Residential Tenancy Branch

Compliance and Enforcement Unit

CEU File #[redacted]
April 20, 2022

Notice of Administrative Penalty and Reasons for Decision

Plan A Real Estate Services Ltd.
Anoop Majithia
[redacted]

To: Plan A Real Estate Services Ltd.
Director: Anoop Majithia

Full Summary of Administrative Penalty

Name of Respondents: Plan A Real Estate Services Ltd. (Plan A) and Anoop Majithia (Mr. Majithia) (collectively the respondents)
Dispute Address: [redacted]
Date of Penalty Issued: April 20, 2022
Contraventions under the *Residential Tenancy Act* (the *Act*):

- Section 5 - This Act cannot be avoided,
- Section 13(2)(a) Requirements for tenancy agreements,
- Section 14(1) A tenancy agreement may not be amended to change or remove a standard term,
- Section 20(e) Landlord prohibitions respecting deposits.

Contraventions under the Residential Tenancy Regulation (the Regulation):

- Section 6 Refundable fees charged by landlord,
- Section 7 Non-refundable fees charged by landlord,
- Section 11 Tenancy agreement must comply with the Act,

- Section 12(2) Disclosure and form of agreement,
- Section 13 Standard terms that must be included in a tenancy agreement,
- Section 13.1 Fixed term tenancy,
- Section 1 of the Schedule of the Regulation (the Schedule)– Application of the Residential Tenancy Act, and
- Section 9 of the Schedule of the Regulation- Occupants and guests,

Amount of the Administrative Penalty: $10,000.00
Date by which Penalty Must Be Paid: June 20, 2022

Matter #1

Under section 5 of the *Act*, a landlord may not avoid or contract out of the *Act* or the Regulation and any attempt to avoid or contract out of the *Act* or the Regulation is of no effect.

The evidence, provided in the Investigation Report indicates the respondents had contracted outside of the *Act* and Regulation by adding a term into their Furnished Travel Accommodation Tenancy Agreements stating, "the Residential Tenancy Act of British Columbia does not apply to the terms of this tenancy agreement or any addendums, changes or additions to these terms".

On several occasions the respondents (or their representative) argued at hearings that the tenancy agreement did fall under the *Act* and Regulation despite the statement on your tenancy agreement to the contrary. On other occasions, the respondents or their representative did not raise the issue of jurisdiction during hearings. The evidence suggested that the respondents contravened the *Act* and Regulation in at least 152 tenancies.

The Investigation Report suggested the respondents created tenancy agreements that look very similar to the standard tenancy agreement provided by the Residential Tenancy Branch (the RTB) and available to the public on the RTB webpage. The evidence appeared to demonstrate the respondents changed or omitted the tenancy agreement terms and tenancy agreement addendum terms in way that creates confusion for an uninformed tenant.

Matter 1 considers whether section 1 of the Plan A Travel Accommodation Tenancy Agreement attempts to avoid and contract outside of the *Act* and Regulation contravening section 5 of the *Act* and section 1 of the Schedule.

Matter #2

The Investigation Report suggested the respondents have changed and contradicted standard terms and included terms that contravene the *Act* and/or Regulation. The table created in the Investigation Report (Appendix D.1, E.2 and E.3) outlined alleged repeated contravention of sections 13(2)(a), 14(1), 20(e) of the *Act*, sections 6, 7, 11, 12(2), 13, 13.1 of the Regulation and section 9 of the Schedule.

Contravention of the *Act*:

Under section 13(2)(a) of the *Act*, a tenancy agreement must comply with any requirements prescribed in the Regulation and must include the standard terms. The Schedule outlines the requirements for each standard term. For example, in term 9(2)(a) of the Plan A Travel Accommodation Tenancy Agreement, the tenant is required to maintain a "high" standard of cleanliness rather than a "reasonable state" as prescribed in section 8(2)(a) of the Schedule. However, the respondents indicate their obligation as a landlord is to provide and maintain the residential property in a "reasonable state" as required by section 8(1)(a) of the Schedule (See Investigation Report Appendix E.2).

Under section 14(1) of the *Act* a tenancy agreement may not be amended to change or remove a standard term. The Investigation Report suggested that on at least 152 occasions the respondents have altered tenancy agreements to both change standard terms and remove standard terms.

Contravention of the Regulation:

The Investigation Report suggested the following contraventions of the Regulation:

- The respondents' tenancy agreements include refundable fees not listed in section 6 of the Regulation. In addition, section 7 of the Regulation stipulates a landlord may charge non-refundable fees only as prescribed. The Report indicates that the respondents' tenancy agreements include charging fees beyond the amount prescribed and/or fees that are not prescribed.

- Section 11 of the Regulation requires landlords to ensure that their tenancy agreements comply with the requirements for tenancy agreements prescribed under Part 2 of the Regulation. The Report provides the respondents' tenancy agreements do not comply with all the requirements under Part 2 of the Regulation.

- Section 12(2) of the Regulation stipulates "A landlord must ensure that the terms of a tenancy agreement required under section 13 [requirements for a tenancy agreement] of the *Act* and section 13 [standard terms] of this regulation are set out in the tenancy agreement in a manner that makes them clearly distinguishable from terms that are not required under those sections." The Investigation Report submits the respondents have mixed in nonstandard terms in such a way that it does not make the standard terms distinguishable from the nonstandard and invalid terms.

- Under section 13(1) of the Regulation, a landlord must ensure that a tenancy agreement contains the standard terms. Section 13(1.1) stipulates the terms set out in the schedule

are prescribed as the standard terms. The Investigation Report suggests the respondents' tenancy agreements have either removed or substantially changed the standard.

- Section 13.1 of the Regulation stipulates 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:
    - (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.

  The Investigation Report provides, the respondents' tenancy agreements include a provision that the tenant must move out on a certain date or sign a new tenancy agreement. This would be considered a contravention of section 13(1) and 13.1 of the Regulation. In order to comply with section 13. 1 of the Regulation the respondents or a close family member would be required to have moved into each residence after the tenancy ended. If the respondents had failed to do so, for each time, it would also constitute a contravention of Part 4 Division 1 section 44 of the *Act*.

- The Investigation Report suggests the respondent's tenancy agreements limit the number of guests a tenant may have. Under section 9 of the Schedule a landlord must not stop a tenant from having guests under reasonable circumstances in the rental unit.

The respondents were provided with notices of an Opportunity to be Heard on two occasions (October 28, 2020, and July 30, 2021) in accordance with section 87.3(2) of the *Act* and section 33 of the Regulation and provided a written response on October 15, 2021. That response was reviewed and considered before this decision was made.

Administrative Penalties are imposed to promote compliance if a landlord has contravened a provision of the *Act* or the regulations; failed to comply with a decision or order of the director; or given false or misleading information in a dispute resolution proceeding or an investigation. I considered the respondents' contraventions, including the seriousness of them, when determining whether to impose a one-time or continuing penalty.

Under the authority provided by Part 5.1 of the *Act*, I am ordering a one-time administrative penalty of $10,000.00 against the respondents. As explained in the decision, in certain circumstances, the respondents have the right to have the Director of the Residential Tenancy Branch (or a delegate appointed by her) to reconsider my decision to impose an administrative penalty.

Response to Opportunity to be heard

The respondents provided their response to the two notices of the Opportunity to be Heard on October 15, 2021. That response included two elements: 1) a 24-page letter from the respondents' legal counsel outlining the respondents' submissions and positions on the issues and evidence provided in both notices of your Opportunity to be Heard; and 2) an affidavit of Mr. Majithia dated November 13, 2020, together with its supporting exhibits, that was originally submitted to the Supreme Court of British Columbia as part of the respondents' interim application for judicial review filed on November 13, 2020.

Contravention or failure to which the penalty relates

Background:

The Compliance and Enforcement Unit (the "CEU") received a complaint on November 2, 2018, alleging the respondents were contravening the *Act* and Regulation. Pursuant to section 87.1 of the *Act*, an investigation commenced regarding these matters on or about May 16, 2019. On October 14, 2020, the Director, Compliance and Enforcement, Scott McGregor (Director McGregor), was provided with an investigation report including supporting documentation.

Based on a review of the investigation report and supporting documentation, I note that on September 6, 2019**,** senior investigator Rishi Mahal (the "investigator") advised the respondent, Mr. Majithia by phone that:

- Plan A and Mr. Majithia were the subject of a complaint and the CEU had commenced an investigation; and
- The purpose of the call was to explain the nature of the complaint and to provide the respondent with an opportunity to provide any information that may assist in the investigation.

Mr. Majithia stated he only had a few minutes as he was leaving for vacation soon and he agreed to schedule another call with the investigator at a future time.

