Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL / MNSDS-DR, FFT

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's application for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $3,892.48 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

And the tenant's application for:

- the return of his security deposit security deposit pursuant to section 38;
- a monetary order for $200 for the return of a strata fine she paid the landlord that the landlord did not actually incur pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

These applications were originally heard by a different arbitrator on August 21, 2020. The landlord did not attend the hearing. These applications were ordered to be reheard in a review consideration decision dated September 10, 2020. I am not bound by the findings in either of the prior decisions.

The tenant attended the hearing and was represented by counsel ("**SM**"). The landlord was represented at the hearing by an agent ("**KH**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Matter - Jurisdiction

The landlord argued that the Residential Tenancy Branch ("**RTB**") does not have jurisdiction to hear this matter, as the unit in question was rented to the tenant as a "furnished travel accommodation". She noted that the agreement signed by the parties was called a "furnished travel accommodation tenancy agreement" and included the following terms:

1) the tenant agrees that the rental unit will only be occupied for the sole purpose of being utilized as a vacation or travel accommodations. Use for any other purpose is explicitly prohibited. Accordingly, both the landlord and the tenant acknowledge that the Residential Tenancy Act of British Columbia does not apply to the terms of this agreement or any addendums, changes or additions to these terms.
2) Since the rental unit will only be utilized for vacation or travel accommodations, the landlord and tenant agree that the [RTB] is the inappropriate organization to settle any disputes arising from this agreement.

The parties initialed beside these two terms.

KH noted that section 4(e) of the Act states:

> **What this Act does not apply to**
> **4** This Act does not apply to
> (e) living accommodation occupied as vacation or travel accommodation,

KH argued that the parties intended to rent the rental unit as a vacation property and not be subject to the Act. She argued that the RTB therefore does not have jurisdiction to hear this matter.

SM argued that the landlord has attempted to contract out of the Act, something that is specifically prohibited by section 5 of the Act, which states:

> **This Act cannot be avoided**
> **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.

SM stated that at the time the tenant entered into the tenancy agreement she was a student and had just arrived in Canada. He stated that the tenant never indicated to the landlord's rental agent (who was not present at the hearing) that she intended to occupy the rental unit as a vacation property. He stated that the tenant indicated to the landlord's renting agent that she was an international student who wanted a place to live while she was studying in Canada.

KH could not say what was communicated between the tenant and the landlord's rental agent at the time (or shortly before) the parties entered the tenancy agreement.

SM stated that the term of the tenancy agreement was one year, and that the tenant had exclusive possession of the rental unit. The tenancy agreement started on September 1, 2020. The tenant paid monthly rent of $2,500. The tenancy agreement contained a renewal term, subject to the agreement of both parties. The tenant paid a security deposit of $1,250 at the start of the tenancy.

SM argued that the “furnished travel accommodation tenancy agreement”, aside from the terms set out above, was substantially the same as the standard for tenancy agreement provided by the RTB.

SM argued that the rental unit was the tenant’s sole place of residence during the time she occupied it. He argued that the tenant used the rental unit as in a manner consistent with other units to which the Act applies, and it would be unjust and not in keeping with section 5 of the Act to find that the Act does not apply to the tenancy agreement.

Policy Guideline 27 discusses vacation or travel accommodation rentals and provides factors to consider when determining whether or not the Act applies. It states:

> The RTA does not apply to vacation or travel accommodation being used for vacation or travel purposes. However, if it is rented under a tenancy agreement, e.g. a winter chalet rented for a fixed term of 6 months, the RTA applies.
>
> Whether a tenancy agreement exists depends on the agreement. Some factors that may determine if there is a tenancy agreement are:
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> • Whether the agreement to rent the accommodation is for a term.
> • Whether the occupant has exclusive possession of the hotel room.
> • Whether the hotel room is the primary and permanent residence of the occupant.
> • The length of occupancy.

I find that these factors favor the tenant’s position that the tenancy agreement should be governed by the Act. The tenant had exclusive possession of the rental unit. The term was a fixed one, for a period of one year, with an option to renew. This is not a common term for a vacation rental, which are typically relatively short. Additionally, the rental unit was the tenant’s only residence, further supporting her assertion that it should be subject to the Act.

