Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Chishaun Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to have the landlord comply with the *Residential Tenancy Act (Act),* Regulation or tenancy agreement.

The hearing was conducted via teleconference and was attended by the tenant, her legal counsel, the landlord's agent, and their legal counsel

Neither party raised any issues of the service of documents and/or evidence. I note that this hearing was scheduled in response to the outcome of Judicial Review heard by the Honourable Mr. Justice Kirchner of the Supreme Court of British Columbia of an original Residential Tenancy Branch (RTB) decision dated January 6, 2020.

Justice Kirchner found the decision was procedurally unfair and patently unreasonable. On the first point it was found that, because the original decision was determined based on Section 28 of the *Act* and the landlord had not been provided an opportunity to make submissions or lead evidence on the issues related to Section 28, the landlord was denied the right to procedural fairness.

On the second point, the Court found that the reasons provided by the original arbitrator "do not meet the minimal standard required to explain her decision and that decision is therefore patently unreasonable."

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to an order that the landlord comply with the *Act*, regulation or tenancy agreement and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 62, and 72 of the *Act.*

Background and Evidence

Both parties submitted into evidence a copy of a tenancy agreement signed by the parties on November 4, 2016 for a month-to-month tenancy beginning on December 1, 2016 for a monthly rent of $543.00 due on the 1st of each month.

While the tenancy agreement contains a number of clauses related to BC Housing and rental subsidies, specifically clause 17 states:

> **Extended absences from Residential Premises**
> If the tenant is eligible for a rent subsidy and if the tenant is absent from the residential premises for one consecutive month or longer without the prior written consent of the landlord, the landlord may end the tenancy even if the rent is paid for that period.

The tenant submits that clause 17 should be struck from the tenancy agreement and found to be unenforceable. Specifically, the tenant asserts that clause 17 breaches Section 28 of the *Act* and the term is unconscionable.

The tenant submits that at the time she entered into the tenancy agreement she had recently left an abusive relationship and was in financial distress and as such, at the time it was not feasible for her to renegotiate clause 17.

The tenant further submits that in September 2019 she advised the landlord that she would be absent from her rental unit for the period of January 1, 2020 to March 4, 2020. In response, she received notification from the landlord's agent that

> "The Tenancy Agreement …. only allows one continuous month of extended absence per calendar year. Therefore the CHS Management **DOES NOT APPROVE** for a 3 – month absence from your suite…"

The tenant requested the landlord reconsider the decision based on specific medical needs which she confirmed through the provision of documentation from her general practitioner and her respirologist, supporting her need to be in a hot climate during winter months.

The landlord responded by indicating they needed to consult with BC Housing before granting any approval. Ultimately, the landlord returned a response granting a "one time" approval noting: "If you expect future lengthy absences owing to your medical condition or otherwise, you should not rely on further consent from CHS and you should seek alternative accommodations."

At the time of this hearing, the tenant had been provided the landlord's "consent" to a new absence from January 2022 to March 2022 on the condition the tenant provided a doctor's note confirming that the absence is required for medical reasons.

The tenant submits that the *Act* is "protective legislation aimed at conferring rights on tenants" and as such must be interpreted liberally conscious of this purpose. As a result, the tenant's position is that any ambiguity in language must be resolved in favour of tenants. In support of this position the tenant references: *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257 at para. 11 [Berry]; *Blouin v Stamp*, 2021 BCSC 411 at para. 32 [Blouin], citing Berry; and Section 8 of the *Interpretation Act*, RSBC 1996, c. 238.

The tenant asserts that exclusive possession is more than physical presence but rather it includes the ability to control their living space in "ordinary and lawful ways without substantial interference". They provide that if the tenant cannot leave their rental unit with out their landlord's permission the tenant does not have use and control or exclusive possession of the rental unit without substantial interference from the landlord.

The tenant also proposes that the landlord has the following three specific policy reasons for requiring clause 17: to avoid tax under the *Speculation and Vacancy Tax Act*, SBC 2018, c46; to satisfy occupancy requirements under insurance policies; and to check the tenants meet the 6-month residency requirement for receipt of a rental subsidy. The tenant submits that these policy reasons are not relevant to the interpretation of Section 28 of the *Act*.

Regardless of this position, the tenant submits the following arguments against the landlord's policy reasons:

1. Speculation and Vacancy Tax – the tenant argues that the tenant does not need to physically occupy the rental unit but rather it is based on the tenant's entitlement to occupy the place she makes her home;
2. Occupancy requirements for insurance policies – the tenant submits the landlord has provided no evidence to show that their specific insurance requires a physical presence in all rental units, at all times. The tenant also asserts there is no evidence that, even in general, if there is a requirement for occupancy that it requires physical presence;
3. Subsidy residency requirements – the tenant suggests it is BC Housing's responsibility to determine eligibility for rental subsidy not the landlords. But even if it were the landlord's responsibility, the requirement to restrict absences to 1 month are "an unnecessary and overly invasive means of checking whether a tenant is resident in British Columbia for at least 6 months of the year"

Finally, the tenant suggests that clause 17 is unenforceable because it is unconscionable. The tenant submits the term is unconscionable because it is oppressive and grossly unfair as it requires her to choose between housing security and meeting her medical needs.

The tenant's position on this point is twofold. First, the tenant submits she must give up a significant part of her freedom by having to ask for permission to be absent, even for

medical reasons. They go on to say that the landlord is not qualified to assess her medical need and that even if she can present medical needs there is nothing in the clause that guarantees her medical needs will be accepted.