On October 1, 2019, the CEU sent Mr. Majithia an email asking to schedule a telephone call. Mr. Majithia responded by email that same day inviting the CEU to send a letter with specific questions or concerns and indicating that he would ask his legal counsel to respond. Mr. Majithia did not identify or provide contact information for his legal counsel.

On October 7, 2019, the investigator mailed the respondents a Decision for the Production of Documents letter and requested the following documents be provided by October 30, 2019:

- All business licences held by Plan A that pertain to residential tenancy and travel accommodations.
- A list of all addresses, including unit numbers, used for travel accommodations.
- A list of all addresses, including unit numbers, used for residential tenancies.
- A list of all addresses, including unit numbers, for which Plan A provides property management services.
- Copies of all current tenancy agreements.
- Copies of all current travel accommodation agreements.
- Current addresses of all travel accommodation guests.
- 2018 and 2019 travel accommodation payment receipts.
- All 2019 advertisements for travel accommodation units.
- All 2019 advertisements for residential tenancy units.
- All contracts for services provided to travel accommodation units (such as, housekeeping, room services, etc.)
- A copy of all current travel accommodation and residential tenancy security deposit receipts.

On October 9, 2019, the respondents' legal counsel sent the investigator a letter acknowledging receipt of the October 7, 2019, request for production of documents, seeking an extension of time to provide the requested documents and asking to be provided with a copy of the complaint. On October 29, 2019, the investigator responded to the respondents' counsel advising the investigation was ongoing and agreeing to the extension request.

On November 29, 2019, the respondents' legal counsel provided CEU a letter with 313 documents on a USB stick. The letter indicated the documents consisted of:

- All business licences held by Plan A that pertain to residential tenancy and travel accommodations (vetted);
- A list of all addresses, including unit numbers, used for travel accommodations (vetted);
- A list of all addresses, including unit numbers, used for residential tenancies (vetted);
- A list of all the addresses, including unit numbers, for which Plan A provides property management services (vetted);
- Copies of all current tenancy agreements (vetted);
- Copies of all current travel accommodation agreements (vetted);
- Current addresses of all travel accommodation guests (vetted);
- Examples of approximately 50 travel accommodation payment receipts from 2018 and 2019 (given the volume of such receipts) with an invitation to advise if the examples provided were not adequate;
- All 2019 advertisements for accommodation units:
    - [redacted]

- [redacted]

- Contracts for services provided to travel accommodation units (such as, housekeeping, room services etc.); and
- A copy of all current travel accommodation and residential tenancy security deposit receipts.

Of the 207 tenancy agreements submitted 22 of them were identified by the respondents as ongoing residential tenancies; 1 was illegible; 3 were missing pages; and 181 were identified as Travel Accommodation Tenancy Agreements.

After review of these documents and RTB records of Dispute Resolution decisions, the investigator determined it was more likely than not that of the 181 travel accommodation agreements submitted, 152 of them which were signed after January 15, 2019, were not for travel accommodation and were not exempt from the jurisdiction of the *Act*.

The respondents were provided with a notice of an Opportunity to be Heard via letter from Director McGregor dated October 28, 2020, in accordance with section 87.3(2) of the *Act* and Section 33 of the Regulation.

Prior to Director McGregor having made a final decision on the imposition of an administrative penalty, the respondents filed an application for judicial review. In the decision *Majithia v. Residential Tenancy Branch*, 2021 BCSC 737, dated April 21, 2021, the Supreme Court of British Columbia prohibited Director McGregor from deciding the matters described in the October 28, 2020 "Notice of Opportunity to be Heard". The Court held the process could continue before a different decision-maker.

As a result of that decision and pursuant to Section 9.1 of the *Act*, I was delegated the powers, duties, and functions under Part 5.1 of the *Act* (Administrative Penalties) to make a decision in this matter.

On July 30, 2021, I provided the respondents with a second notice of Opportunity to be Heard asking for a response by September 10, 2021. The respondents sought an extension to that deadline and through an August 27, 2021 response from the Executive Director of the RTB, the deadline for response was extended to October 15, 2021. I confirmed the deadline extension in my letter to the respondents' legal counsel on September 22, 2021.

On October 15, 2021, the CEU received the respondents' response. The response included two elements: 1) a 24-page letter from the respondents' legal counsel making submissions in response to the Opportunity to be Heard; and 2) an affidavit of Mr. Majithia, dated November 13, 2020, together with its supporting exhibits, that was originally submitted to the Supreme

Court of British Columbia as part of the respondents' interim application for judicial review filed on November 13, 2020.

In general response to the July 30, 2021 Opportunity to be Heard, the respondents' legal counsel submitted:

- The 152 "Furnished Travel Accommodation Tenancy Agreements" are all exempt from the *Act*, specifically as a result of section 4(e) which states the *Act* does not apply to "living accommodation occupied as a vacation or travel accommodation. In the alternative, if these agreements are found to be subject to the *Act*, the respondents did not deliberately intent to contract outside of the *Act*;
- The CEU failed to establish, on a balance of probabilities, that the exemption in section 4(e) of the *Act* does not apply. Counsel asserts that the investigator made his determination solely on the basis of previous Dispute Resolution decisions without individually examining the agreements. In addition, counsel submits the evidence demonstrates that Mr. Majiithia believed the exemption applied to all agreements and there was no intention to contravene Section 5; and
- Finally, if I find that the respondents have contravened the Act, the penalty should be at the lower end of the range as no dishonesty on the part of Plan A or Mr. Majithia has been shown. Counsel suggests that the respondents did their best "to apply a test that the RTB's Landlord and Tenant Hotline told Mr. Majiithia applied."

In the respondents' submissions, they repeatedly state that no one factor or term in these agreements is determinative of whether or not an exemption for a vacation or travel rental applies and I concur. As such, I have considered the totality of all of the terms in the 152 agreements that were identified.

From my review of the 152 "Furnished Travel Accommodation Tenancy Agreements", I find over 70% of these agreements (107 in total) are for terms of 6 months or more in duration, as outlined in the following table:

Duration	Number of Agreements
1 Month	7
2 Months	9
3 Months	14
4 Months	11
5 Months	4
6 Months	51
Greater than 6 months	56

In addition, of the 152 agreements, 41 indicate that the security deposit has been transferred from the previous lease agreement (suggesting the tenancy relationship was longer than the

specific agreement indicated) and one agreement has a handwritten notation stating: "Deposit to be transferred to next rental or refunded" (suggesting that at the time of signing the original agreement the tenant was not planning a vacation rental).

The respondents submitted that the previous 18 RTB decisions that found the *Act* applied to the respondents' travel accommodation tenancy agreements are not determinative, and that each situation must be assessed on its particular facts. Specifically, the respondents point out that, in the 23 hearings in total that the respondents have been involved with before the RTB, the issue of jurisdiction has been discussed in 13 of them. In five of those decisions, the arbitrator declined jurisdiction on the basis that the *Act* did not apply because the rental unit fell within the section 4(e) exemption. In the other eight decisions, the arbitrator found the *Act* did apply.

While the previous decisions are not determinative, I do not agree that they fail to provide any guidance. Looked at from another perspective, in 18 of the 23 total decisions, the arbitrator either expressly found in favour of accepting jurisdiction or jurisdiction was assumed or accepted – including by the respondents – because it was not raised. This shows that in 78% of cases involving the respondents, the *Act* was applied. Further, in some cases, the applications concerned "Furnished Travel Accommodation Tenancy Agreements" in relation to which the respondents themselves sought to rely on the *Act* in order to seek resolution from the RTB.

I have considered the five previous decisions where the arbitrator declined jurisdiction, and note the following:

- One case provided that there was a 22-day tenancy and both parties agreed the *Act* did not apply;
- A second case provided that both parties also agreed the *Act* did not apply;
- A third case where there was insufficient evidence provided by the tenant to determine whether the *Act* applied.
- A fourth case provided that despite explicit testimony from the tenant that they had not used the property for vacation or travel accommodation but rather their short-term tenancy was used for the residence while they were in between selling their previous home and moving into a new home; and
- A fifth case where the tenant indicated that they while they travel for work, they had intended for the rental to be used as their home.

As a result, and despite the landlord's position that these decisions are exonerative, I find these cases do not assist me in determining whether the *Act* applies where there is a dispute about its application.

I also note that in the 13 cases where jurisdiction was expressly addressed, in 8 of them, the *Act* was found to apply, and in 5 of them, not. So that's still 62% of cases where jurisdiction was addressed and found to apply. In addition, there were 5 decisions in which jurisdiction

was not argued by either party. Of these, the landlord accepted two settlement agreements recorded as decisions under the *Act* and three decisions made where the landlord themselves had submitted the Applications. In another Application made by a tenant to dispute a Notice to End Tenancy for Landlord's Use of Property, Mr. Majithia, himself, attended the hearing and did not raise the issue or jurisdiction.

