



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Cecile-Evergreen Estate and  
[tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OLC, RR, RP, FFT

### Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

On November 12, 2021 the tenants filed an amendment to the above claim seeking:

- an Order for regular repairs, pursuant to section 32; and
- an Order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65.

The landlord's agent (the "agent"), the tenants and the tenant's advocate attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision.

The advocate submitted that the tenants were served with this application for dispute resolution and some evidence on August 13, 2021 via registered mail. The agent testified that the above documents were received on August 17, 2021. I find that the above documents were served in accordance with section 89 of the *Act*.

Both parties agree that the tenants served an evidence package on the landlord's office on November 10, 2021. I find that the evidence was served in accordance with section 88 of the *Act* and Rule 3.14 of the Residential Tenancy Branch Rules of Procedure (the "*Rules*").

The advocate submitted that the tenants' amendment was e-mailed to the landlord on November 11, 2021, one day before it was filed with the Residential Tenancy Branch. No proof of service documents were entered into evidence. Both parties agree that the landlord and the tenant do not have a written agreement allowing service via email. The agent testified that the landlord did not receive the tenants' amendment.

Section 88 of the *Act* sets out the approved methods of service for documents other than applications for dispute resolution, as follows:

**88** All documents, other than those referred to in section 89 [*special rules for certain documents*], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
- (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;

- (i) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (j) by any other means of service provided for in the regulations.

Section 43(1) of the Regulation to the Residential Tenancy Act states:

For the purposes of section 88 (j) [*how to give or serve documents generally*] of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.

Residential Tenancy Guideline #12 states:

To serve documents by email, the party being served must have provided an email address specifically for the purposes of being served documents. If there is any doubt about whether an email address has been given for the purposes of giving or serving documents, an alternate form of service should be used, or an order for substituted service obtained.

I find that the landlord did not provide the landlord with authorization to serve them via email. Therefore, the tenants were not permitted to serve the landlord with their amendment via email. I also find that the tenants failed to prove that the email purporting to serve the landlord was sent as the serving email was not entered into evidence.

Rule 4.6 of the *Rules* states in part:

....a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) not less than 14 days before the hearing.

I find that even if the landlord had received the amendment package on November 11, 2021, the landlord would not have received the amendment package 14 clear days before the hearing. As stated in the definition of "days" in the *Rules*:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

Had the amendment been received by the landlord on November 11, 2021, the landlord would only have received it 13 clear days before this hearing, not the required 14 days.

I dismiss the tenants' amendment with leave to reapply for failure to serve in accordance with section 88 of the *Act*, for failure to prove service and for failure to meet the service deadline outlined in Rule 4.6 of the *Rules*.

### Issues to be Decided

1. Are the tenants entitled to an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 1, 2020 and is currently ongoing. Monthly rent in the amount of \$2,000.00 is payable on the first day of each month. A security deposit of \$1,000.00 was paid by the tenants to the landlord. A written Tenancy Agreement was signed by both parties and a copy was submitted for this application. The Tenancy Agreement states that the tenancy is a fixed term tenancy set to end on January 31, 2021.

Both parties agree that the agent asked the tenants to sign a Mutual Agreement to End Tenancy (the "First Mutual Agreement") at the same time the Tenancy Agreement was signed. The First Mutual Agreement states that the tenants agree to move out of the subject rental property by January 31, 2021.

The advocate submitted that the agent told the tenants that if they signed the First Mutual Agreement, they would be permitted to move out with 30 days' notice without being penalized for breaking the lease. This submission was not disputed by the agent. The advocate submitted that at the time of signing, the tenants did not realize that the landlord could force them to move out on January 31, 2021. The agent testified that the

landlord instructed him to have the tenants sign the First Mutual Agreement at the start of the tenancy, but he did not know why.

The advocate submitted that the tenants made no preparations for moving out on January 31, 2021 as they did not understand the nature of the First Mutual Agreement they signed. The advocate submitted that the landlord made no steps to enforce the First Mutual Agreement and accepted rent for February 2021 on February 1, 2021. The above submissions were not disputed by the agent.

The advocate submitted that on February 22, 2021 the tenants emailed the landlord about a dead tree they were concerned about and the next day the agent told them that their First Mutual Agreement had expired and asked the tenants to sign a new Mutual Agreement to End Tenancy (the “Second Mutual Agreement”), referring to it as the “renewal”. The above submissions were not disputed by the agent.

The advocate submitted that the tenants thought that this was a requirement of their tenancy and signed the Second Mutual Agreement on February 23, 2021. The Second Mutual Agreement states that the tenants agree to move out by 1:00 p.m. on July 31, 2021.

The advocate submitted that on June 14, 2021 the landlord sent the tenants an email informing them that, per the Second Mutual Agreement, they would have to vacate the subject rental property by 1:00 p.m. on July 31, 2021. The advocate submitted that the tenants expressed to the agent that they did not want to move and that the agent informed them that the landlord was unwilling to extend the tenancy and intended on enforcing the Second Mutual Agreement. The advocate submitted that the tenants filed this application seeking to have the Second Mutual Agreement struck down because they are entitled to a month-to-month tenancy.

The advocate submitted that the use of Mutual Agreement to End Tenancy forms is an attempt to contract out of the *Act* contrary to section 5 of the *Act*. The advocate submitted that previously, landlords in British Columbia were allowed to include “vacate clauses” in rental agreements that required tenants to move out at the end of a fixed term lease. However, in 2017 the BC Legislature amended the *Act*, expressly removing the provision allowing vacate clauses in all but a few specific cases, which are not applicable here.