The tenant submits that the landlord has already demonstrated that this is a possibility when the landlord informed the tenant that, on her first approval to be absent from the rental unit in 2020, she should not expect to receive future approval for absences of greater than one month.

In addition, the tenant takes the position that the landlord's approval based on medical need is an unreasonable invasion of her privacy. Specifically, the tenant asserts the landlord has no need nor right to know her personal medical circumstances.

The landlord submits the tenant's Application must be dismissed because:

1. The tenant's claims are not grounded in evidence, rather, they are based on hypothetical future events which are outside the purview of the *Act*;
2. Clause 17 and others like it are reasonable and necessary in the context of the subsidized housing regime, of which CHS is a part. Monitoring and regulating the length and frequency of tenant absences advances the interests of tenants as a whole and is consistent with the purposes of the *Act*.
3. Clause 17 has no connection to the Tenant's right to quiet enjoyment and it is not an unconscionable term.

The landlord submits that the tenant's assertions are based on the assumption that clause 17 is a complete bar on all tenant absences and that prior written consent is required in order for the tenant to leave the rental unit. The landlord presents that clause 17 is not an absolute bar but is a discretionary provision that requires a tenant to get approval prior to being absent from the rental unit for longer than "one consecutive month".

The landlord submits that, in fact, the tenant has not been barred from a previous and a future extended absence from her rental unit and that there is no evidence to support the tenant's position that clause 17 limits the tenant's ability to travel or leave her rental unit.

The landlord suggests that because of this the tenant is seeking to have a decision from the Residential Tenancy Branch (RTB) based on "hypothetical future events". The landlord goes on to say that should I rely upon such future events to make this decision it would render my decision "unreasonable and subject to being overturned on judicial review." In support of this position the landlord references *Hernandez v. Barrie*, 2007 BCSC 1771 at para 19, which states:

> "Having decided to consider events subsequent to the notice of termination, the arbitrator then made a finding based entirely on speculation rather than evidence.

> That speculation appears to have related in part to hypothetical future events that would be outside of the purview of the Act. In my view, that makes the decision patently unreasonable."

The landlord submits that clause 17 is reasonable and necessary and in support of this position forwards three specific points:

a) Clause 17 is consistent with the purpose of the *Act*;
b) Clause 17 ensures compliance with the BC Housing subsidy eligibility conditions; and
c) There are valid reasons why a landlord would include such a provision.

First, while the landlord does not disagree with the tenant's position that the *Act* is intended to confer rights to tenants and that it should be interpreted in favour of the benefitted group, they disagree with the view that it is in the interest of tenants as a whole to preclude any oversight of tenant absences from subsidized rental units. The landlord argues that this view would place an individual tenant's interests over the most vulnerable members of the benefitted group.

The landlord submits that subsidized rental units are intended for persons who are most in need of housing. They suggest that a person who has the ability to live somewhere else for months at a time each year is less in need of housing than an individual who does not have the same options.

The landlord submits that the demand for subsidized housing far exceeds the available supply and therefore it is not in the interest of all tenants to have the limited number occupied by tenants who are less in need than others.

Secondly, the landlord submits that clause 17 allows for the landlord to ensure tenants are compliant with at least one of the requirements for the tenant to be eligible for subsidy. The requirement noted by the landlord is that recipients of subsidy must permanently reside in BC – meaning they must be physically present in BC for at least six months of the year. I note the landlord has not provided a copy of their agreement with BC Housing but have provided a document called 6_BC_Housing_-_Subsidized_Housing_Program_(excerpt).

I note this document states that "subsidized housing is long-term housing for people who permanently reside in British Columbia" and under the title "Am I eligible" subsection b) states: "Applicants must permanently reside in British Columbia when applying, and each member of the household must be one of the following: Canadian citizen; individually lawfully admitted into Canada for permanent residence; refugee sponsored by the Government of Canada; and individual who has applied for refugee status. There is no reference to a 6-month residency requirement.

The landlord submits that the tenant's suggestion that any limit imposed on absences is in violation of the *Act* is inconsistent with the eligibility requirements of the BC Housing subsidy program. The landlord provides that the *Act* specifically recognizes the importance of subsidy eligibility requirements since it allows for the landlord to end a tenancy on the sole basis of a tenant no longer qualifying for subsidy under Section 49.1 of the *Act*.

The landlord submits that this is demonstrated by the words taken from Hansard of the Legislature when the *Act* was amended to include this provision:

> "First of all, the amendment allows public housing bodies to end tenancy if the tenant ceases to meet eligibility requirements for a subsidized rental unit. The eligibility requirement for a subsidized rental unit is usually rent-geared to income. If we have somebody living in a unit whose income determines that they should actually be living in the marketplace, so that we could give that unit to somebody who can't afford housing, we should have that ability to deal with that.
>
> There are some examples of subsidized rental units that are in housing where the rent is based on income — family housing and housing for persons with health care needs, etc. Many such landlords have policies which would require tenants to vacate or move to a different rental unit if they cease to qualify. This is due to high demand in housing for persons who do qualify. There's no current provision in the act which allows this to occur."

The landlord submits that the template agreement that BC Housing uses has "an almost identical provision to Clause 17". As such they suggest that should I determine that any limit on the length or frequency of tenant absences is a breach of the *Act*, there would be broader implications than this one tenancy.