To the extent that the respondents seek to rely on the express language that is set out in the 152 agreements, I am not satisfied that any contract that is presumptively subject to a regulatory scheme can simply include terms purporting to exempt it from the relevant legislation, just because one of the parties finds it is in their interest to do so. This is especially the case where there is a statutory prohibition against contracting out of the regulatory scheme. As such, the simple existence of the clause in the "Furnished Travel Accommodation Tenancy Agreement" that the *Act* does not apply does not, in and of itself, preclude the application of the *Act*.

I also agree with the respondents that neither Residential Tenancy Policy Guideline 9 nor Policy Guideline 27 provide definitive guidance. With the exception of Section B, Policy Guideline 9 deals primarily with issues relating to tenancy agreements vs. licences to occupy that need to be considered when determining jurisdiction under the *Manufactured Home Park Tenancy Act (MHPTA)*. Section B, however, states:

> "Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:
>
> • the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and
> • the tenant pays a fixed amount for rent."

The difficulty in these cases is that, based on my consideration of the evidence and submissions provided, I find that the tenants who sign these forms of travel tenancy agreements do gain exclusive possession of their respective rental units (subject to the usual right of a landlord to access the rental property) and that they pay a fixed amount of rent. However, the respondents have at the same time inserted into these travel tenancy agreements clauses that assert that the *Act* does not apply or that are contradictory to the requirements of the *Act.*

Likewise, Policy Guideline 27, which refers to the *Act* as the RTA, provides the following:

> "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:

• 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.

Even if a hotel room is operated pursuant to the *Hotel Keeper's Act*, the occupant is charged the hotel room tax, or the occupancy is charged a daily rate, a tenancy agreement may exist. A tenancy agreement may be written, or it may be oral."

Based on this guidance, even when a rental property is specifically intended for use as a vacation or travel accommodation, such as a ski chalet or a hotel room, if the landlord entered into an agreement that would constitute a tenancy, the tenancy would fall under the *Act*.

Based on Policy Guideline 27, and from the evidence, I am satisfied that the 152 agreements I have reviewed are for a fixed term and the majority are for a fixed term of six months or greater; exclusive possession of the rental unit is provided to the tenant (subject to a landlord's usual access rights); and in the absence of any other documentation or evidence provided by the landlord, none of these tenants have any other permanent or primary residence identified.

As I have noted that the Policy Guidelines provide limited guidance, I find it is necessary to assess how a reasonable person might interpret an agreement that purports to be outside of the jurisdiction of the regulatory scheme.

In the investigator's report, he identified, and I have confirmed, that in each of the 152 agreements, each was for a specified term and in each case, the tenants:

- had exclusive possession of their respective rental units; and
- were required to:
    - pay a security deposit of ½ month's rent;
    - set up a hydro account in their own name;
    - obtain insurance to cover personal property; and
    - complete maintenance and repairs.

In addition to the above noted factors, I have also considered:

- The outcomes of the previous decisions issued by RTB Arbitrators;
- Whether the landlord has identified or recorded any alternate and/or permanent accommodation of their tenants; and

- Any relevant submissions provided by the landlord.

Taken together, I find that these requirements are more consistent, than not, with the establishment of a residential tenancy rather than a vacation rental. In looking at the specific requirements of these agreements I have considered each of the above noted attributes in turn, and I discuss my respective findings below. I have also considered and will address the respondents' submissions with respect to intention.

Fixed Terms

While the guideline identifies that fixed term stays and the length of occupancy may individually be factors that could indicate a tenancy has been entered into, I suggest that when looked at in combination, their impact on the relevant question of the nature of the tenancy becomes clearer.

As noted above, in 107 of the 152 agreements reviewed the duration of the occupancy was for six months or greater. In addition, as noted above, there are 41 tenancies that were entered into that transferred their security deposit from their previous agreement to a current one, suggesting the overall tenancy relationship was longer than the specific agreement indicated. However, as the respondents had redacted the names of the tenants from all documents, it was not possible to determine if the duration of the first agreement and/or the second agreement should be considered a short or long-term rental.

Despite this, I am satisfied that the bulk of these fixed term tenancies were for longer durations, indicating that it is more likely than not that residential tenancies were created as opposed to a short term vacation or travel accommodation.

Exclusive Possession

The respondents' travel tenancy agreements contain the following standard language in Clause 12 with respect to what is entitled "Landlord's Entry Into Rental Unit":

1. For the duration of this tenancy agreement, the tenant is entitled to quiet enjoyment, reasonable privacy, freedom from unreasonable disturbance, and exclusive use of the rental unit;
2. The landlord may enter the rental unit only if one of the following applies:
    a. At least 6 hours before the entry, the landlord gives the tenant a verbal or email notice which communicates
        i. The purpose for entering, which must be reasonable, and
        ii. The date and time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant agrees otherwise;
    b. There is an emergency and the entry is necessary to protect life or property;
    c. The tenant gives the landlord permission to enter at the time of entry or not more than 30 days before the entry;

d. The tenant has abandoned the rental unit;
e. The landlord has an order from an arbitrator or court; saying the landlord may enter the rental unit;
f. The landlord is providing housekeeping or related services and the entry is for that purpose and at a reasonable time;
g. The tenant has not paid rent as required by this agreement.

3. The landlord may inspect the rental unit at any time for reasonable cause and will inform the tenant of such inspection. When possible, the landlord will provide the tenant with advance notice.

I am not persuaded by the respondents' submissions that "vacation renters' have exclusive occupation not possession because the "vacation renters" cannot exclude Plan A from its own units." This feature is not unique to the respondents' travel tenancy agreements. The standard Residential Tenancy Agreement from the Residential Tenancy Branch and the *Act* both grant exclusive possession to the tenant subject to a landlord's limited rights to access the rental unit (see, for example, section 11 of the Schedule to the Regulation).

The respondents also submit that the fact that the agreements limit the renter's ability to change the locks on the units and impose limits on the number of guests that may be in the units at any given time further supports their assertion that the agreements do not grant renters exclusive possession consistent with a residential tenancy. Again, I note that the *Act* and the standard Residential Tenancy Agreement allow for similar such restrictions, where reasonable. Specifically:

- Section 31 of the *Act* (and section 10 of the Schedule to the Regulation) – outlines the circumstances in which changes may be made to locks and other access by both landlords and tenants.
- Section 9 of the Schedule to the Regulation – prohibits a landlord from preventing a tenant from having guests in the rental unit "under reasonable circumstances", but expressly allows the landlord to impose reasonable restrictions on a tenant's guests in relation to the use of common areas of a residential property.

I am satisfied that subsection 1 of Clause 12 of the respondents' standard travel tenancy agreement grants the tenants who sign these agreements exclusive possession of the rental unit, subject to the landlord's limited rights to enter as set out in subsection 2 and 3. The limited rights of entry in Clause 12 of the travel tenancy agreement parallel, to a significant extent, the rights of tenants under section 11 of the Schedule to the Regulation (i.e. the standard Residential Tenancy Agreement). As such, I find, contrary to the respondents' submissions, that this term is consistent with a residential tenancy.

<u>Security Deposit</u>

Based on my review of the 152 agreements, in each case, the agreements require the tenant to provide a security deposit of one-half of a month's rent. This is the case regardless of the length of the rental term.

Clause 4 of the respondents' standard travel tenancy agreement does not stipulate the amount the respondents may charge as a security deposit, however, in each of the 152 cases the landlord's practice to charge ½ month's rent does not consider any other factor such as the length of stay in the rental unit or value of the property. Clause 4 of the agreement also allows for the collection of a pet damage deposit.

The agreement stipulates the landlord will return the security and pet damage deposit within 15 days of the end of the tenancy and on receipt of the tenant's forwarding address in writing. The agreement also specifies that the tenant cannot use the security deposit or pet deposit as payment of rent.

Further, it is not clear why the respondents would collect both types of deposits, which are specifically allowed for and managed under the *Act*, when, if the respondents definitively believed that the *Act* had no jurisdiction over these tenancies, they could charge any amount they wanted for all damages – such as loss of rent; damage to the property; and/or damage caused by a pet – under one more simplified term.

I note that in each of the 152 agreements and their respective "New Tenancy Worksheets" there is no space allotted to collect another address from the tenant. Specifically, there is no requirement for the tenant to provide their permanent address to the respondents prior to or upon signing their agreements. I find this to be inconsistent with the practice of someone who is renting vacation rentals.

It is not clear why the respondents, who advise that 75% of their rental business is for travel or vacation accommodation (which assumes that the renters have other residential arrangements), would not proactively gather a permanent address for any of those tenants. Instead, the respondents appear to choose to rely on their tenants providing a forwarding address after the travel or vacation rental has ended.