I note also that the Act does not exclude from its jurisdiction units that are *rented* as vacation properties. Rather, it excludes units that are *occupied* as vacation properties. As such, I must look to how the rental unit was actually used, rather than to the intentions of the parties at the time the tenancy agreement was made. The evidence overwhelmingly shows that the tenant used the rental unit in a manner consistent with a unit to which the Act applies.

Accordingly, I find that I have jurisdiction to hear these applications.

Preliminary Issue – Tenant's Monetary Claim

At the hearing, KH stated that the landlord agreed to pay the tenant the $200 claimed in his application. As such, with consent of the parties, I order the landlord to pay the tenant $200.

I will address the remaining issues in the balance of this decision.

Issues to be Decided

Is the landlord entitled to:

1) a monetary order for $3,892.48;
2) recover its filing fee; and
3) retain the security deposit in partial satisfaction of the monetary orders made?

Is the tenant entitled to:

1) an order that the landlord return to him his security deposit; and
2) recover his filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

As stated above, the parties entered into a written, fixed-term tenancy agreement starting September 1, 2019 and ending August 31, 2020. Monthly rent was $2,500 and is payable on the first of each month. The tenant paid the landlord a security deposit of $1,250, which the landlord continues to hold in trust for the tenant.

The tenancy agreement included an addendum which has the following terms:

> The tenant is required to make themselves aware of the correct manner in which to use all appliances […] Any damage caused to any appliance as a result of the tenant's misuse will be repaired at the owner's expense.
>
> The tenant is required to immediately inform the landlord of any damages or deficiencies in the unit. This includes issues related to: plumbing, fire, vandalism or damage of any type. The tenant acknowledges full liability for all damages caused either directly or indirectly by the tenant or the other occupants of the property, during the tenancy.
>
> The landlord will conduct a professional cleaning which will be charged to the tenant's security deposit as follows: […] one-bedrooms: $125 (budget: five hours)

> […]. While these budgeted times are normally sufficient depending on the move out condition of the unit if the cleaning time exceeds these budget hours access cleaning time will be charged at $25 per hour additionally, depending on the condition of the carpet, a professional carpet cleaning may be conducted by the landlord, at the tenant's expense.
>
> Administration, liquidated damages and related charges may be applicable if the tenant terminate this lease prior to the lease and date indicated on the lease.

The tenant moved out of the rental unit on February 29, 2020. She mailed a copy of her forwarding address to the landlord by registered mail on March 21, 2020. A move in condition inspection report was completed on September 1, 2019. A move out condition inspection report was completed on February 29, 2020. Both parties signed each of these documents.

The tenant gave notice of her intention to terminate the tenancy agreement on January 16, 2020 when she provided the landlord with an "Early Termination by Tenant (Fixed Term Tenancy Agreement)" form in which she gave notice that the tenancy would end on February 29, 2020.

The tenant also included a forwarding address on this form. As stated above, the parties agreed the forwarding address was provided to the landlord on March 21, 2020. Neither party referred this form as the means by which the tenant provided her forwarding address. I note that the address provided on this form appears to be the street address of an apartment building and does not include a unit number. It is likely that the tenant was unable to receive mail at the address provided, which is why neither party argued that this form constituted the tenant providing the forwarding address to the landlord.

SM stated that the reason for the tenant terminating the tenancy was that the heating system in the rental unit did not work properly.

The tenant reported issues with the heater from start of the tenancy. The landlord sent a technician to the rental unit on September 16, 2019 to repair the heating system. The landlord provided an invoice from this visit for $632.63 (representing 3.5 hours of work at $155 per hour, which KH testified was their minimum bill out, as well as a $50 truck charge and a $10 parking charge, plus GST). On the invoice, the technician wrote:

> To investigate the heating issue (not working) on 2 baseboards, 1 in the living room, 1 in the bedroom.
>
> Came to site and gained access, to investigate issue with the baseboard heaters in apartment 902. Checked and found cooling operation was working correctly when switching to heat nothing would happen. Carried out all checks and possible issue with all checking out correct. Further investigation found there is a

> master controller in which was in cooling mode. Switched master controller to heating and checked both baseboards with both operating correctly in heating.
>
> Advised tenant how to use master control baseboard now back up and operational.