The advocate submitted that since the 2017 change to the *Act*, it appears some landlords have attempted to create a loophole in the new rules by taking the vacate

clause out of the tenancy agreement by having tenants sign a mutual agreement to end tenancy at the beginning of a tenancy. This tactic is a plain and obvious attempt to contract out of the Act, in contravention of section 5.

The advocate submitted that the Second Mutual Agreement is void because there was no consideration which is a requirement for a valid contract. The advocate submitted that consideration is the benefit gained by each party by enacting the contract. In the example of a tenancy agreement, the benefit to a landlord is the monthly rent they will receive, whereas the benefit to the tenant is the right to occupy the rental area. Importantly, a promise to continue doing that which one is already legally obligated to do is not valid consideration in law.

The advocate submitted that the Second Mutual Agreement grants no benefit to the tenant. According to section 44(c) of the Act, when the Tenants' fixed-term lease expired on February 1, 2021, they were deemed to have entered a month-to-month tenancy agreement with the landlord under the same terms. Under section 45(1), a tenant may end a tenancy by providing a landlord with one month's written notice. This right is duplicated under section 21 of the Residential Tenancy Agreement signed by the Tenant and the Landlord (the "Tenancy Agreement").

The advocate submitted that absent even one of these necessary ingredients, a contract cannot be enforced. The advocate submitted the Second Mutual Agreement does not offer any consideration to the Tenants, rendering it invalid. A Mutual Agreement to End Tenancy dated for July 31 and signed on February 23 provides no benefit to a tenant on a month-to-month lease, absent any collateral evidence that some other right was granted.

The agent testified that the tenants willingly entered into the First and Second Mutual Agreement and are not now permitted to change their minds. The agent testified that the Second Mutual Agreement is valid and the landlord is entitled to its enforcement.

### Analysis

It is undisputed that both parties signed the First Mutual Agreement and the Tenancy Agreement on July 30, 2020. It is undisputed that both parties signed the Second Mutual Agreement on February 23, 2021.

Section 44 of the *Act* sets out how a tenancy may end:

- 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.

As seen above, landlords are not entitled to require tenants to vacate the subject rental property at the end of a fixed term outside of the prescribed circumstances under section 97(2)(a.1), which were not argued in this case.

Residential Tenancy Policy Guideline #30 states:

A landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term. If a tenancy does not end at the end of the fixed term, and if the parties do not enter into a new tenancy agreement,

the tenancy automatically continues as a month-to-month tenancy on the same terms.

The tenants' advocate submitted that the landlord has tried to avoid the *Act* by requiring the tenants to sign consecutive Mutual Agreements to End Tenancy to avoid the fixed term tenancy from turning into a month-to-month tenancy at the end of the fixed term.

Based on the submissions of both parties I find that the agent asked the tenants to sign the First Mutual Agreement at the same time the Tenancy Agreement was signed. I find that the timing of the signing of the First Mutual Agreement was a coercive tactic that vitiated the tenants' ability to refuse and in effect, was a condition of signing the Tenancy Agreement. I find that instead of complying with Policy Guideline #30 the landlord required that the tenants sign the First Mutual Agreement.

I find that the Second Mutual Agreement was a direct consequence of the First Mutual Agreement which the agent described as a "renewal" and was a tactic of the landlord to avoid the tenancy from continuing on a month-to-month basis.

Section 5 of the *Act* states:

5(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Although section 44 of the *Act* allows two parties to end a fixed-term tenancy by mutual consent, the tenants have filed an application challenging the validity of the consecutive Mutual Agreements to End Tenancy as they were required to sign them as a condition of the tenancy agreement, and they feel that the landlord is attempting to contract out of the *Act*.

I find that to condone the use of a Mutual Agreement to End Tenancy to circumvent the prohibition on requiring tenants to move out at the end of a fixed term, subject to limited circumstances set out in section 97 (2) (a.1) of the *Act*, amounts to the nullification of important provisions of the legislation intended to protect tenants.

As noted above in section 5 of the *Act*, parties may not avoid or contract out of the provisions of the *Act* or *Regulation*. I find that the landlord's use of the Mutual Agreements as a required condition of the Tenancy Agreement and continuation of the



tenancy amount to an attempt to contract out of the *Act* and legislation. I make this finding based on the fact that under the *Act*, the fixed-term tenancy would automatically convert to a month-to month tenancy and could not have required the tenants to move out.

Pursuant to section 5 of the *Act*, I find the First Mutual Agreement and the Second Mutual Agreement are void and of no force or effect. I order the landlord to comply with section 44 of the *Act* regarding how a tenancy ends. I find that this tenancy continues on a month-to-month basis.

As the tenants were successful in this application for dispute resolution, I find that they are entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenants are entitled to deduct \$100.00, on one occasion, from rent due to the landlord.

As I have determined that the First Mutual Agreement and the Second Mutual Agreement are void pursuant to section 5 of the *Act*, I decline to consider if the First Mutual Agreement and the Second Mutual Agreements should be struck down for any other reason.

### Conclusion

The Mutual Agreement to End Tenancy dated July 30, 2020 is void and of no force or effect.

The Mutual Agreement to End Tenancy dated February 23, 2021 is void and of no force or effect.

This tenancy continues on a month-to-month basis.

The tenants are entitled to deduct \$100.00, on one occasion, from rent due to the landlord.

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 26, 2021

---

Residential Tenancy Branch