I further find that this approach does not assist the respondents with the concerns raised in Mr. Majithia's affidavit that it is hard to obtain compensation for damages or otherwise from these "vacation renters". To the extent that the respondents have not taken what would appear to be available steps to determine where a "vacation renter" came from and to where the person will return, it would seem to be next to impossible to track them down to pursue any claims.

Obtaining a tenant's permanent address would appear to assist in resolving some of the above noted concerns and could enable the landlord to pursue a tenant for damage to the rental unit or loses as a result of the tenancy. Despite the availability of this potential solution, the respondents have instead chosen to include terms in these 152 agreements that

provide the respondents do not need to return the security deposits until the tenants provide the landlord with a "forwarding" address.

Since it is the respondents' position that they have difficulty collecting any debt from all of their foreign travellers and students, it is unclear why the respondents would not avail themselves of the opportunity to collect the tenant's permanent address prior to the start of the tenancy, potentially eliminating the need to rely on the provision of a forwarding address at the end or after the end of the tenancy.

In the alternative, it is also not clear why the landlord would not collect credit card information up front and put a hold on their tenants' credit card for the purpose of addressing any potential damages, instead of the cumbersome practice of collecting security deposits and then returning them after the fact.

While the respondents' have suggested that the collection of security and damage deposits is the norm for vacation rental operators, they go on to suggest that even if they collect these deposits, they still have difficulty collecting for any further damage. They also do not explain why they tie the return of the deposit to the provision of a forwarding address instead of requiring the permanent address of their renters prior to the start of the tenancy.

Based on the above, I am satisfied that the terms in the 152 agreements governing the collection of security and pet damage deposits, and the practices adopted by the respondents in relation to them, is consistent with a residential tenancy.

Hydro Account

While the respondents have submitted that they no longer require a tenant to obtain a hydro account in their own name, as I am assessing alleged past contraventions, I must still consider this term as it existed in the 152 agreements.

The respondents' counsel submits: "Roomers or boarders occasionally have to set up their own utility accounts and such arrangements unquestionably fall outside of the RTA. Similarly, tenants with leases with terms exceeding 20 years also invariably have separate utility accounts, but these tenancies are exempted from the RTA." While I agree that there are many circumstances that are not under the jurisdiction of the *Act* that may require a tenant to set up their own hydro account, I am not convinced that a rental unit that is used for short term or vacation rentals would ever require a "guest" to set up a hydro account.

Further, my decision is based on whether or not the respondents' 152 agreements that I have been asked to consider fall within the exemption for vacation rentals. None of those agreements approach rentals in the nature of a 20-year term, and I am skeptical that anyone would reasonably consider a 20-year tenancy to constitute either a travel or vacation rental.

I find the requirement in the 152 agreements for a tenant to have hydro services set up in their name is indicative of a residential tenancy and not a vacation rental.

Personal Insurance

The respondents' counsel submits that the requirement for a renter to obtain insurance for their personal property does not "imply" a residential tenancy. The respondents submit that while tenant's insurance covers personal property, it also typically covers accidental damage to a property's fixtures and fittings and usually provides for third party liability protection. However, they seek to distinguish between tenant's insurance and the personal property insurance that they require their renters to obtain.

I note that in the addendum of the "Furnished Travel Accommodation Leave Agreement" the requirement is written as follows:

> "The tenant is responsible for obtaining an insurance policy for coverage of their personal property at the unit"

The standard language of the agreement does not specifically identify the type of insurance that must be obtained or clarify that tenant's insurance is not required. Further, the respondents have not provided any explanation as to why the respondents require a tenant to have any insurance whatsoever. If the respondents' concern is that the respondents are not held responsible for losses a tenant might suffer as a result of loss or damage to their own personal possessions during their stay, it would be sufficient to make such a statement, such as a waiver of liability.

The standard language of the addendum to the 152 agreements specifically requires the tenant to obtain insurance for their personal property while it is in the unit. The landlord does not suggest that any losses may be covered under the tenant's home insurance or current coverage.

Based on the respondents' standard language, and the evidence provided in relation to the issue of insurance, I am satisfied that this requirement, more likely than not, is indicative of a residential tenancy.

Maintenance and Repairs

The respondents submit that they provide leases for travel and vacation rentals that are typically longer than hotel stays in which the tenants must provide their own housekeeping. As such, the respondents' position is that it is reasonable to expect that the tenant would be required to purchase cleaning supplies and that they may have to replace light bulbs. They also submit that in such circumstances it is also consistent with the purpose of the exemption to require the tenant make minor repairs.

I am not persuaded by this position. In fact, I find that if the tenancy is intended for a vacation rental, even without housekeeping services, it is more likely than not that a landlord would be responsible for providing cleaning supplies, light bulbs and make minor repairs. It seems unlikely that travellers would be expected to carry around household cleaning supplies

and/or lightbulbs in their luggage or that the tenants, from other locations, would be able to arrange for any minor repairs that might require local service providers to complete.

As such, I find that these requirements set forth in the Furnished Travel Accommodation Lease Agreement Addendum are consistent with expectations of a residential tenancy than a vacation rental.

Deliberate Intention

The respondents' counsel submits that the respondents have not deliberately attempted to contravene the *Act*, but rather did their best to apply a purpose-based test to determine whether an exemption for their rentals applied. The respondents submit they lack the requisite intent to contravene the *Act*. I am not persuaded by this position for the reasons that follow.

I note that there is no provision under the *Act* that requires me to consider the intent of a party who contravenes the *Act* by self-determining that they are exempt from the *Act*. Instead, I need consider only if the party has contravened the *Act* and in doing so subsequently contracted outside of the *Act*.

Despite the fact that it is not necessary for me to find a deliberate intent to contravene the *Act*, I will nonetheless address the submissions made on behalf of the respondents in this regard. In his affidavit, Mr. Majitha provides evidence regarding the volume of the respondents' vacation rental business; the bulk of the makeup of their tenants as foreign students and travelers; and certain risks that the respondents face that are different than those of other landlords. I find Mr. Majithia's evidence in this regard is not consistent with the information in the investigation report or the information in the documents submitted in response to the order to produce records.

A review of the respondent Plan A's website and the advertisement links provided by respondents' counsel shows the respondent does not communicate any reference to the provision of vacation or travel rentals in any of their advertising at all. In addition, in most cases, the advertisements require a "minimum of one month lease term" and provide a monthly rental rate.

I note Plan A's website advertises specifically for the following services: Property Management for property owners; Apartments for rent; Parking spots for rent; Furnished Offices for rent. I acknowledge that the website does reference one program that mentions short term housing called Plan A+ which is described as follows:

> "Plan A+ is a program put together by Plan A Real Estate which aims to provide accepted candidates with free, short term housing, providing them an opportunity to build the equity needed to make the move to a long term, sustainable housing situation. Plan A+ is about helping people get out of the cycle of poverty or homelessness by providing the

> stability of housing, and working with successful candidates to foster structure in their lives conducive to maintaining gainful employment and a healthy lifestyle."

While this one program mentions "short term" housing, based on the context of the paragraph in which that reference is made, I find that it is clearly intended to support local residents and not geared toward those vacationing or needing short term accommodation for the purposes of travelling.

I find, on a balance of probabilities, that it is unlikely that a business that says 75% of their business is to rent units for vacation and/or travel accommodation would not mention the words "vacation", "travel accommodation" or even "short term accommodation" in their advertisements. I similarly find that it is unlikely that a business focused primarily on renting units for vacation and travel purposes would impose a relatively lengthy minimum rental duration (at least a month); or that their minimum advertised rent amount would be set as a monthly rate, with no indication of a weekly or daily rate.

I find that despite the respondents' claim that most of their tenants are foreign students or travelers to [redacted] (who would presumably have permanent addresses), they have provided no evidence that they have collected the traveler's permanent addresses in either their "New Tenancy Worksheet" or "Furnished Travel Accommodation Tenancy Agreement". There is, therefore, no documentation before me that confirms the respondents' assertions about the demographics of their renters, other than their self-declared exemption from the *Act* and reliance on undocumented verbal requests from their applicants about the nature of the rental that is sought.

In addition, to the extent the respondents seek to rely on Mr. Majithia's evidence that some of their tenants were students, the simple fact that a person is a student does not necessarily bear on whether they were looking for vacation or travel accommodation. If a person is from one community and moves to another community for the purposes of attending school (a student), that is not indicative of the type of tenancy they fall under. In such cases, the student may have the full intention of treating the rental unit as their permanent residence.

Again, the respondents have failed to provide any evidence that any of their renters have permanent accommodation outside of the accommodation the respondents are providing under the 152 agreements as reviewed.

