



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes: FFT, DRI, OLC, CNR

### Introduction

The tenants seek various relief under sections 41 through 43, 46, 62, and 72 of the *Residential Tenancy Act* ("Act").

On September 21, 2020 the tenants made an application for dispute resolution under section 59(2) of the Act, and a dispute resolution hearing was held before me on November 19, 2020. One of the tenants, a witness for the tenant, and the landlord attended the hearing and were given a full opportunity to be heard, present testimony, make submissions, and call witnesses. No issues of service were raised by the parties.

### Issues

1. Are the tenants entitled to an order that a rent increase was not in compliance, and therefore not valid, pursuant to sections 41 through 43 of the Act?
2. If not, are the tenants entitled to an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent?
3. Are the tenants entitled to an order that the landlord comply with the Act, the regulations, or the tenancy agreement, pursuant to section 62 of the Act?
4. Are the tenants entitled to recovery of the \$100.00 application filing fee, pursuant to section 72 of the Act?

### Background and Evidence

I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure*, to which I was referred, and which was relevant to determining the issues of this application. Only relevant evidence necessary to explain my decision is reproduced below.

The facts in this dispute are, in fact, relatively undisputed. The parties entered into a tenancy under the terms of a written tenancy agreement. They then entered into a subsequent tenancy agreement. Both agreements set out fixed terms for the tenancy, and were, except for the omission of an addendum in the second agreement and higher rent in the second agreement, largely identical. Two issues are at the forefront of this dispute: (1) the validity of the end-of-tenancy term in the first agreement, and (2) the validity of the higher rent in the second agreement.

I will refer to these two tenancy agreements as Agreement 1 and Agreement 2.

Agreement 1 is a written Residential Tenancy Agreement (form #RTB-1) for a tenancy commencing September 1, 2018. Monthly rent on Agreement 1 is \$2,400.00, due on the first of the month. The tenancy is indicated on the agreement as having a fixed term ending on September 1, 2020. In the adjacent section on the agreement there is included two options for what may happen at the end of the fixed term. This section reads as follows (reproduced from the agreement):

<b>IF YOU CHOOSE C, CHECK AND COMPLETE D OR E</b>			
<b>Check D or E</b>	<input type="checkbox"/> D)	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 tenancy at least one clear month before the end of the term.	
	<input checked="" type="checkbox"/> E)	At the end of this time, the tenancy is ended and <b>the tenant must vacate the rental unit.</b> <b>This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act.</b>	
<b>Reason tenant must vacate (required):</b>		END OF LEASE; NEW LEASE MUST BE NEGOTIATED.	
<b>Residential Tenancy Regulation section number (if applicable):</b>		<input type="text"/>	
• If you choose E, both the landlord and tenant must initial here		<b>Landlord's Initials</b>	<b>Tenant's Initials</b>
<div style="border-bottom: 1px solid black; width: 100%;"></div>			
The tenant <b>must move out on or before the last day of the tenancy.</b>			

Both parties were unaware (as will be discussed further below) that the reason given for the tenant to vacate was, in fact, invalid. Nevertheless, the tenancy's fixed term ran its course and, in early 2020 the landlord contacted the tenants about what they wanted to do come September. They expressed an interest in staying longer, so the landlord sent a "draft" agreement (Agreement 2) for the tenancy after September 1, 2020.

Agreement 2, to which I referred earlier, is a written Residential Tenancy Agreement that includes the term of the tenancy to start on September 1, 2020 and end on August 31, 2021. Monthly rent on Agreement 2 was \$2,800.00. The "Reason tenant must vacate" section of the agreement includes the same language as that which is included on Agreement 1. The tenants reviewed Agreement 2 and eventually accepted it.

The tenants, after (rather quickly it would seem) coming to a realization that the increase in rent from \$2,400 to \$2,800 might be invalid, decided to pay rent of \$2,400.00 on September 1, 2020. After a failed attempt by the parties to resolve the issues which ultimately lead to this application (namely, the rent), the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) for the \$400.00 difference. The 10 Day Notice was served on the tenants on September 21, 2020. A copy of the 10 Day Notice was submitted into evidence.

### Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

I turn first to an examination and analysis of the two agreements, as this will have a bearing on the individual remedies sought by the tenants.

For the purpose of my analysis, I shall again reproduce the critical language within the agreements:

<b>IF YOU CHOOSE C, CHECK AND COMPLETE D OR E</b>		
<b>Check D or E</b>	<input type="checkbox"/> D) 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 tenancy at least one clear month before the end of the term.	
	<input checked="" type="checkbox"/> E) At the end of this time, the tenancy is ended and <b>the tenant must vacate the rental unit.</b> <b>This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act.</b>	
	<b>Reason tenant must vacate (required):</b> <span style="border: 1px solid black; padding: 2px;">END OF LEASE; NEW LEASE MUST BE NEGOTIATED.</span>	
	<b>Residential Tenancy Regulation section number (if applicable):</b> <span style="border: 1px solid black; display: inline-block; width: 80px; height: 20px; vertical-align: middle;"></span>	
	• If you choose E, both the landlord and tenant must initial here	
	<div style="display: flex; align-items: center;"> <div style="flex-grow: 1; border-bottom: 1px solid black; position: relative;"> <div style="position: absolute; right: -20px; top: -10px; font-size: 24px;">➔</div> </div> <div style="border: 1px solid black; padding: 5px; text-align: center; width: 100px;"> <i>Landlord's Initials</i> </div> <div style="border: 1px solid black; padding: 5px; text-align: center; width: 100px;"> <i>Tenant's Initials</i> </div> </div>	
	<b>The tenant must move out on or before the last day of the tenancy.</b>	

It is worth noting for my analysis that the language in this section reflects the requirements of subsections 13(2)(f)(iii) and (iii.1) of the Act, which require clarity around when a fixed term tenancy ends. Those sections of the Act read as follows:

the agreed terms in terms in respect of the following: [ . . . ]

(iii) if the tenancy is a fixed term tenancy, the date on which the term ends;

- (iii.1) if the tenancy is a fixed term tenancy in circumstances prescribed under section 97 (2) (a.1), that the tenant must vacate the rental unit at the end of the term;

Section 97(2)(a.1) of the Act states that “Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows: [. . .] 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;

From here, we must venture over to section 13.1(1) of the *Residential Tenancy Regulation*, B.C. Reg. 477/2003 (the “Regulation”), which states the following:

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.