However, this visit does not resolve the tenant's issues. On November 28, 2019, the tenant emailed the landlord and stated "I wanted to let you know that if you do not send someone to fix my heater I assume you denied the agreement and I do not want to continue with this agreement." The landlord then sent a technician a second time to the rental unit to investigate. The landlord provided an invoice from this visit as well for $572.25 (representing 4 hours of work at $120 per hour, which KH testified was their minimum bill out, as well as a $50 truck charge and a $15 parking charge, plus GST). On the invoice, the technician wrote:

> Look at [thermostat] again, monitor room temperatures as tenant is cold
>
> Came to site to investigate issue with heating not operating correctly. Checked and found lounge room temp to be at 22.5 degrees C and bedroom at 23 degrees C. Temperature on thermostat in lounge room is displaying 21 degrees indicating inaccurate temperate.
> Checked base board heater in both living and bedroom to find return air blocked see photos, cleaned and checked temperatures.
> Water in 32 degrees C
> Water Out 28.1 degrees C
> Supply Air 28.3 degrees C
> Return Air 22.3 degrees C
> Coil indicating 6 degree C delta t which would appear to be operating satisfactory, unable to fault.
>
> Advised to have a look at building water temperature or adding additional heating.

On November 29, 2019, the tenant wrote to the landlord:

> Today the technician came and he checked the heater. He said the heater is fine however, when he checked the room temperature, it was 21 degrees! I really have no ideas what is the problem but this temperature is really not a proper temperature for room in this time of year and specially when winter comes it is going to be colder. As far as I can see the only solution is either send someone who is more professional and can fix the issue or you can provide me proper heater and the cost of its electricity should be included in the monthly rent of $2500.

On December 2, 2019, the tenant emailed the landlord again, having received no response to his prior email. she stated that the unit is “freezing” and she is giving the landlord until December 4, 2019 to fix the issue, or she will call the RTB and file a dispute.

Later that day, the landlord responded and indicated that the technician confirmed there is nothing wrong with the heating system, but there is a “maximum temperature that can be reached with this system and [the tenant] seems to be at the max.” The landlord’s agent suggested if it is not hot enough for the tenant that she purchase some space heaters or that the landlord could lend the tenant two space heaters.

On January 14, 2020, the tenant wrote an email to the landlord regarding a noise complaint she had received from the building’s strata, and in it she indicated that she purchased a heater and that her electricity cost is so high she was considering moving out. In another email from that same date, the tenant wrote to the landlord that she had spoken to the building manager who told him that the temperature in all the other building units reaches at least 26 degrees Celsius. In this email, she indicated that she had decided to move out due to this issue and expects a full refund of his deposit. The tenant did not provide any evidence to corroborate her assertion in the email that the other units in the building can be heated to 26 degrees.

In response to this email, the landlord provided the tenant with a copy of the “Early Termination by Tenant (Fixed Term Tenancy Agreement)” form for the tenant to complete and sign, which the tenant did on January 16, 2020.

The tenant testified that she moved out on February 29, 2020, and that the rental unit was clean and undamaged at the end of the tenancy.

The landlord claims that the rental unit required cleaning at the end of the tenancy and submitted a cleaning invoice for $131.25 from a third-party janitorial service representing five hours cleaning done in the rental unit at $25 per hour.

The move out condition inspection report provides space for and a code to use if cleaning is required after the move out inspection. The space for recording the condition of the rental unit on the move out report does not indicate that cleaning of any room is required. However, the report also includes a section entitled “security/pet damage deposit statement” wherein the landlord’s agent has written “$25/hour” next to the words “other cleaning”. This section appears to be a used to allow the tenant to authorize the landlord to deduct an amount from the security deposit at the end of the tenancy. However, the landlord’s agent also wrote “TDB” next to the words “damage repair/replacement” and did not indicate how much, if anything, would be deducted from the security deposit.

KH testified that the landlord re-rented the rental unit on March 15, 2020.

The landlord seeks compensation as follows:

Cost of heating service call (September 16, 2019)	$632.63
Cost of heating service call (November 28, 2019)	$572.25
Cleaning unit	$131.25
Tenant Sourcing Fee	$1,312.50
Loss of rent (half month)	$1,250.00
Total	**$3,898.63**

KH testified that the landlord charged the owner of the rental unit $1,312.50 for its services for securing as new tenant for the rental unit. She testified that this cost covered administrative work, advertising costs, and the cost of reference checks. The landlord did not provide invoices for any of the costs, only the lump sum charge passed on to the owner of the rental unit.