In addition, the respondents have failed to provide any explanation as to why the risks they assert they face from such a high volume of renters, or from an unreasonable number of occupants or from the non-payment of rent are anything different than what other residential landlords face. For example, the *Act* considers these circumstances and allows for any landlord to end a tenancy under section 47 if a tenant has an unreasonable number of occupants (i.e., six individuals in one-bedroom apartments, in the example included in Mr. Majithia's affidavit) and under section 46 for non-payment of rent.

While I acknowledge that there may be a long wait time for hearings at the RTB for monetary claims for damage to a rental unit, the same cannot be said for the issue of non-payment of rent.

For example, the RTB has an *ex parte* "Direct Request" process that allows a landlord the opportunity to obtain an order of possession and a monetary award for unpaid rent within a few weeks of the issuance of a Notice to End Tenancy for Unpaid Rent, without requiring to attend a hearing or raise the issue of jurisdiction. As such, the tenant can be served on the 6th day after a 10 Day Notice to End Tenancy has been issued to the tenant. I note that in two of the Arbitrator decisions that I reviewed the tenancies involved were based on the respondent's "Travel Accommodation Tenancy Agreement"

Furthermore, just because it may take some time to have a claim adjudicated by the RTB, does not provide justification for being excluded from the jurisdiction of the *Act*.

In his affidavit, Mr. Majithia states that he has contacted the RTB several times to seek guidance on how to classify his rental units as vacation and travel accommodation. He states at paragraph 8 of his affidavit:

> "…Those manning the Help Line have previously told me, and I do verily believe, that a purpose-based test must be used to distinguish "vacation or travel accommodations" from other tenancies. I have also been told that I should ask prospective tenants why they wish to rent from Plan A. If prospective tenants tell me that it is for a travel or vacation purpose, the Act does not apply. If prospective tenants tell me that they wish to live in Plan A's apartments and use them as principal residences, then the Act does apply."

Mr. Majithia states that he asks prospective tenants if they wish to use the rental unit for the purposes of travel, and if so, he has them use the "Furnished Travel Accommodation Tenancy Agreements".

Mr. Majithia also states that he has never taken the name of any of the staff from the RTB that he has spoken to. I note that neither of the respondents indicated whether they have ever sought this kind of advice in writing by sending an email to the request line, nor did either indicate whether they have received written guidance from RTB staff.

Furthermore, the landlord has provided no specific details of these "calls" such as if they were made prior to him starting to use these "Furnished Travel Accommodation Tenancy Agreements" or after January 15, 2019, when the respondents began receiving arbitrator decisions that found the *Act* applied to their travel tenancy agreements.

I also note that while Mr. Majithia indicated he was instructed to use a "purposed-based test" **and** to ask a potential tenant if they want to rent the unit for the purpose of travel or their

permanent residence, Mr. Majithia has not identified what "purposed-based test" he uses, other than to ask the tenant their purpose. It is not clear if the only "test" the respondents apply is to inquire as to the intended purpose of the rental.

However, even if Mr. Majithia was told by RTB Information Services staff that all he needed to do was develop a "purpose-based" test and ask prospective tenants why they wish to rent from Plan A, this appears to be inconsistent with the respondents stated practice (as noted above), in that in 41 of the 152 agreements, the security deposit is being transferred from a previous agreement between the landlord and the tenant.

Further, the respondents have not provided any documentary evidence that any such purpose-based assessment has been used or even any evidence documenting that the respondents ask the tenant if they want the accommodation for travel/vacation or permanent residency and recording the responses to that question, such that the responses could be verified. As previously noted, there is also no recording on any document submitted by the respondents that any of the tenants in the 152 agreements have any other addresses that they use as a permanent address, which might be able to corroborate the assertion that they are only seeking travel or vacation accommodation.

I also find the respondents use of the format, content, and colour on their "Furnished Travel Accommodation Tenancy Agreements" is identical to the format, content and colour used by the RTB on the Residential Tenancy Agreement (Form RTB-1). While I accept that some of the terms themselves have been altered, I find this contributes the respondents' attempts to convince potential tenants their exemption is in compliance with the *Act*.

Based on all of the evidence before me, I find it would be unreasonable for a business to maintain that a significant portion of their operations, all of which appear to bear the hallmarks of residential tenancies, are in fact vacation and travel accommodations that fall outside the jurisdiction of the *Act*.

Contraventions

Matter #1

Section 4(e) of the *Act* stipulates that living accommodation occupied as vacation or travel accommodation is exempt from the *Act*.

Based on the above, I find that in the 152 "Furnished Travel Accommodation Tenancy Agreements" considered as part of this investigation, there is insufficient evidence to support the application of an exemption, pursuant to Section (4)(e).

As described above, all of the indicators considered, when viewed in their totality, lead to the conclusion that in all 152 cases the landlord has entered in residential tenancies that are subject to the jurisdiction of the *Act*.

Section 5 of the *Act* states that landlords and tenants may not avoid or contract out of the *Act* or the regulations and that any attempt to do so is of no effect.

As I have determined these 152 agreements are not exempted from the *Act*, I am satisfied, based on my findings above, that the respondents' inclusion of standard language that seeks to avoid or disapply the *Act* on the basis that the tenancies are vacation or travel accommodations, is a contravention of section 5 of the *Act* and of no effect.

Matter #2

The Investigative Report and tables provided the specific legislative and regulatory contraventions identified. For convenience, I list them here: sections 13(2)(a), 14(1), and 20(e) of the *Act* as well as sections 6, 7, 11, 12(2), 13, and 13.1 of the Regulation and section 9 of the Schedule.

In response to this issue the respondents acknowledge that certain terms of their agreements are not compliant and submits that the reason for any such non-compliance with the *Act* and Regulation is that the respondents had an honest believe that they were exempt from the jurisdiction of the *Act*.

As I have found the respondents' agreements are not exempted from the *Act* and therefore the language that attempts to disapply the *Act* is of no effect and following my review of the terms of all of the 152 agreements, I am satisfied that respondents' agreements contravene the identified sections of the *Act* and Regulations.

Amount of penalty

For the reasons set out in the Administrative Penalty Assessment document attached to this decision and pursuant to Residential Tenancy Policy Guideline 41, I have set the amount of the administrative penalties as follows:

- $5,000.00 for contravening section 5 of the *Act* (Matter #1); and
- $5,000.00 for contravening sections 13(2)(a), 14(1) 20(e) of the *Act*, and sections 6, 7, 11, 12(2), 13 and 13.1 of the Regulation and section 9 of the Schedule of the Regulation (Matter #2).

I have considered the respondents' submissions in relation to the specific determination of the amount of the penalties and provide my responses here.

Matter 1

Previous Enforcement Actions for Similar Contraventions.

I note Policy Guideline 41 stipulates specific point values can be attributed based on any similar contraventions as documented by the number of previous decisions that were against the respondent on the same topic in the past two years.

There have been at least 5 decisions written where the landlord argued that the *Act* did not apply to the tenancy, but the arbitrator determined that the *Act* did apply. The investigator recommended a value of 3 points which corresponds with three or four decisions having been issued, but I note that the investigator's recommendation was also made in October 2020 and some time has since passed.

The respondents submit that the value assigned to this factor should be 1 because "the RTB's jurisprudence on the issue is evolving". However, they do not explain how that translates into reducing the number of decisions against the respondents, on this issue.

As noted above, the previous decisions declining jurisdiction do not provide much assistance in determining when the exemption in Section 4(e) applies. In two files, there was agreement that the Act did not apply; in a third file, there was insufficient evidence to determine whether the *Act* applied. One of these decisions is dated within the past two years.

The 8 decisions where jurisdiction was expressly addressed and accepted provide some guidance as to what the arbitrators considered in reaching their conclusions. Of these decisions, only 3 were written within the last two years. Those considerations include many of the same issues that were identified in the investigation report and that I have subsequently considered in this decision.

In his Administrative Penalty Assessment, the investigator wrote:

> "Jurisdiction was established explicitly in eight separate Residential Tenancy Branch (the RTB) hearings based on a review of the terms reflected in the tenancy agreements given in evidence at the hearings."

As such, I find there have been 3 decisions in the past two years where the landlord's position on jurisdiction was dismissed and jurisdiction was accepted. I also find the weight to be afforded to these decisions is not materially diminished by the few decisions from the past two years where jurisdiction was declined for the reasons noted above.

As a result, I have decided that the appropriate point score for this factor is a score of 3.

<u>Gravity and Magnitude of Contravention</u>

The investigator recommended assigning a value of 4 points in relation to this factor, in part because of "the number and scale of residential tenancies that Plan A manages." Policy

Guideline 41 indicates that this factor requires consideration of the respective impacts on health and safety, as well as the percentage of the annual rent for all rental units that the contravention would have impacted. Another relevant consideration is whether the section of the *Act* and Regulation at issue is open to interpretation.