In other words, what the Act and the Regulation are saying is that the *only* manner in which a tenant is required to vacate a rental unit, and thus bring a tenancy to its end, is where a tenancy agreement expressly states that the tenancy is to end because the landlord is an individual and intends in good faith to occupy the rental unit at the end of the tenancy. As is clearly seen in the above-included snapshot from page 2 of Agreement 1, while the second box was ticked, the reason given is demonstrably different than a permitted reason under section 13.1(1) of the Regulation.

It follows, then, that the term of Agreement 1 as negotiated and agreed to by the landlord and the tenants is of no force or effect. Section 6(3)(a) of the Act clearly states

that “A term of a tenancy agreement is not enforceable if (a) the term is inconsistent with this Act or the regulations”. Further, section 5 of the Act states that landlords and tenants “may not avoid or contract out of this Act or the regulations,” and, that “any attempt to avoid or contract out of this Act or the regulations is of no effect.”

While the term of Agreement 1 regarding what was to happen at the end of the tenancy is, I find, of no force or effect, this does not result in the entire agreement disintegrating. Rather, the agreement must revert (or what I will call a “default”) to the only available term that would have been available at the time the parties negotiated and entered into the agreement. Namely, that at the end of the fixed term tenancy ending September 1, 2020, the tenancy would have continued on a month-to-month basis or a fixed term.

Both parties testified that at the time of entering into Agreement 1, they were unaware of the statutory requirements in respect of a fixed-term tenancy not being ended unless the landlord intended to occupy the rental unit. It was only some time after that each became aware of this requirement. The landlord and the tenant presented as straightforward, knowledgeable gentlemen who clearly entered into Agreement 1 with good and honest intentions. However, they did so in error. Moreover, it is the landlord who was responsible for drafting the terms of the tenancy agreement, thus, he cannot gain, either directly or indirectly, any benefit from the clause “NEW LEASE MUST BE NEGOTIATED”.

Further, but for this invalid term of Agreement 1, I cannot conclude that the parties would have proceeded with Agreement 2 in the manner that they did. The landlord proceeded on the basis and his understanding that the tenants would have to enter into a new tenancy agreement as of September 1, 2020 if they wanted to continue staying in the property. But the tenants were not, contrary to the invalid term of Agreement 1, under any obligation to accept Agreement 2. For these reasons, I find that Agreement 2 is of no force or effect. Irrespective of the landlord's and tenants' ignorance of the law, the requirement that the tenants sign a new tenancy agreement is, and was, simply put, of no force or effect.

In the absence of any additional agreement between the parties, the tenancy would have, by virtue of the “default” to a month to month term, continued as a month to month tenancy, which is, I conclude, the current type of tenancy. Should the parties wish to enter into a new agreement they may certainly do so, but neither party is required to.

Finally, for the purposes of clarity, as Agreement 2 is of no force or effect, the material terms of Agreement 1 are those that are in force. Therefore, monthly rent is \$2,400.00.

Having found that Agreement 1 is the written tenancy agreement that is (and was) in force on September 1, 2020, the 10 Day Notice issued by the landlord is hereby cancelled. The 10 Day Notice is of no force or effect and the tenancy shall continue until it is ended in accordance with the Act. The tenants' application for an order to cancel the 10 Day Notice pursuant to section 46 of the Act is granted.

In respect of the tenants' application to dispute a rent increase, having found that the rent is \$2,400.00, as per Agreement 1, this claim for relief is moot. This aspect of the tenants' application is dismissed without leave to reapply.

In respect of the tenants' application for an order under section 62(3), this section of the Act states that

The [arbitrator] 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 this dispute, based on the shared ignorance of the parties in respect of their rights and obligations under the Act, I decline to issue an order under this section, and the tenants' claim on this point is dismissed, without leave to reapply.

Both parties, and the landlord in particular, expressed their understanding of the law regarding how fixed-term tenancies may end, and issues related thereto. It is reasonable to conclude that, going forward, the landlord will be better informed as to how a tenancy agreement ought to be drafted. Certainly, the landlord is within his rights to extend a tenancy by a further fixed term by way of a new tenancy agreement, and the tenants are within their right to either accept additional fixed terms, or, continue on a month-to-month basis.

Finally, in respect of the tenants' application for recovery of the application filing fee, section 72(1) of the Act permits an arbitrator to order payment of a fee under section 59(2)(c) by one party in a dispute to another party. A successful party is generally entitled to recovery of the filing fee. As the tenants were successful in respect of their application to cancel the notice to end tenancy, I grant their claim for reimbursement of the filing fee.

In full satisfaction of this award, I authorize the tenants to make a one time deduction in the amount of \$100.00 from a future rent payment.

Conclusion

**I hereby grant the tenants' application, in part, as outlined above.**

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: November 19, 2020

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Residential Tenancy Branch