In regard to the landlord's position that there are valid reasons why a landlord would include such a provision, the landlord provides these reasons specifically:

1. To satisfy occupancy requirements under a property insurance policy;
2. To avoid paying vacancy taxes; and
3. As a check that tenants meet residency requirements for receipt of a rental subsidy.

The landlord suggests that often occupied premises are required for insurance coverage. They put forward that if a landlord "were unable to restrict tenant absences", they would lose the ability of ensuring the rental property has adequate insurance coverage for events such as a fire.

In support of this position the landlord submits a partial pamphlet from the Insurance Bureau of Canada entitled "All About Home Insurance". Despite a number of sections outlined in the table of contents the only information provided is from a section called

Perils. The landlord refers specifically to the list of uninsured perils listing vacancy – loss or damage is not covered if your home has been vacant for 30 consecutive days.

I note the landlord has not provided a copy of their own specific insurance and/or any stipulations in their own insurance policy regarding vacant rental units. The landlord provided no evidence or testimony as to how untenanted rental units or tenanted units that are vacant for temporary absences are covered or excluded by insurance under their policy.

The landlord submits that the landlord would become liable for the payment of Speculation and Vacancy tax with no ability to have an exemption unless the tenant occupies the residence for at least six months of the year. The landlord disagrees with the tenant's position that the tenant has an entitlement to occupy with no requirement for physical occupation of the residence.

The landlord goes on to say that the *Speculation and Vacancy Tax Act* requires a tenant to have entitlement to occupy and "the residence is a place the tenant makes the tenant's home". As such the landlord's position is that the residence will only be deemed occupied where a tenant does in fact live there. I note the landlord has provided no evidence that they have been required to pay a vacancy tax on any of their vacant rental units, including those that are being renovated over a period of months or the tenant's rental unit when she last had her extended absence of 3 months.

The landlord disagrees with the tenant's position that it is not the responsibility of the landlord to determine subsidy eligibility but rather BC Housing. The landlord submits that this "overlooks the existence of the operating agreement between BC Housing and CHS which requires CHS to ensure tenant compliance with the eligibility conditions. Neither party provided a copy of the operating agreement in full or part.

The landlord also disagrees with the tenant's position that clause 17 is overly invasive in that it limits the tenant's absences to one month instead of six months. The landlord suggests that the tenant is not looking at altering the duration of the absence but rather at removing the clause in its entirety.

Finally, the landlord argues that clause 17 is not a breach of quiet enjoyment or unconscionable. The landlord submits that the clause does not limit the tenant's travel or ability to leave the rental unit "at all". The landlord states:

> "The Tenant relies on this inaccurate premise (i.e. the Tenant cannot freely leave her rental unit without the landlord's permission[40]) as the basis for her conclusion that the Tenant does not have exclusive possession of the rental unit.[41] If the underlying premise is amended to accurately reflect the facts (i.e. the Tenant can freely leave her rental unit whenever she wants, it is only when she will be leaving her unit empty for longer than one consecutive month that she needs to

> seek permission from the landlord), the conclusion about a lack of exclusive possession falls away."

The landlord also disagrees with the tenant's position that leaving the rental unit vacant for an extended period of time is ordinary and lawful use of the premises and that requiring approval from the landlord substantially interferes with that ordinary use.

The landlord argues that the tenant has provided no explanation or authourity for her position that leaving the rental unit vacant is ordinary or lawful use. The landlord puts forward that "ordinary" means "not unusual or different in any way" pursuant to the Oxford Advanced Learner's Dictionary and provided a link to the online definition. The landlord goes on to say using the rental unit as a place to live would be the ordinary use of the unit. They further explain that if the tenant leaves the unit vacant for an extended period of time, they are not using it as a place to live.

The landlord states that this position is particularly relevant when the tenant receives subsidy for her rental unit as having alternative places to live for extended periods is not consistent with being "in need" of subsidized housing. As such, it is not accurate to contend that an extended absence qualifies as an "ordinary and lawful use" of a subsidized rental unit.

In support of this position, the landlord provides that the Residential Tenancy Regulation allows for a landlord "to consider personal property abandoned if, *inter alia*, the tenant leaves it in a rental unit that they have not "ordinarily occupied" for a continuous period of one month." The landlord purports that the implication of this is that "ordinary" requires physical occupation of a rental unit during the tenancy.

The landlord's secondary position on this point is that the tenant has provided no explanation as to how the clause amounts to an interference with ordinary use or exclusive possession. They further suggest that, even if it is interference, it is a temporary inconvenience which is not a basis for finding a breach of quiet enjoyment, pursuant to Residential Tenancy Policy Guideline 6.

The landlord submits that there is no evidence to support the tenant's position that clause 17 is unconscionable. The landlord states that the clause is not an absolute bar and is discretionary. They also put forward that on both occasions that the tenant has asked for approval the landlord has used its discretion in favour of the tenant. The landlord concludes: "Thus, the Tenant has not once found herself in a position where she is required to choose between her medical needs and her housing security.

The landlord notes that the amount of the subsidy is irrelevant in that it overlooks the fact that the amount of a subsidy is based on the applicant's income. The landlord also points out that the determination of a tenant's subsidy and the process of that determination is outside of the jurisdiction of the Residential Tenancy Branch (RTB) and by extension the *Act*.