The respondents submit that because the application of the exemption is open to interpretation, and there is no evidence of an impact to health or safety, a point value of zero should be assigned. In support of this position, the respondents essentially submit that there are decisions that both accept and decline jurisdiction suggestion there is room for interpretation and notes the lack of evidence of dishonesty or that any of the tenants were misled.

As noted, I have reviewed the 152 "Furnished Travel Accommodation Tenancy Agreements". I have taken into account the respondents' evidence about the volume of agreements that it enters into, and that the travel and accommodation units account for 75% of its business when considering magnitude.

I have also considered the terms of the agreements that on their face would appear to allow the respondents to benefit from the potential imposition of fees and charges that are not allowed under the *Act*.

Similarly, I consider it reasonably possible that the inclusion of statements that the *Act* does not apply in each of the 152 agreements may have prevented some tenants from pursuing their rights under the *Act*. But I accept that there is no evidence before me of actual benefits or harms in these regards.

I also accept the respondents' position the contravention of the Act is open to interpretation as shown by the fact that there are differing opinions provided in the decisions reviewed that both accept and decline jurisdiction.

As a result, I have decided that the appropriate point value to be assigned to this factor is 0 (zero).

Extent of Harm to Others

The investigator recommended a point value of 0, in recognition that the substance of the allegation for Matter #1 does not demonstrate quantifiable harm of the type contemplated in Policy Guideline 41.

Policy Guideline 41 outlines point values based on contraventions that cause physical discomfort or other harm that may result in losses of quiet enjoyment or a need for medical treatment for the infractions. There is no evidence of such harms before me. While there is also a component of economic harm in relation to this factor, I note that the investigation report did not address this harm and as such, my decision cannot result in a score that would include consideration of economic harm.

As a result, it is my decision that a 0 (zero) value is appropriate on this point.

Repeated or Continuous

The investigator's recommendation of a value of 5 points for this factor relies primarily on the fact that there were decisions made that the *Act* applied to the respondents' travel tenancy agreements, and despite those decisions, the respondents continued to use the same form of agreement, with its language asserting the *Act* does not apply, on at least 152 occasions.

As noted above, I have found that the 152 agreements are not exempted from the *Act*, and therefore that the inclusion of language that seeks to disapply or avoid the jurisdiction of the *Act* is in contravention of section 5 of the *Act* and section 1 of the Schedule to the Regulation.

On that basis, I find that the same contravention has occurred for more than five tenants more than five times, and that the contravention has continued for more than a year after several decisions finding the exemption for travel and vacation accommodation did not apply.

I am not persuaded by the respondents' submissions that "Plan A wishes to comply with the RTA. It has no intention of doing otherwise." Its continued use of the same travel tenancy agreement, especially when a significant number of its tenancies are for 6 months or greater, suggests otherwise. The respondents also submitted that "at most, the point value of four should be given for this factor." However, they have provided no explanation as to how they determined 4 to be the appropriate value.

I am satisfied that a value of 5 is appropriate in these circumstances.

Whether Contravention was Deliberate

The respondents' counsel submitted:

> "For the CEU to find that the Exemption did not apply to each of the Agreements, there must be some evidence from the tenants to these agreements stating that they were using Plan A's units for residential purposes. There is no such evidence and Mr. Majithia's evidence is to the contrary."

Evidence from tenants in respect of their intended use is only one form of evidence that could be used to assist in determining the application of the *Act.* As noted above, based on my review of the totality of terms of the agreements before me, I have determined that the 152 tenancy agreements are not exempt from the jurisdiction of the *Act*, and that the language attempting to disapply the *Act* is in contravention of the *Act* and Regulation. I also found that the respondents failed to submit documentary evidence that could be used to corroborate the standard language of the agreements to the effect that the 152 tenancies were for travel or vacation accommodation. The only additional evidence provided by the

respondents in support of their position was Mr. Majithia's generalized evidence in his affidavit, which could not be corroborated either generally or in relation to individual agreements.

Respondents' counsel also relies on two decisions where the arbitrators specifically found that they would not accept jurisdiction: [redacted] *v. Plan A* and *Plan A v.* [redacted]. In [redacted] *v Plan A*, there was a dispute about whether the *Act* applied. The arbitrator's reason for reaching the conclusion that it did not was because the tenant failed to provide sufficient evidence that she had used the unit for residential purposes. In contrast, in *Plan A v.* [redacted], and despite these same respondents having submitted the Application for Dispute Resolution to seek a monetary award in reliance on the provisions of the *Act*, at the hearing, "both parties agreed" that there was no jurisdiction. As there was no dispute, the arbitrator concluded they were without jurisdiction.

In the cases sought to be relied on by the respondents, the decision to exempt the tenancies was based either on a lack of evidence about use or on the agreement of the parties that the *Act* did not apply. In neither case was the decision based on any analysis of whether or not the tenancies themselves were short term vacation rentals or residential tenancies, or on any analysis of the other terms of the tenancy agreements. They are therefore not instructive in this instance.

The investigator recommended a point value of 5 be assigned to this factor, given that more than a year had passed since the RTB issued a decision against the respondents finding that the same form of tenancy agreement was subject to the *Act*.

I acknowledge that there are cases that found "in favour" of the respondents on the same point, including as late as 2020. However, in the most recent case that declined jurisdiction (March 5, 2020) I note that the tenancy itself was for a short term of 1½ months and not meant as a permanent resident for the tenant. I do not find that this one case sufficiently reduces the impact of the continued reliance on the exemption in the bulk of the respondents' tenancy agreements.

As such, I have determined that a point value of 5 is appropriate.

<u>Economic Benefit</u>

Given the terms of the 152 agreements, I am not satisfied that it is reasonable to suggest the respondents have not realized any economic benefit at the cost of those tenants who may have entered into these agreements and been charged fees that are not statutorily allowed or, in fact, had their tenancies ended in a manner that does not comply with the *Act*.

However, I acknowledge that the investigation did not include pursuing the extent of any potential economic benefit, and therefore there is no evidence of economic harm that

cannot be quantified. As such, I have concluded that the 0 (zero) value is appropriate on this point.

Efforts to Correct the Contravention

The respondents submit, on this point, that "Investigator Mahal did not attempt to speak with anyone from Plan A". The investigation report indicates that, in fact, the investigator, through EDU, did attempt to contact Mr. Majithia on two occasions to discuss these issues. The investigation report notes that the first time, Mr. Majithia declined to have any discussion with the investigator as he was going on vacation and the second time Mr. Majithia declined to set up a telephone meeting, and instead suggested that any questions be put in a letter that Mr. Majithia could then refer to legal counsel for response.

Based on these unsuccessful attempts to speak directly to Mr. Majithia, the investigator proceeded to seek relevant documents. The investigation report does not indicate that Mr. Majithia offered to discuss any issues directly with the investigator after that point. Rather, the investigation report and correspondence indicate that Mr. Majithia addressed this matter solely through his legal counsel.

While respondents' counsel asserts that it is relevant that Mr. Majithia asks each prospective tenant why they want to rent Plan A's units, I have found above that the respondents have provided no additional evidence, apart from Mr. Majithia's affidavit, to corroborate or document that those questions are asked, or to record what responses are received in return. I have also noted that, apart from the agreements themselves and Mr. Majithia's affidavit, the respondents did not provide any other evidence to demonstrate that the 152 agreements pertained to vacation rentals, and the terms of the agreements, viewed collectively, suggest otherwise. I have not been provided with any evidence of other attempts by the respondents, beyond the undocumented questions said to be asked of prospective tenants, to correct the circumstances where the *Act* was found to apply to similar travel tenancy agreements.

As such, I reject the respondents' submission that the appropriate value is 2 and find that the appropriate value to assign is 5.

I note the total point score for Matter #1 is 18; however, the value of 5 has been assigned in three categories and as such the penalty is $5,000.00, pursuant to Policy Guideline 41.

Matter 2

Rule against Multiple Convictions

In general response to the question of whether a penalty should be imposed in relation to Matter #2, counsel for the respondents seeks to rely on the *Kienapple* principle which is essentially the rule against multiple convictions for the same acts. In this respect, the respondents submit, at page 14 of their submission letter:

"The Supreme Court of Canada in ***R. Kienapple***, 1974 Can LII, [1975] 1 S.C.R. 729, held that multiple convictions should be prohibited where there is no legal and factual distinction between the offences.