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> 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. In most circumstances this is the person making the application.

In this case, each party has brought an application. Therefore, each party must prove that it is more likely than not that the claims they have made in their application are true.

1. Landlord's Application

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
>
> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;

- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

(the "**Four-Part Test**")

a. Heating Service Calls

KH argued that the landlord is entitled to recover the cost of the heating service because the service calls did not reveal any problem with the heating system. KH argued that that the addendum requires the tenant to make herself "aware of the correct manner in which to use" the heating system. As such, KH argued that by failing to do this, she has breached the addendum.

KH pointed to the comments of the technician for the first service call of "further investigation found there is a master controller in which was in cooling mode. Switched master controller to heating and checked both baseboards with both operating correctly in heating" to show that the tenant did make herself aware of the correct manner in which to use the heating system.

The addendum does require the tenant to make herself aware of how to use the appliances. I note that it does not indicate how she must go about doing this. It also requires her to "immediately inform the landlord of any damages or deficiencies in the rental unit" (emphasis added).

I find that these two obligations put the tenant in an untenable position. She encountered what she perceived to be a faulty heating system. The tenancy agreement required her to both (1) ascertain how to use the heating system and (2) immediately report the issue to the landlord. If did one of these, she would not be able to do the other. Additionally, I find that a reasonable way to learn how to use the heating system would be to ask the landlord how to do this. I have no evidence to suggest that the landlord ever showed the tenant how to be operating the heating system and switch its mode from cooling to heating.

Additionally, I find that the landlord did not act reasonably to minimize its damage. Rather than sending an expensive technician with a minimum charge-out of $542.50 to investigate the problem, a more reasonable course of action would be for the landlord to first ascertain that the tenant was using the heating system correctly. This might have been done by a phone call or a site visit by an agent of the landlord. Accordingly, I find that the landlord did not act reasonably to minimize its loss and therefore failed to satisfy the fourth part of the Four-Part Test. I decline to award them any amount as reimbursement for the first technician's service call.

With regard to the second service call, KH asserted that there was no damage to repair and therefore the tenant should bear the cost of the visit. This assertion is not correct.

The report prepared by the second technician states that the lounge thermostat displays the incorrect temperature. The addendum requires the tenant to report any deficiency to the landlord immediately. She did this (a faulty thermostat is a deficiency). Additionally, the second technician also advised the landlord to "have a look at building water temperature", which seems to indicate the possibility that there is problem with the building's heating system at large, rather than just with the rental unit system itself.

As such, I am not satisfied that that the tenant breached the addendum by seeking repairs to the heating system for a second time. I decline to award the landlord any amount as reimbursement for the second technician's service call.

b. Cleaning

Section 37 of the Act states:

> **Leaving the rental unit at the end of a tenancy**
> **37**(2) When a tenant vacates a rental unit, the tenant must
> (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and

The move-out condition inspection report does not record any unclean areas of the rental unit. The landlord has provided no evidence that the rental unit was left in an unclean condition. As such, I find that the rental unit was left in a reasonably clean condition at the end of the tenancy. Any cleaning of the rental unit that was required after the tenancy was only needed to bring the cleanliness level to a state higher than "reasonably clean".

Policy Guideline 1 states:

> The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with [reasonable health, cleanliness and sanitary standards]. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the *Residential Tenancy Act*
>
> [emphasis added]

I find the landlord has failed to discharge its onus to prove that the tenant breached the Act. Accordingly, I decline to award it any amount for the cleaning of the rental unit.

c. Loss of Rent

The tenancy was for a fixed term, ending August 31, 2020. The tenant vacated on February 29, 2020. Section 45(2) and (3) of the Act state how a tenant may give notice to end a fixed-term tenancy agreement:

> (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a) is not earlier than one month after the date the landlord receives the notice,
>
> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
>
> (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
>
> (3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Plainly, the tenant did not end the tenancy pursuant to section 45(2). SM argued that the tenant was entitled to terminate the tenancy agreement due to the landlord failing to repair the heating system. This argument would seem to suggest that the tenant is relying on section 45(3) of the Act.