The landlord submits that Residential Tenancy Policy Guideline 8 stipulates that to be oppressive the clause must be "so one-sided as to oppress or unfairly surprise the other party". They state that to be one-sided, the term must provide some benefit to the other party (the landlord, in this case). The landlord's position is that the landlord has no material benefit or undue advantages as a result of clause 17, rather it provides "practical utility by allowing CHS to oversee compliance with the subsidy program and remain on track with its society mandate of providing low income housing to seniors in need."

The landlord also submits that the tenant was aware of the existence of clause 17 at the time of signing the tenancy agreement and it should not come as surprise. They go on to note that clause 11 of the tenancy agreement required the tenant to disclose all information relevant to her entitlement to a rental subsidy, including the fact of her permanent residency in BC at the beginning and during the tenancy.

In support of this the landlord references another decision where an arbitrator had determined a similar clause was not only enforceable but was also material to the tenancy. As a result, the arbitrator allowed the landlord to end the tenancy for breach of a material term using a One Month Notice to End Tenancy for Cause.

In the hearing, I asked the landlord if any tenant had failed to comply with clause 17 how would the landlord end the tenancy. The landlord provided that they would determine that on a case-by-case basis, but either for breaching a material term or because the tenant no longer qualified for subsidy.

In response to the tenant's position that clause 17 is unreasonably invasive of the tenant's privacy the landlord suggests that:

> "…the Tenant's medical circumstances are material to her continued tenancy at [residential property] which is an independent living facility. This necessarily requires CHS to have access to information about the status of the Tenant's health. This is demonstrated by the questions included in the Tenant's application forms which required her to disclose the nature and extent of any health issues she suffered from. Further, clause 11 of the Tenancy Agreement specifically entitles CHS to verify the Tenant's medical circumstances from time to time."

As their last position, the landlord submits there is no evidence of bad faith. The landlord submits that despite the tenant's assertion that the clause will allow the landlord to capriciously and unreasonably refuse to allow the tenant extended absences despite her medical needs is not supported by the record. The landlord also suggests that this would be "inconsistent with the general doctrine of contract law which imposes a duty on contracting parties to exercise contractual discretion in good faith.

Analysis

Based on the submissions of both parties I am satisfied, on a balance of probabilities, that clause 17 is inconsistent with the *Act*. Specifically, I find the tenant has established that clause 17 breaches her right to quiet enjoyment, contrary to Section 28 of the *Act*, and is an unconscionable term pursuant to Section 3 of the regulation and is therefore not enforceable as per Section 6 of the *Act*.

I make this finding for the reasons set forth in this section of this decision.

Before I address the specifics leading to my above findings I comment, in general, on the landlord's position of including any subsidy eligibility requirements within the tenancy agreement. With due respect to the landlord, their legal counsel and BC Housing, I find that the landlord has conflated their two responsibilities in the provision of "subsidized housing".

I note that, quite often and consistently in the landlord's submissions, the landlord referred to the "need for housing" and, for example, that a person who has the ability to live in alternate accommodation for 3 months of the year is not demonstrative of that "need for housing". When, in fact, the landlord meant that someone who can afford to pay rent in two places is not likely in need or deserving of subsidization for their housing costs. I would suggest that most people, if not all, are in need of some form of housing.

I also am cognizant of the landlord's repeated assertion that their tenancy agreement was reviewed and approved by BC Housing. However, I note that just because BC Housing has approved the template the landlord used, in this instance, does not mean any of the clauses in the subject tenancy agreement comply with the *Act* or regulation.

As an example, I point to clause 13 (a clause completely unrelated to subsidy) in which the agreement reads:

> "The tenant may end a month-to-month tenancy by giving the landlord at least six (6) weeks written notice. The landlord must receive the written notice 14 days before the day that rent is due, for the tenant to move out the end of the following month."

While I am not making any specific ruling on this clause (as I heard no submissions from either party on the issue), I note that Section 45 of the *Act* specifically requires a tenant to issue their notice to end tenancy with an effective date to be not earlier than one month after the date the landlord receives the notice. Based on the landlord's assertions, I can only assume that BC Housing allowed the landlord to include a clause that appears, at least on the surface, to require the tenant give 6 weeks notice which would be in conflict with the *Act*.

I concur with the landlord's position that the determination of eligibility for rental subsidy is outside of the jurisdiction of the *Act*. However, the *Act* is intended to confer rights to all tenants residing in the province of BC, whether or not they are entitled to any type of rental subsidy. As such, I note that rights and obligations of both parties provided by the *Act* and regulation applies to both tenants outside of and within the provincial subsidy scheme, with three exceptions.

Section 2 of the Regulation specifically allows for rental units operated by, among other prescribed landlords, the British Columbia Housing Management Commission (BC Housing) as being exempt from first - Section 34(2) [assignment and sublet provisions], second - 41, 42, and 43 [rent increase provisions] of the *Act*. Third, Section 49.1 of the *Act* allows for a public housing body, as prescribed under Section 2 of the Regulation, to end a tenancy for a person who no longer qualifies for a subsidy.

These specific exemptions were made, as per the landlord's Hansard submission, and are intended to provide the ability for public housing bodies to administer their subsidy programs.

Section 34(2) of the *Act* stipulates landlords cannot unreasonably withhold consent for a tenant to assign or sublet their rental unit where there are 6 or more months left in a fixed term tenancy. Section 41, 42, and 43 of the *Act* are all related to the administration of rent increases. Rental units operated by BC Housing are exempt, as noted above.