With respect to Matter #1, the CEU alleges that Plan A contracted out of the RTA and, in this regard, you say in the Notice of Opportunity to be Heard that:

> *The evidence suggests that you created you created [sic] tenancy agreements that look very similar to the standard tenancy agreement provided by the Residential Tenancy Branch (the RTB) and available to the public on the RTB webpage. The evidence appears to demonstrate that you changed or omitted the tenancy agreement terms and tenancy agreement addendum terms in such a manner as to create confusion for an uninformed tenant.*[footnote omitted]

With respect to Matter #2, you say in the Notice of Opportunity to be Heard that:

> *Evidence suggests that you have changed and contradicted standard terms and included terms that contravene the Act and/or Regulation. The table created by the investigator (Appendix D. I, E. 2 and E. 3) outlines the alleged repeated contraventions of sections 13(2)(a), 14(1), 20(e) of the Act, sections 6, 7, 11. 12 (2), 13, 13.1 of the Regulation and section 9 of the Schedule.* [footnote omitted]

Both alleged contraventions arise out of the same acts. The same agreements are in issue in both alleged contraventions. In Matter #1, the CEU alleges that Plan A changed tenancy agreements and omitted necessary tenancy agreement terms. In Matter #2, the CEU makes the same allegation. The only apparent difference is that the CEU, in Matter #2, provides particulars of how Plan A allegedly changed tenancy agreements and omitted prescribed tenancy terms."

The Kienapple principle has been applied in administrative cases [footnote reference is to 1999 ABCA 253]. It applies to the case at bar and in answer to Matter #2, Plan A repeats its submissions with respect to Matter #1 and states that it would be procedurally unfair to find against Plan A on both counts.

In regards to the Kienapple principle, I have reviewed relevant passages in the case of *Macdonald v Institute of Chartered Accountants of British Columbia*, 2010 BCCA 492, where at paragraph 54, the British Columbia Court of Appeal wrote:

> [54] The concept of multiple convictions for the same conduct, or double jeopardy, was succinctly stated in the administrative law context in *C. (K.) v. College of Physical Therapists (Alberta)*, 1999 ABCA 253 (Alta. C.A.) at para. 63, (1999), 244 A.R. 28 (Alta. C.A.):

> [63] Multiple convictions for the same conduct are prohibited. In a criminal context, a verdict of guilty on two counts, with the same or substantially the same elements making up the offences charged in both counts, results in the application of the rule against multiple convictions: *R. v. Kienapple*, [1975] 1 S.C.R. 729 at 751. The relevant inquiry is whether the same cause, matter or delict, rather than the same offence, is the foundation for both charges: *Kienapple* at 750. The rule does not bar several convictions if they are in respect of different factual events. The rule against multiple convictions applies when the counts arise from the same transaction: *R. v. Prince*, [1986] 2 S.C.R. 480 at 490. Therefore in order for the rule to apply there must be both a legal nexus, that is no additional or distinguishing elements in the second offence, and a factual nexus, that is the same act must ground each of the charges. The rule against multiple convictions applies to allegations of professional misconduct made against members of a self-regulated profession: *Richmond v. College of Optometrists of Ontario* (1995), 25 O.R. (3d) 448 at 460 (Div. Ct.); Re *Carruthers and College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 at 398 (Div. Ct.).

55 The rule is only engaged where the impugned conduct arises from the same transaction and applies in disciplinary proceedings taken against members of a self-regulated profession. Thus, in *Carruthers v. College of Nurses (Ontario)* (1996), 31 O.R. (3d) 377 (Ont. Div. Ct.) at 398, [1996] O.J. No. 4275 (Ont. Div. Ct.), the Ontario Divisional Court noted:

> ... The rule erects no bar to a multiplicity of findings of guilt, each recorded in respect of a different factual event. What it seeks and does do, however, is to bar multiple findings of guilt where the same or substantially the same elements make up the offence. There would seem no reason in principle to permit the application of the doctrine in respect of "regulatory" offences under provincial law, yet deny it to members of self-regulated professions in the case of prosecutions for alleged misconduct. There is about such prosecutions, after all, a "public" aspect. The discipline and/or disqualification of members of a self-regulated 16 profession affords protection to members of the public who, by choice or otherwise, engage their services. Prosecutions for professional misconduct ensure that those who undertake the regulated activity are fit to do so. The public is protected by disqualification of those who fail to achieve or maintain such standards. There can be no quarrel with the proposition that a registrant/member ought be held liable for each breach of the governing rules of the profession. No one, however, should be twice punished for the same delict or matter. It is as much the case for professional discipline as it is for a regulatory offence.

While being a landlord is not a self-regulated profession, so the context is different, I acknowledge that there are at least some similarities between disciplinary proceedings for misconduct and assessing administrative monetary penalties for contravention of a statutory regime, in the sense that the goals are, at least in part, to promote compliance with the regime and in doing so, to protect the public – in this case, tenants.

However, I am not persuaded by the respondents' submissions that the contraventions outlined in Matter 1 and Matter 2 arise from the same acts in a way that attracts the application of the *Kienapple* principle. Rather, I find that, Matter 1 relates to the express inclusion in the agreements of a clause that the *Act* does not apply. Matter 2 concerns the failure of the respondents to include the required standard terms in their agreements and/or the alteration by the respondents of required standard terms in a manner that is inconsistent with the *Act*.

It would be entirely possible for a person to include a term in a tenancy agreement that the *Act* does not apply but still include all of the required standard terms without any problematic alterations. It would also be possible to leave out or alter the required standard terms without ever expressly providing in an agreement that the *Act* does not apply.

Therefore, I find that the two allegations in Matter #1 and #2 arise from two distinct factual circumstances, despite the fact that may both arise in the same agreement. As a result, I find that the *Kienapple* principle does not apply to bar my decision to impose a penalty for Matter #2.

Previous Actions for Similar Contraventions

The respondents submit that the statement in the investigation report that "Plan A was advised in writing their "Travel Accommodation Agreements" did fall under the jurisdiction of the Act and Regulation" is grossly misleading. I disagree. I find that the respondents have been informed on multiple occasions through RTB decisions that the *Act* applies to their travel tenancy agreement. This in turn means that the standard terms must be included in the agreement without alteration.

The decisions which ought to have informed the respondents include those identified in the investigation report where jurisdiction was expressly discussed, as well as those decisions where the respondents themselves sought to take advantage of the *Act* by making an application for dispute resolution to the Residential Tenancy Branch. I find it inconsistent for the respondents to maintain that they did not believe the *Act* applied where the respondents' own agents attended the hearings and stated that despite the agreement the *Act* should apply.

As such, I am satisfied that at a minimum there have been at least three decisions provided to the respondents in the last two years that show their "Furnished Travel Accommodation

Tenancy Agreements" do fall within the jurisdiction of the *Act* and combined with my determinations in this decision.

I accept the investigator recommended a point value of 3.

Gravity and Magnitude of Contravention

The investigator recommended a point value of 4 for this factor on the following basis:

> "The magnitude of the contravention is established from the 152 tenancies that PLAN A entered into using the altered tenancy agreements. Their behavior has undermined the Act and Regulation which is established to protect landlords' and tenants' rights."

The respondents suggest that the point value should be zero because:

> "There is no evidence that the Agreements dealt with residential tenancies. On the contrary, Mr. Majithia says that they were vacation rentals which were subject to the Exemption."

The respondents do not appear to contest that where the *Act* applies, the prescribed requirements must be complied with. Rather, their position is that the *Act* does not apply. As noted above, I have found that, apart from Mr. Majithia's evidence and the language of the agreements themselves, there is no other documentary evidence to support or corroborate the respondents' position that the 152 "Furnished Travel Accommodation Tenancy Agreements" were vacation rentals. Further, I have determined that, when viewed in totality, the terms of the 152 agreements bear the markers of residential tenancies such that they are subject to the *Act*.

Consistent with my comments in relation to this factor for Matter #1 above, I accept that there is no evidence of significant impacts on health or safety, but in the circumstances, I do not think it is reasonable, in a context where the respondents admit that 75% of their business involves this same form of agreement, to suggest that the failure to include or the improper alteration of required terms has had no impact on tenants. The existence of applications for dispute resolution suggests otherwise. As such, I have determined that the appropriate point value is 0 (zero)].

Extent of Harm to Others

The investigator recommended a point value of 0 (zero), in recognition that the substance of the allegation for Matter #1 does not demonstrate quantifiable harm of the type contemplated in Policy Guideline 41.

Policy Guideline 41 outlines point values based on contraventions that cause physical discomfort or other harm that may result in losses of quiet enjoyment or a need for medical treatment for the infractions. There is no evidence of such harms before me. While there is

also a component of economic harm in relation to this factor, I note that the investigation report did not address this harm and as such, my decision cannot result in a score that would include consideration of economic harm.

As a result, it is my decision that a 0 (zero) value is appropriate on this point. While the respondents made specific submissions in relation to their position that the point value should be 0 (zero), it is not necessary for me to address those submissions in any detail, as I have decided for my own reasons that a 0 (zero) point value should be assigned.

Repeated or Continuous

The investigator recommended a point value of 5 for this factor based on the specifics of decisions made between January 2019 and 2020.

