstances in which a move out clause is enforceable and reads as follows:

> **97** (1)The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.
>
> (2)Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> …
>
> (a.1)prescribing the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term;

The "prescribed circumstances" referenced above are set out in section 13.1 of the *Residential Tenancy Regulation;* the relevant portions of which read as follows:

> **Fixed term tenancy — circumstances when tenant must vacate at end of term**
>
> **13.1** (1)In this section, "close family member" has the same meaning as in section 49 (1) of the Act.
>
> (2)For the purposes of section 97 (2) (a.1) of the Act *[prescribing circumstances when landlord may include term requiring tenant to vacate]*, the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that
>
> (a)the landlord is an individual, and
>
> (b)that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

A landlord may only insert such clauses if the landlord is an individual *and* the landlord, or a close family member intends to move into the rental unit. In the case before me, the Landlord is a limited company, and not an *individual*; as such, 13.1 does not apply to this tenancy and the Landlord therefore cannot include a vacate clause in the tenancy agreement or addendum.

Although section 44(1)(c) allows a landlord and tenant to mutually agree to end a tenancy, I find this is limited to circumstances arising after the tenancy has begun. In the present case, the Tenant was required to sign the Mutual Agreement to End Tenancy as a condition of the tenancy, such that the effect of the Mutual Agreement in this case was to create a vacate clause, which is specifically limited by the *Residential Tenancy Act* and not permitted in this tenancy.

The evidence confirms the Landlord intends to demolish the rental unit. A Landlord may end a tenancy for such a purpose, provided they issue a 4 Month Notice to End Tenancy pursuant to section 49 which reads as follows:

> **Landlord's notice: landlord's use of property**
> **49** …
>
> (2)(b)for a purpose referred to in subsection (6) by giving notice to end the tenancy effective on a date that must be
>
> (i)not earlier than 4 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.
>
> …
>
> (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.

Counsel for the Landlord conceded that the Landlord wanted to avoid delaying the development by the four months required in section 49 of the *Act*. Counsel further characterized the tenancy agreements as a “sweetheart deal” offered to sellers and tenants, to avoid the four-month delay inherent in a 4 Month Notice to End Tenancy for Landlord’s Use.

Pursuant to section 5 of the *Act* landlords and tenancy may not avoid or contract out of the *Act* or the *Regulations,* and any attempt to do so is of no effect.

Although I am not satisfied the rental unit was offered at a below market rent, I find this to be irrelevant to the issues before me. I agree with counsel for the Tenant that the fact the rent may have been lowered does not make the move out clause in the September Tenancy Agreement or the September Mutual Agreement more enforceable.

Counsel for the Landlord argued that the Tenant should be estopped from relying on the *Act* to avoid moving out of the rental unit at the end of the fixed term. The evidence before me confirms that the Tenant was clear with the Landlord that he was signing the September Tenancy Agreement and the September Mutual Agreement without prejudice to his right to argue the move out clause was not enforceable. This is confirmed in the text communication between the parties. Notably he had already filed an Application to dispute the similar provisions in the February Tenancy Agreement. The Tenant's mother, who occupies the rental unit, also communicated to the Landlord that she felt bullied by the Landlord's tactics. To suggest the Landlord was relying on an assumption that the Tenant agreed to the move out clause is not supported by the evidence.

Counsel further submitted that the Tenant took advantage of the reduced rent and is "now attempting to use a technicality to get out of the deal". While I am not satisfied the rent was in fact reduced, the provisions of the *Act* with respect to ending tenancies are not *technicalities*, they are the governing law with respect to residential tenancies in British Columbia.

Counsel for the Landlord submitted that the permits may not be obtained until the fall of 2020. Section 49(6) requires a landlord to have such permits and approvals in place prior to issuing the Notice. While this may delay demolition and construction somewhat, the purpose of section 49(6) is to ensure a tenancy is ended only when necessary. Should the Landlord's Counsel's estimate of the issuance of the permits be optimistic, the tenancy should be able to continue until such authorizations are in place.

I therefore grant the Tenant's Application. Pursuant to sections 5, 6(3) and 62(3) of the *Act,* I find the following to be of no force and effect:

- Section 4(a) and (b) of the September Tenancy Agreement;

- Section 45 of the September Tenancy Agreement as it references the Mutual Agreement to End Tenancy:
- Sections 1, 4 and 14 of the September Tenancy Agreement Addendum;
- Schedule A, the Termination Agreement;
- the September Mutual Agreement to End Tenancy; and,
- any other provisions of the agreement between the parties which mandates the Tenant to move from the rental unit on April 30, 2020.

Having been substantially successful, I authorize the Tenant, pursuant to section 72 of the *Act,* to reduce the next month's rent as compensation for the $100.00 feel paid to file this Application.

The Landlord is reminded that they are also not able to contract out of the *Act* in terms of their obligation to repair and maintain the rental unit as required by section 32 of the *Act.*

Conclusion

The Tenant's Application for an Order that the Landlord comply with the *Residential Tenancy Act* and the *Residential Tenancy Regulation* is granted. The Tenant is not required to vacate the rental unit on April 30, 2010. This tenancy shall continue as a month to month tenancy until ended in accordance with the *Residential Tenancy Act.*

Pursuant to sections 5, 6(3) and 62(3) of the *Act,* the following are of no force and effect:

- Section 4(a) and (b) of the September Tenancy Agreement;
- Section 45 of the September Tenancy Agreement as it references the Mutual Agreement to End Tenancy:
- Sections 1, 4 and 14 of the September Tenancy Agreement Addendum;
- Schedule A, the Termination Agreement;
- the September Mutual Agreement to End Tenancy; and,

- any other provisions of the agreement between the parties which mandates the Tenant to move from the rental unit on April 30, 2020.

The Tenant is permitted to reduce their next month's rent by $100.00 as recovery of the filing fee.

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: February 5, 2020

Residential Tenancy Branch