Section 49.1 specifically identifies a "subsidized rental unit" as a rental unit that is:

a) Operated by a public housing body, or on behalf of a public housing body; and
b) Occupied by a tenant who was required to demonstrate that the tenant, or another proposed occupant, met eligibility criteria related to income, number of occupants, health, or other similar criteria **before entering into the tenancy agreement in relation to the rental unit**. [emphasis added]

In relation to clause 17, I note that the *Act* itself does not allow for any landlord (public housing body or not) to include in tenancy agreements a term limiting a tenant's quiet enjoyment, including exclusive possession and reasonable privacy or a term that is unconscionable. I also find that, by adding clause 17, which is a term of eligibility for subsidy into the tenancy agreement itself, the landlord is downloading the responsibility from BC Housing, or in this case CHS, to the Residential Tenancy Branch to determine, at least portions of eligibility for subsidies, contrary to the intent of the legislature.

From the reading of Section 49.1, and, as noted above, in concurrence with the landlord's position, I find that the determination and administration of the tenant's subsidy is a distinct and separate component of the relationship between the landlord and tenant. As such, the landlord is obligated to determine eligibility for subsidy outside

of the administration of the components of the tenancy that are under the jurisdiction of the *Act*.

If the landlord wishes to end a tenancy because the tenant no longer qualifies for subsidy Section 49.1 requires the landlord issue a notice to end tenancy with an effective vacancy date of not earlier than two months after the date the notice is received.

In direct relation to clause 17 and the landlord's testimony regarding unconscionability of the clause, the landlord confirmed that if a tenant has breached clause 17 the landlord would consider either ending the tenancy under Section 49.1 (using a two-month notice) or pursuant to Section 47 for breach of a material term. I note that section 47 allows for an effective vacancy date of not earlier than one month after the date the notice is received (a one-month notice).

During the hearing the landlord presented that the landlord does not receive any "material benefit or undue advantages as a result of clause 17". However, I find that if the landlord "chose" to end a tenancy using a one month notice the landlord has obtained an advantage and a material benefit by ending the tenancy in a manner that was contrary to the intent of the legislature. I refer to the landlord's submission from Hansard:

> There must be a provision of a tenancy agreement informing the tenant that they may be given notice to end the tenancy if they cease to qualify for a rental unit. If it's not in the tenancy agreement, you can't do it either way — right?
>
> The landlord **must give two months notice or negotiate another end date** with the tenant, so it's not a quick thing. Another end date could be when another unit comes up on our list that you could qualify for because of the housing mix, or whatever the case may be. [emphasis added]

Therefore, in general, I find that any term that represents an eligibility criterion for subsidy should be dealt with by the landlord outside of the tenancy agreement itself. As per Hansard, I find the intention was that these public bodies could put in a single term in the tenancy agreement that would advise the tenant that the landlord may end their tenancy if they failed to qualify for subsidy. I also find that if, based on whatever criteria BC Housing has determined, the tenant does not qualify for subsidy the landlord has the specific obligation to make this determination.

I also note the landlord is not required under the *Act* to end the tenancy if the tenant no longer qualifies for subsidy but if they chose to, their remedy is to end the tenancy under 49.1 only. By putting into the tenancy agreement specific qualifications for subsidy and allowing the landlord to end the tenancy for one specific component of subsidy without any context for an arbitrator, I find that there is an unfair advantage provided to the landlord should they attempt to end the tenancy for breach of a material term (one

month notice under Section 47) as opposed to the full assessment of eligibility for subsidy completed by the landlord and issuing a two month notice, under Section 49.1.

In regard to the landlord's evidence of a previous decision (dated August 28, 2014) where an arbitrator granted the landlord an order of possession for a one month notice under Section 47 for a similar cause, I note, as the landlord's counsel had during her submissions, that pursuant to Section 64(2) I am not bound by any previous decisions.

I have no ability to know exactly what was presented to that arbitrator or if the issues of unconscionability or contravention of Section 28 were even raised in that proceeding, as such I find there is insufficient context to determine its value in this determination. I am, however, disturbed by the decision, both by the arbitrator and the landlord in that case to end the tenancy of someone while she was hospitalized for an extended period of time.

As noted above, just because a tenant, in a subsidized housing facility, does not qualify for subsidy the landlord is not **required** to end the tenancy. Rather a landlord has the ability to increase the rent to market rent and let the tenancy continue, at least until such time as the tenant could have finalized what their needs may have been.

The landlord submits that my decision should dismiss the tenant's Application on the grounds that her "claims are not grounded in evidence, rather, they are based on hypothetical events which are outside the purview of the Act." I disagree with this position.

First the landlord argues that the tenant's position is based on an assumption that clause 17 is a complete bar to "all tenant absences and that prior written consent is required in order for the Tenant to leave her rental unit or travel at all". I see nothing in the tenant's submissions that support this argument.

The tenant's submissions are based on the specific requests she has had in relation to extended absences exceeding one month. The tenant argues that the requirement to request approval for absences over one month is significant interference of the tenant's right to quiet enjoyment. They also argue that the requirement of the landlord to provide medical documentation to get the approval was an unnecessary invasion of the tenant's right to privacy.

The landlord also argues that the tenant seeks a decision based on "hypothetical future events" and states that relying on such events would render the decision unreasonable and subject to being overturned by judicial review.