However, in order for section 45(3) of the Act to apply, the tenant must show that the landlord breached a material term of the tenancy agreement. Policy Guideline 8 address material terms:

> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The tenancy agreement contains a term that the “heating system” is included the monthly rent. The evidence provided shows that the rental unit temperature was, at a minimum, 21 degrees Celsius. This temperature falls in the commonly accepted range of “room temperature” (20 to 22 degrees Celsius). As such, I find that the heating system had not stopped working to the point where it was no longer providing adequate heat to the rental unit. The amount of heat it was providing may not have been to the liking of the tenant, but the temperature of the rental unit was not “freezing” as alleged by the tenant. Rather, it was in an acceptable range of temperature. Accordingly, the landlord has not breached the term of the tenancy agreement requiring it to provide a functioning “heating system” to the tenant.

The tenant provided no evidence to suggest that the provision of heat at a level above room temperature of the rental unit was term of the tenancy agreement, let alone a *material* term. Based on the evidence before me, I cannot find that the tenancy agreement contained an implied term that the heating system be able to heat the rental unit to a temperature above that of room temperature. Or, if it did, the tenant has failed to satisfy me that such a term would be material to the tenancy agreement (as she provided no evidence in support of this proposition).

While neither party argued this point, I should note that I find no basis upon which to conclude that the parties mutually agreed to end the tenancy (which is permitted by section 44 of the Act). I find that, at no point, did the landlord permit the tenant to end the tenancy prior to the end of the fixed term.

As such, I find that, by vacating the rental unit on February 29, 2020, the tenant breached the tenancy agreement. I find that as a result of this breach the landlord lost the ability to collect rent from the rental unit for the first half of March 2020. I accept that this loss amounted to half of the tenant's monthly rent ($1,250). I also find that, by re-renting the rental unit by March 15, 2020, the landlord acted reasonably to minimize its loss. Accordingly, I order that the tenant pay the landlord $1,250, in satisfaction of this loss.

d. Tenant Sourcing Fee

The landlord has not provided me with any basis on which I can determine how the amount claimed as a "tenant sourcing fee" was calculated. Rather, it appears to be a flat fee which covers a variety of costs including labour, administrative fees, and advertising costs. I cannot say how the figure of $1,312.50 was arrived at. I cannot say what work was done. Accordingly, I am not satisfied that the landlord has discharged its onus to prove the amount of damage suffered as a result of the tenant's breach (move out of the rental unit before the end of the fixed term).

Rather, this portion of the landlord's claim appears to be one for liquidated damages. Policy Guideline 4 states:

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable.

The addendum to the tenancy agreement refers to liquidated damages:

> Administration, liquidated damages and related charges may be applicable if the tenant terminate this lease prior to the lease and date indicated on the lease.

However, this clause does not provide a “genuine pre-estimate” of loss. As such, it cannot function as a liquidated damage clause and give rise to the tenant being liable to pay for any amount.

I decline to award the landlord any amount to reimburse them the “tenant sourcing fee”.

2. Tenant’s application

The tenant served the landlord with her forwarding address by registered mail on March 21, 2020. Pursuant to section 90 of the Act, I deem that it was received by the landlord five days later on March 26, 2020. The landlord applied to keep the security deposit on April 7, 2020. This is less than 15 days after receiving the security deposit, so the doubling provision of section 38(6) does not apply.

However, as set out above, the landlord has not proven that the tenant has caused any damage to the rental unit or left the rental unit in a condition that required the landlord to incur costs to clean.

Accordingly, the tenant is entitled to the return of her security deposit. I order that the landlord pay the tenant $1,250, representing the return of the security deposit.

3. Set Off

Policy Guideline 17 states:

> Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.

I have ordered that the tenant pay the landlord $1,250 and that the landlord pay the tenant $1,250. As such, I set these amounts off against one another, and neither party must pay the other either amount. In effect, the landlord may retain the security deposit in satisfaction of the monetary order I have made against the landlord (per section 72(2) of the Act).

As both parties have been successful in their respective applications, I decline to order that either party reimburse the other their filing fee.

Conclusion

The tenant must pay the landlord $1,250, as reimbursement for the loss of one-half month's rent. The landlord must pay the tenant $1,250, representing the return of the security deposit. These amounts are set off against one another.

By consent of the parties, the landlord must pay the tenant $200, as reimbursement of a strata fine charged to the tenant. I attached a monetary order for this amount to this decision.

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: December 2, 2020

Residential Tenancy Branch