



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding 1316602 BC Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes: OLC FFT

### Introduction

The tenant seeks an order under section 62(3) of the *Residential Tenancy Act* (“Act”). In addition, he seeks recovery of the application filing fee under section 72 of the Act.

Attending the hearing were the tenant, his legal counsel, legal counsel’s paralegal, and the agent for the numbered company landlord. No service issues (with the exception of a version of a tenancy agreement discussed in more detail below) were raised, the parties were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

### Issue

Is the tenant entitled to an order under section 62(3) of the Act?

### Background, Evidence, and Facts

Relevant oral and documentary evidence, complying with the *Rules of Procedure*, was carefully considered in reaching this decision. Only the evidence needed to explain the decision is reproduced below.

The tenancy began on September 10, 2021. Monthly rent is \$3,000.00. A copy of a written *Residential Tenancy Agreement* (the “Agreement”) was in evidence. It is the Agreement that forms the underlying basis for the issues raised in this application. Relevant sections of the Agreement, including an Addendum, are reproduced below.

The Agreement is completed in full and is signed by both parties. It was signed on September 13, 2021. The Agreement states that the tenancy was to begin on September 10, 2021 and that it was a fixed-term tenancy ending November 30, 2021.

Box "E" in section 2 of the Agreement states that the tenancy ends on November 30, 2021 and that the tenant must vacate the rental unit. The reason for the tenant having to vacate is stated as "owner requires vacant possession." The next two lines, which leaves a space to enter the relevant regulation section number, and the two initial boxes (where the landlord and tenant are required to initial) are blank. Or, not completed.

A one-page addendum (the "Addendum") forms part of the Agreement. The relevant portion of the Addendum states that the tenant agrees to pay a sum of \$11,500.00 to the landlord and that the "Break down of deposit" comprises a \$1,500.00 security deposit (referred to as a "damage deposit") and a \$10,000.00 "Deposit to guarantee move out date of November 30, 2021."

Below this sentence is a term stating that the tenant "has to vacate the property on or before November 30, 2021 by 12pm or he will forfeit the entire amount of ~~\$11,500.00~~ 10,000.00 (Ten thousand dollars)". The \$11,500 amount has a hand-drawn line crossed through it and the revised dollar amount, including the amount spelled out within the parentheses is hand-written. The Addendum was signed by both parties, and it is dated September 13, 2021.

The landlord submitted a copy of the Agreement which differs in one, perhaps minor, respect. On page three, section 4, of the version of the Agreement submitted by the tenant, the amount of the security is listed as \$10,000.00. On the landlord's version of the Agreement this amount appears, but it is crossed-off, and the amount of \$1,500.00 is hand-printed below.

(The landlord testified that he served a copy of the Agreement as an attachment in email he sent to the tenant on February 22, 2022. Tenant's counsel denied ever receiving this, and the landlord did not provide documentary evidence that this version was received by either the tenant or counsel. Be that as it may, the issues of this dispute can be effectively addressed regardless of the version of the Agreement being relied upon.)

Tenant's counsel's argument was two-pronged: (1) the Agreement's terms in respect of why the tenancy was to end under a fixed-term agreement are vague and ambiguous. In short, there is incomplete information under section 2 of the Agreement that ought to have been, but were not, completed. This, counsel argued, makes ineffective the fixed term tenancy agreement and in the absence of a legally binding fixed-term tenancy the tenancy is to be a periodic, or month-to-month tenancy. The tenant seeks a declaration or order stating that the tenancy is a month-to-month tenancy.

(2) The \$11,500.00 deposit required by the landlord constitutes a security deposit which vastly exceeds the amount permitted under the Act. While the tenant takes no issue with the \$1,500.00 portion of the deposit paid (and which is set out in the Addendum), the tenant disputes the \$10,000.00 deposit that the landlord sought to impose as an incentive for the tenant to vacate at the end of November. The tenant seeks an order that the landlord return the \$10,000.00 portion of the deposit.

The tenant gave the landlord a cheque in the amount of \$11,500.00 on September 14, 2021 and the documentary evidence before me indicates that the cheque was negotiated (or “cashed,” in layperson vernacular) on October 1, 2021. The landlord does not dispute this fact.

Last, counsel argued that there is no evidence before the Residential Tenancy Branch demonstrating that the landlord ever intended to occupy the rental unit at the end of November.

The landlord testified that when he purchased the rental unit from the tenant, he permitted the tenant to rent the property on the understanding that he would give the landlord vacant possession at the end of November 2021. He further testified that he had full intention of moving into the rental unit, more so because he has close family living in the house next to the rental unit house. The landlord sought \$10,000.00 from the tenant “to secure that he leaves at the end of November.” As an aside, the landlord commented that despite the tenant having a dog, he did not require the tenant to pay a pet damage deposit. In any event, the landlord reiterated that the terms of the Agreement and the Addendum were made on a mutual understanding basis.