The judicial review the landlord relies on, *Hernandez v Barrie* 2007 BCSC 1771, is based on a decision by an arbitrator who ordered the end of a tenancy on the potential that a behaviour, attributed to the tenant's son, might be repeated in the future. In that

case, the arbitrator found that future “cause” may exist and that was sufficient for the landlord to rely on the previously issued Notice to End Tenancy.

In this case, the landlord suggests that I cannot rely on potential future events to establish whether or not a clause should be allowed in a tenancy agreement or contract. I find the sole intention of a tenancy agreement or a contract is to set out terms that will outline how both parties to the contract must behave in order for the contract to be fulfilled. By definition, then, the whole purpose of the tenancy agreement is to anticipate and address “hypothetical future events”

If I were to follow the landlord’s logic, for example, there would be no need to write down a term in a tenancy agreement that would require the tenant to pay rent on a certain day in the future, since there would be no evidence at the time of signing of the agreement that the tenant would not pay rent when the landlord expected it to be paid. As such, the landlord’s logic suggests there is no need for a contract whatsoever.

I am not persuaded by this argument.

Section 28 of the *Act* stipulates that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted]; and
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6 states:

> “A landlord is obligated to ensure that the tenant’s entitlement to quiet enjoyment is protected. A breach of an entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises."

In the case before me, the landlord suggests the issue is a temporary discomfort or inconvenience, and should, therefore, not be considered a breach of quiet enjoyment. However, as the tenant appears to have an annual need to be absent from the rental unit for 3 months, or ¼ of the year, I am not satisfied that this is a temporary inconvenience but a concern the tenant must live with each year.

In addition, the Policy Guideline requires balancing the tenant's right to quiet enjoyment against the landlord's right and responsibility to maintain the premises. I find that in this instance, the landlord is seeking, in essence, to balance two different things that do not have a relationship, under the *Act.* Specifically, balancing the tenant's right to exclusive possession with the landlord's right to administer the subsidy program. I find the right to administer the subsidy program is not consistent with the Policy Guideline wording of balancing the tenant's right with the landlord's "right and responsibility to maintain the premises".

I concur with the tenant's submissions that exclusive possession refers to the tenant's ability to use and control their living space without substantial interference. I note that the tenant has included the proviso that the use and control is "in ordinary and lawful ways", which is consistent with the wording of Policy Guideline 6. However, the landlord suggests that the tenant has not provided any explanation of ordinary use means anything other than a place to live.

I am not persuaded by the landlord's position on this point. The landlord provided "A tenant who leaves the rental unit vacant for an extended period of time is not, during the extended absence, using the rental unit as a place to live." However, the landlord has provided no context for this argument.

While the landlord has provided a definition from the Oxford Advanced Learner's Dictionary for the word ordinary to mean "not unusual or different in any way" they do not provide how it is unusual for a person living anywhere (whether as a tenant or a homeowner) to be away from their home for any period of time.

I prefer the tenant's submissions that part of "living" anywhere does not require a person to never leave their home for more than a month. I am satisfied that it is ordinary for people to be absent from the home. In particular, in a case such as this one or the August 28, 2014 decision noted above where the tenancy ended because that tenant was hospitalized for an extended period, I find that people do not usually give up their place of residence because they are undergoing medical treatment and/or therapy. As such, I find that it is an ordinary use to continue to pay rent and maintain your tenancy for any absence, extended or not.

I am, likewise, not persuaded by the landlord's comparison to the abandonment of personal property provision in the regulation. Specifically, the landlord suggests that the wording implies "physical occupation" of the rental unit. However, upon review of Section 24 of the regulation, I see no reference to physical occupation of the rental unit and that there are a number of other relevant factors that would be required to determine that the tenant had not occupied the rental unit, such as the non-payment of rent; written or oral notice that the tenant was vacating or circumstances where it would be reasonable to expect the tenant was not returning.

While these two examples are based on medical conditions, I see nothing in the evidence of either party that would suggest a person being on an extended absence for reasons other than medical ones would not be an ordinary use.

I also prefer the tenant's submissions that the requirement for the tenant to seek approval for any absence (again whether extended or not) is a significant interference with the tenant's quiet enjoyment. I find this way, in part, because there are no provisions or exemptions specific to public housing landlords, in the *Act* for the landlord to require the tenant to seek approval to be absent from their rental unit for any length of time or that would bar any tenant from being able to be absent at all (with or without landlord approval).

Again, if the landlord believes it is something that is a requirement for the determination of subsidy that is out of my jurisdiction, but to have it as a term in the tenancy agreement does require compliance with the *Act,* not the rules governing the provision of subsidy.

I find that by requiring the tenant to seek permission from the landlord for any absence over one month in duration, the landlord is significantly interfering with the tenant's ability to determine how she uses the rental unit. As part of the landlord's obligation, I find the landlord granted the tenant exclusive possession of the rental unit, including deciding how to use it, pursuant to Section 28 of the *Act*.

I am not persuaded that the landlord has the ability to limit that exclusive possession in any manner whatsoever. I find that any such requirement is a breach of Section 28(c).

I also am persuaded by the tenant's argument that to provide medical justification to the landlord is an inappropriate invasion of the tenant's privacy, also contrary to Section 28 of the *Act*. I find there is no authourity under the *Act*, for the purposes of administering a tenancy that would allow the landlord to request medical information, for any purpose.