The respondents submit that this recommendation is based on the unreasonable and misleading assertion that the previous decisions unequivocally concluded that the Act applies to the "Furnished Travel Accommodation Agreements" and that, as a result, each of the 152 Agreements contravened those rulings. The respondents point to the existence of decisions that found the exemption did apply.

For the reasons noted above, I found that all of the 152 Agreements are subject to the *Act* and therefore the failure to include the required standard terms and/or the alteration of the required standard terms in those agreements contravene the *Act* and the Regulation. On that basis, I find that the same contravention has occurred for more than five tenants more than five times, and that the contravention has continued for more than a year after several decisions finding the exemption for travel and vacation accommodation did not apply to these agreements.

As a result, I find it appropriate to assign a point value of 5 to this factor.

Whether Contravention Was Deliberate

The investigator recommended a point value of 2 for this factor based on the fact that it had been a year or more since the first decisions accepting jurisdiction, which the investigator appears to have considered to constitute a "written" request to stop or correct the contravention. Specifically, the investigator reasoned:

> "PLAN A was first made aware on January 22, 2019 that the Act applied to their "Furnished Travel Accommodation" agreements and then again on April 5, 2019 (date of written decision from January 15, 2019 hearing). Then a year later, the RTB issued another decision that the Act applied to PLAN A's "Furnished Travel Accommodation" tenancy agreements. Entering into 152 tenancies after January 2019, stating the Act did not apply in your "Furnished Travel Accommodation" tenancy agreements was a deliberate attempt to avoid or contract out of the Act and Regulation."

The respondents submit: "There is no evidence that any tenant to an Agreement requested Plan A to use a residential tenancy agreement or asked for changes to be made to the Agreement. The CEU's submissions are entirely without foundation. A point value of zero should be given for this factor."

For the reasons noted above, I have found that the 152 agreements are subject to the *Act* and therefore the failure to include, and the alteration of, the required standard terms is in contravention of the *Act* and Regulation. By January 2020, the respondents had been subject to at least three decisions from the RTB finding that their agreement was not exempted from the *Act*.

Despite that, the respondents made a conscious decision to continue to use the same form of agreement a significant number of times after that date. I find this was a deliberate choice in circumstances where the respondents should have been aware that there was a realistic possibility that doing so could be found to be in contravention of the *Act*.

I agree with the respondents it is not accurate to characterize the written decisions of the RTB as a written request by "the other party to the tenancy to stop or correct the contravention" within the meaning of the point value considerations in Policy Guideline 41.

However, in my view, it is accurate to find that one year or more has passed since the RTB issued a decision or order against the respondents finding that the *Act* applies to the same form of agreement. Balanced against that, I acknowledge that there is at least one more recent decision that found the exemption did apply to the respondents' form of agreement. As such, I have decided that the appropriate point value to be assigned is 5.

Economic Benefit

As in Matter #1, and given the terms of the 152 agreements, I am not satisfied that it is reasonable to suggest the respondents have not realized any economic benefit at the cost of those tenants who may have entered into these agreements and been charged fees that are not statutorily allowed or, in fact, had their tenancies ended in a manner that does not comply with the *Act*.

However, I acknowledge that the investigation did not include pursuing the extent of any potential economic benefit, and therefore there is no evidence of economic harm that cannot be quantified. As such, I have concluded that the 0 (zero) value is appropriate on this point. Since the respondents agree with that point value, it is not necessary for me to address their comments in relation to this factor.

Efforts to Correct

The investigator recommended a point value of 5 for this factor on the basis that there was no documented evidence that the respondents had made any attempts to correct the contravention.

The respondents submit:

> Mr. Majithia's evidence is that it is unclear to him when the Exemption applies and when it does not. He has sought guidance from the RTB, which Plan A has implemented.
>
> It is undeniable that the CEU refers to factors for distinguishing vacation rentals from residential tenancies that the RTB, in its Decisions, did not.
>
> Plan A has taken reasonable steps to be in compliance with the RTA and to apply the Exemption only when it is permissible to do so.
>
> It has sought guidance from the CEU as to what the applicable test should be. The CEU has declined to provide this guidance.
>
> A point value of two ought to be applied.

As noted above, despite the respondents' assertions that they have sought guidance from the RTB and that they have tried to implement these changes, other than Mr. Majithia's affidavit, the respondents have provided no documentary evidence to confirm that they have done so. This is probably best exemplified by the respondents' failure to collect permanent addresses from the tenants said to be using the rental units as vacation rentals and the failure to document the questions asked and the responses received about intended use of the unit. In fact, the respondents' practice not to collect such information, and their further practice of transferring the security deposit from one tenancy agreement to the next and still characterizing it as a "vacation rental", appear to provide evidence of practices that are actually inconsistent with implementing guidance they have received.

As a result, I have concluded that [there are no documented efforts by the respondents to correct the contravention, and a point value of 5 is therefore appropriate.

I note the total point score for Matter #2 is 18; however, the value of 5 has been assigned in three categories and as such the penalty is $5,000.00, pursuant to Policy Guideline 41.

Additional Information

Please note that the *Act* allows for separate monetary penalties of $5,000.00 for each day a contravention continues. At this time, I am setting the penalty at $5,000.00 for each Matter with the expectation that this will ensure your compliance with the *Act* and Regulation.

Please be advised that should you continue to contravene the *Act* and Regulations as described above, you may be subject to additional penalties of up to $5,000.00 for each day that each contravention continues.

Pursuant to section 9(5)(d) of the *Act*, the RTB will be publishing this decision, as well as a summary of this decision, with respect to the administrative penalty proceedings against you, including your penalty payment status. To the extent necessary to address privacy concerns, personal details will be redacted from the published version.

This $10,000.00 administrative penalty is to be made payable to the Minister of Finance by cheque, money order or bank draft. Please submit the payment to:

Compliance and Enforcement Residential Tenancy Branch
PO Box 9298 Stn Prov Govt
Victoria, BC V8W 9J8

Date by which penalty must be paid

Section 35 of the Regulation states that an administrative penalty must be paid within 60 days after the date of the order. **Please send your payment to my attention at the address noted above by June 20, 2022.**

Sections 87.3(4) through (7) of the Act provide an opportunity for the Director to consider alternatives to enforcing all or part of an Administrative Penalty and enter into an agreement with respondents. Any request to consider an alternative can be sent to my attention at the address provided above before the payment due date. The request should include your proposal for an agreement including:

- the actions you propose to take,
- the date by when you propose to have completed those actions, and
- the amount by which you propose the administrative penalty be reduced or whether you propose the administrative penalty be cancelled if those actions are completed by that date.

If an agreement is entered into and you fail to complete the required actions by the specified date, the administrative penalty will once again be due and payable in full.

Right to have Director of the Residential Tenancy Branch reconsider this decision

Under section 87.8 of the *Act*, you have the right to apply to the Director for a review of the matters set out in this notice. Division 2 of Part 5 of the *Act* applies to any such review. Please note that, as outlined in section 79 of the *Act*, a decision or an order of the Director may be reviewed only on one or more of the following grounds:

a) a party was unable to attend the original hearing (or respond to the opportunity be heard) because of circumstances that could not be anticipated and were beyond the party's control;

b) a party has new and relevant evidence that was not available at the time of the original hearing (or in consideration of an Administrative Penalty, at the time the original opportunity to be heard was provided to you);
c) a party has evidence that the Director's decision or order was obtained by fraud.

An application for review of a decision or order of the Director:

a) must be made in the approved form and in the manner approved by the Director,
b) must be accompanied by the fee prescribed in the regulation,
c) must be accompanied by full particulars of the grounds for review and the evidence on which the applicant intends to rely, and
d) may be made without notice to any other party.

The time limit for filing an application for review is within 15 days after you have received a copy of this decision. Should you wish to exercise this right, complete an Application for Review Consideration (form #RTB-2). Be sure to clearly indicate the grounds for the review and include all evidence that supports your claim. Submit your application along with the $50.00 filing fee in person at a Residential Tenancy Branch office or Service BC Location.

You can find additional information including the Application for Review Consideration on this webpage:

https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/after-the-hearing/review-clarify-or-correct-a-decision

Recovery of Administrative Penalty

As set out in section 87.9(1) of the *Act*, an administrative penalty is a debt due to the government. Failure to pay the penalty as ordered will result in collection action being taken.

In addition, section 59(5)(b) of the *Act* gives the RTB the authority to refuse applications for dispute resolution, with respect to any matter, if the applicant owes outstanding fees under this *Act* to the government.

Sincerely,

[redacted] *Signature on original decision

[redacted] Maddia
PO Box 9298 Stn Prov Govt
Victoria, BC V8W 9J8

Email: [redacted]

Enclosed:

Administrative Penalty Assessment
Administrative Order
Residential Tenancy Branch Administrative Penalty Policy Guideline 41