Both parties then gave brief rebuttal submissions, which I will not reproduce further.

### 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. Here, the tenant seeks an order under section 62(3) of the Act, which states that

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

By extension, in requesting an order that the landlord return \$10,000.00 of the deposit, an order under section 65(1)(c)(i) of the Act is applicable. Section 65(1) and subsection 65(1)(c)(i) of the Act states that

Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders: [. . .] that any money paid by a tenant to a landlord must be (i) repaid to the tenant,

## 1. Security Deposit

As a starting point in respect of this aspect of the tenant's application, it must be noted that a "security deposit" is defined, *inter alia*, in section 1 of the Act, to mean

money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property [. . .]

In this dispute, the tenant paid \$11,500.00 to the landlord. \$10,000.00 of the deposit was, in the landlord's words, to ensure that the tenant vacates the rental unit at the end of the fixed-term tenancy. In other words, the landlord required that the tenant pay \$10,000.00 to be held as security for the tenant's obligation to vacate the residential property. The entirety of the \$11,500.00 is therefore, I find, a security deposit for the purposes of the Act and the *Residential Tenancy Regulation*, B.C. Reg. 477/2003 (the "Regulation").

Turning now to section 19 of the Act, which addresses the limits of a security deposit and what happens when those limits are exceeded, it states as follows:

- (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.
- (2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

Here, monthly rent is \$3,000.00. Thus, the maximum amount of a security deposit that the landlord could request and accept is \$1,500.00. And the tenant does not dispute that this portion of the deposit may remain in trust with the landlord during the tenancy. However, the \$10,000.00 portion of the deposit exceeds the amount permitted under section 19(1) of the Act. Pursuant to section 19(2) of the Act the tenant is entitled to recover this overpayment.

Therefore, pursuant to section 62 and subsection 65(1)(c)(i) of the Act the landlord is hereby ordered to repay to the tenant the amount of \$10,000.00.

## 2. Tenancy

Section 13(2)(f)(iii.1) of the Act requires (that is, “must comply with”) that “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 is the regulation-making authority under the Act, and leads us to section 13.1(2) of the Regulation. This section states that

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 this matter, the landlord is a numbered company, a corporation. While a corporation under law is generally considered a person, the Act and Regulation require that a landlord seeking to end a fixed-term tenancy be an individual. That is, a human being. As such, *prima facie*, the landlord was never in a legal position to impose a fixed-term tenancy on this basis.

Further, there is merit to the tenant’s argument that the required initial boxes on the Agreement were not initialled by either party. Nor is there any reference to the applicable section number of the Regulation. This term of the Agreement is, as argued by counsel, vague and ambiguous. I would agree.

Section 6(3) of the Act states that

A term of a tenancy agreement is not enforceable if

- (a) the term is inconsistent with this Act or the regulations,
- (b) the term is unconscionable, or
- (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Based on the evidence before me and taking into consideration the arguments and submissions of the parties, it is my finding that the term in the Agreement regarding that it be a fixed-term tenancy is not expressed in a manner that clearly communicates the rights and obligations under it.

For these reasons, it is my finding that the tenancy is not a valid fixed-term tenancy. Rather, it is a periodic (or, as it is usually referred to, a monthly or month-to-month) tenancy. A fixed term tenancy means a tenancy under a tenancy agreement that specifies the date on which the tenancy ends (see definition of “fixed term tenancy” in section 1 of the Act). As the date on which the tenancy was to end under the Agreement is found to be invalid and of no force or effect – because of the insufficiency of the Regulation and Act being met – then by default there is no stated end date, and the tenancy is instead a periodic tenancy.

A “periodic tenancy,” to reiterate, means “a tenancy on a weekly, monthly or other periodic basis under a tenancy agreement that continues until it is ended in accordance with this Act.”

Pursuant to section 62(3) of the Act it is both my finding and order that the tenancy is a period tenancy.

### **3. Filing Fee**

Section 72 of the Act permits an arbitrator to order compensation for the cost of the filing fee to a successful applicant. As the tenant succeeded in his application, I grant \$100.00 in compensation to cover the cost of the filing fee.

Conclusion

IT IS HEREBY ORDERED THAT:

1. the landlord must pay to the tenant \$10,100.00; and,
2. the tenancy is a periodic tenancy.

The landlord is ordered to pay the above-noted amount to the tenant within 15 days of receiving a copy of this decision. A copy of the monetary order is issued in conjunction with this decision, to the tenant and his counsel, should enforcement of this payment order be necessary.

This decision is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal the decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

Dated: February 24, 2022

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Residential Tenancy Branch