Furthermore, the landlord has described clause 17 to be a discretionary clause, but they have provided no boundaries for what would be considered to get an exemption or how that would impact the landlord's other reasons for justifying clause 17. For example, the landlord granted the tenant approval in 2020 based on her medical documentation and

approval for 2022 based on the condition the tenant provided more medical documentation.

However, the landlord does not explain how, the provision of medical documentation overcomes their "valid reasons why a landlord would include such a provision". As noted above, the landlord states they need to limit extended absences to satisfy insurance requirements; to avoid payment of vacancy taxes; and ensure the tenant meets residency requirements for subsidy.

If these arguments submitted by the landlord are correct, then the landlord should have evidence that they have the ability to be exempted from these concerns when they approve an extended absence. In fact, the landlord has provided no evidence that those were even part of their considerations when determining approval for the tenant's recent absences. From their submissions, it appears the approval was only considered as a result of the tenant's medical documentation.

I will allow that the landlord, in their consultation with BC Housing, on the first of the tenant's requests, *likely* discussed the impact of residency requirements, but the landlord provided no confirmation that they considered that at all.

The landlord also argues that the provision of medical documentation should not be a surprise for the tenant because of the inclusion of clause 11 of the tenancy agreement. I note this clause reads:

> 11. Disclosure
>
> If the tenant is eligible for a rent subsidy from BC Housing, the tenant:
>
> (a) agrees to promptly provide or cause to be provided such information and documentation as is requested by the landlord regarding the tenant as required to determine the applicable Tenant Rent Contribution or for
> audit purposes;
> (b) consents to the landlord verifying personal information, as defined in the Freedom of Information and Protection of Privacy Act, which consent is required by that Act to enable the landlord to carry out its audit
> function; and
> (c) agrees that if the tenant fails to disclose or misrepresents any information requested by the landlord to allow the landlord to determine the applicable Tenant Rent Contribution or for audit purposes, such failure or misrepresentation will be deemed to be a material breach of this tenancy agreement entitling the landlord to end this tenancy agreement and to recover from the tenant in contract or otherwise the difference between the amount the tenant paid as the Tenant Rent Contribution and the rent payable under

> Section 3. The remedy is not exclusive and may be exercised by the landlord in addition to any other remedies available to the landlord in law or equity or as set out in this tenancy agreement; (d) The Society, from time to time, may need to verify the tenant's medical condition for the tenant's own safety and that of the other residents. The tenant gives his or her physician(s) express consent to disclose his or her
> medical condition to the landlord, and waives doctor-patient privilege and confidentiality. The landlord shall have the right to transfer the tenant to a suite of similar size on the ground floor of the property (or other location on the property), if in the opinion of the landlord it would be best for the tenant's or other tenants' safety. Any such transfer will be at the tenant's sole cost and expense'

Again, while I have noted above, without making any specific orders on the inclusion of other clauses in the tenancy agreement that may or may not be enforceable under the *Act*, I find that just because the landlord has a requirement in the tenancy agreement for the provision of medical documentation in the tenancy agreement; that requirement may not be consistent with the *Act*.

The landlord submits that this requirement is “material to her continued tenancy at [residential property] which is an independent living facility”. However, I find there are no exemptions under the *Act* and the landlord has not argued in their submissions that they have any exemption to have access to a tenant’s medical records because they are an independent living facility.

The landlord argues that the need for this information is “demonstrated by the questions included in the Tenant’s application forms which required her to disclose the nature and extent of any medical issues she suffered from”

In support of this position the landlord refers to the tenant’s application for tenancy with the landlord which required her to comment on her health – by filling in a blank line, there were no specific questions about health or even any requirement to provide any diagnosis. For example, the tenant responded on this form “Good, injured right arm”.

The landlord also references another form completed by the tenant that includes questions on disabilities and health conditions that was submitted as evidence by the tenant. The tenant explained that this form was completed by the tenant with a housing outreach worker from a separate organization (third party verifier) to gain access to the services of a housing registry and was not a form required by the landlord.

As such, I consider the only document provided that the landlord used to consider the tenant for her tenancy, where the tenant was asked a general health status question without diagnosis or description. I note that on the “New Tenant Application form” there

is, in fact, no disclosure statement as would be required where a landlord requests personal, including medical, information, explaining the purpose of the need for the information.

In addition, the landlord's document that provides an overview of the eligibility for the subsidized housing program indicates that the eligible groups include families; seniors; people with disabilities; and single people and couples facing homelessness or the risk of homelessness.

I also note that the document indicates that applicants for subsidy may be excluded if they are unable to live independently with supports. There is no evidence as to how the landlord assesses the ability to live independently, specifically there is no information that this assessment requires access to medical information.

Again, I find it is more likely than not that this is a requirement of acceptance for subsidy more so than for a tenancy.

As I have found the landlord has provided no evidence of how they would determine an exception to clause 17 or how that exception would negate all of their other reasons for not allowing a tenant to be absent for an extended period and that the reasons for this information are more related to eligibility for subsidy than to landlord or tenant obligations under the *Act*, I prefer the tenant's position the requirement for her to provide medical information for her to justify her extended absence is overly intrusive and a breach of Section 28(a).

Section 6(3) of the Act states a term in a tenancy agreement is not enforceable if:

a) The term is inconsistent with the Act or the regulations;
b) The term is unconscionable; or
c) The term is note expressed in a manner that clearly communicates the righs and obligations under it.

Section 3 of the Residential Tenancy Regulation defines a term in a tenancy agreement as "unconscionable" if the term is oppressive or grossly unfair to one party.

Residential Tenancy Policy Guideline 8 states 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.

I am not persuaded by the tenant's position that she was "not in a position to meaningfully negotiate clause 17 when she signed her tenancy agreement due to her

low income and difficult personal circumstances." However, I have considered the totality of the implications of the clause to the jurisdiction of the *Act* and the landlord's need to assess subsidy eligibility.

I find that it is not relevant, as to the tenant's state of mind or immediate circumstances to make a finding that the clause is oppressive, but rather whether the term is oppressive in light of the rights conferred to all tenants under the *Act*.

The landlord submits that the tenant has provided no evidence that clause 17 is oppressive or grossly unfair to her because it requires her to choose between her housing security and meeting her medical needs. I disagree with the landlord on this point.

The tenant has submitted two responses from the landlord in regard to her first request for an extended absence that show, that despite the landlord's assertion of discretion the message provided to the tenant was that her tenancy was in jeopardy. The first instance was when the tenant provided her initial notice to the landlord that she would be absent, and she was informed:

> "The Tenancy Agreement …. only allows one continuous month of extended absence per calendar year. Therefore the CHS Management **DOES NOT APPROVE** for a 3 – month absence from your suite…"

The landlord's response provided no specific reference to clause 17 or an ability to seek a review of that decision and, in fact, added an additional restriction to the clause. The additional restriction was that she was only allowed "one continuous month of extended absence per calendar year."

I find, in this circumstance, the landlord used their discretion to attempt prevent the tenant from taking her extended absence, without even considering why she planned to be absent. In addition, the landlord used their discretion to add an additional restriction, which was not even consistent with the original restriction.

As such, in this instance I find the tenant has provided evidence that the tenant had to make a choice between permanent housing and her medical advice without even understanding why….it was the tenant who first raised the issue that she had a medical reason for the need.

Secondly, once the landlord agreed to approve the first extended absence, the letter provided to the tenant suggested that she should not rely on this approval for future extended absences and that should that be of concern to her, she should find another place to live.

Even with the tenant's approval for her current extended absence, the approval was contingent on her medical needs. Again, I concur with the tenant that this shows the

landlord is making the tenant choose between her medical needs and her housing needs.

In addition, when I consider that should the landlord decide to end the tenancy if the tenant fails to obtain prior approval for an extended absence, by issuing a one month notice for breach of a material term, I find the landlord would enjoy an oppressive advantage over the tenant to end the tenancy in one month rather than after a full assessment of eligibility for subsidy and the issuance of a two month notice as is required when a tenant is no longer eligible for subsidy, as noted above.

The landlord submits that the clause is required as part of the landlord's ability to confirm 6-month residency requirements for the purposes of subsidy determination. However, the landlord has failed to provide any other criteria that the landlord would use to establish this criterion or how approval for a one-month absence is consistent with the 6-month requirement or the 3-month requirement in the BC Housing tenancy agreement template.

As such, it appears, that even within the scope of determining eligibility this tenant is subject to criteria that includes two fewer months than the standard BC Housing template or 5 fewer months than the full actual residency requirement. For that reason alone, I find this term is exceedingly oppressive.

I also find that, if the landlord intended to use clause 17 as a way to assess BC residency, the clause should be specific to extended absences outside of BC, however the wording does not exclude absences for periods of time over 1 month but under 6 months within BC.

I concur with the landlord's position that the amount of subsidy is not relevant to the matters presented here as it relates to the terms of the tenancy agreement. I also agree that, as noted above, the determination of eligibility for subsidy is outside of the jurisdiction of the *Act.*

However, I find that any inclusion of a term that places the eligibility requirements for subsidy as an individual term in the tenancy agreement, allowing the landlord two ways to end the tenancy despite the legislature's intent to have the reason be specific to the total eligibility for subsidy provides the landlord with a material benefit and is therefore oppressive. As a result, I find clause 17 is unconscionable pursuant to Section 3 of the regulation.

As I have found clause 17 of this tenancy agreement is a breach of Section 28 of the *Act* and is unconscionable as per Section 3 of the regulation, I find clause 17 is unenforceable, pursuant to Section 6 of the *Act*.

Also as noted above, I have suggested that the tenancy agreement contains a number of clauses that conflate the landlord's obligations to assess eligibility for subsidy with

their obligations as landlords under the *Act*, I encourage the landlord to review the content of the entire tenancy agreement to ensure that their clauses related to subsidy are reduced to the one intended clause, identified in Hansard, that cautions a tenant that if they fail to qualify for subsidy their tenancy may end.

I do not make this an order, as the other terms in the tenancy agreement were not an issue raised by the tenant in her application, nor did the parties have an opportunity to present evidence on any of the other clauses, except where it related to clause 17 and the tenant's arguments regarding that clause.

And finally, since this tenancy agreement was based on a template provided by BC Housing, I would encourage the landlord to share this decision with BC Housing and that they too should consider a review of the content of all of their tenancy agreements.

Conclusion

The tenant's Application for Dispute Resolution is granted and I order clause 17 of the tenancy agreement is of no force or effect.

I find the tenant is entitled to monetary compensation pursuant to Section 67 in the amount of **$100.00** comprised of the filing fee paid by the tenant for this application. I order the tenant may deduct this amount from one future rent payment, pursuant to Section 72(2)(a).

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: January 13, 2022

Residential Tenancy Branch