



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, OPR, MNR, MNSD, FF

### Introduction

This hearing was convened in response to an application by the Tenant and an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The Tenant applied on July 11, 2011 for:

1. An Order cancelling a Notice to End Tenancy – Section 46; and
2. An Order to recover the filing fee for this application - Section 72.

The Landlord applied on July 15, 2011 for:

1. An Order of Possession - Section 55;
2. An Order for unpaid utilities - Section 67;
3. An Order to keep all or part of the security deposit – Section 38; and
4. An Order to recover the filing fee for this application - Section 72.

The Tenant and Landlord were each given full opportunity to be heard, to present evidence and to make submissions.

### Issue(s) to be Decided

Is the Notice to End Tenancy valid?

Is the Landlord entitled to an Order of Possession?

Are the Parties entitled to recovery of their respective filing fees?

### Background and Evidence

The tenancy of a basement unit began on October 14, 2010 1, 2008. The basement unit is a one bedroom suite and the upper house is a three bedroom split level. The

Landlord occupies the upper level of the house sporadically. Rent in the amount of \$750.00 is payable in advance on the first day of each month. The lease notes that at the outset of the tenancy, the Landlord collected a security deposit from the Tenant in the amount of \$400.00. The Landlord currently holds \$375.00 of that deposit. The Landlord states that since the beginning of the tenancy, the Tenant has not paid the utilities (electricity) owing and on June 30, 2011 the Landlord served the tenant by registered mail a 10 day Notice to End Tenancy for unpaid utilities (the "Notice"). The Tenant states that he received the Notice on July 9, 2011 as the mail was slow due to the strike. The Tenant filed an application to dispute the Notice two days later.

The Landlord states that the schedule to the lease sets out that the utilities are to be calculated and apportioned between the Landlord and Tenant according to the days of occupancy of the Landlord with the Tenant's occupancy being calculated as constant. The Landlord states that the Parties jointly read the lease prior to signing and that the Tenant was fully aware of the calculations and apportionments to be made. The Landlord states that the apportionment cannot be calculated based on the Tenant's word about the Tenant's occupancy as the Landlord is not present to be able to confirm the dates. The Landlord states that as the Tenant uses the unit continuously, the Tenant knows when the Landlord uses the upper floor. The Landlord states that when the upper floor is not being occupied, the thermostat is turned to 4 or 5 degrees Celcius and only the fridge is operating continuously.

The Tenant states that he has never refused to pay the utility bills but that he disputes the way they are calculated by the Landlord. The Tenant states that he is not in the unit 50% of the time due to work and time spent with his girlfriend located at another city. The Tenant states that the lease schedule does not require the calculations to be based on the continuous occupancy of the Tenant as it clearly states that "Electricity use will be proportionately calculated depending on the day of occupancy of the Tenant and Owner." It is noted that following this term, is an example calculation that uses the Tenant's occupancy as constant and the Landlord's occupancy as variable. The Tenant states in his written submissions and orally that the first two electrical bills were sent to

him without the Landlord identifying the occupancy calculations and that on February 1, 2011, the Landlord finally confirmed the Landlord's occupancy dates and that the calculations were based on the Tenant having continuous occupancy. The Tenant states that the calculations are not made according to the lease he signed and that such calculations are unfair as the Landlord technically occupies the upper floor full time, as the upper floor is continuously heated, furnished and the fridge is continuously running. The Tenant further states when the outside temperatures drop over the winter months, sometimes to as low as minus 25 degrees Celsius, the utility usage to maintain the heat on the upper floor is substantial and that it is unfair for the Tenant to pay for these costs. The Tenant states that a fair apportionment would be a split of 1/3 tenant, 2/3 Landlord or alternatively the usage should be calculated on the occupancy of each the Tenant and the Landlord as provided for in the lease.

### Analysis

Section 46 of the Act requires that upon receipt of a Notice to End Tenancy for non-payment of utilities the tenant must, within five days, either pay the full amount of the arrears indicated on the Notice or dispute the notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. Given the mail strike and consequent delays of mail delivery, including registered mail delivery, and accepting the evidence that the Tenant filed the application two days after receiving the notice in the mail, I find that the Tenant filed the application to dispute the Notice within the time required by the Act.

Section 6 of the Act provides that a term of a tenancy agreement is not enforceable if the term is unconscionable, or the term is not expressed in a manner that clearly communicates that rights and obligations under it. Section 3 of the Residential Tenancy Regulation defines unconscionable as being oppressive or grossly unfair to one party. As the Landlord did not dispute the Tenant's claim that the Tenant does not continuously occupy the unit, I accept the Tenants evidence that he occupies the unit approximately 50% of the time.

If the relevant term of the lease states that electrical use will be proportionately calculated depending on the days of occupancy of the Tenant and Landlord, then it is clear that the occupancy days of both the Tenant and Landlord must be used for the calculations. The Landlord however calculates the apportionment through application of the example following the term, i.e., constant occupancy of the Tenant and variable occupancy of the Landlord. Accepting the undisputed evidence that the upper unit consumes the utility regardless of the Landlord's occupancy, the calculations used by the Landlord is grossly unfair to the Tenant as the Tenant assumes a large portion of the costs accrued by the Landlord's use.

Therefore, if the example is used to determine the meaning of the term, then I find that the term is unconscionable as it is grossly unfair to the Tenant to assume costs of the Landlord. If the example calculation is not used to determine the meaning of the term, then I find that the presence of the example causes the term not to be expressed in a manner that clearly communicates the rights and obligations under it as can be seen by the Landlord and Tenant's differing interpretation of the term.

As a result, I find that the term of the tenancy agreement in relation to the apportionment of the utility costs is not enforceable. As the term is not enforceable, the Notice claiming unpaid utilities is not valid and I therefore cancel the Notice and the tenancy continues. As the Tenant's claim to have the Notice cancelled has been successful, I find that the Tenant is entitled to recovery of the filing fee and I order the Tenant to reduce the next rent payable by the amount of \$50.00.

As the Notice has been found to be not valid, I dismiss the Landlord's claim.

### Conclusion

The Landlord's application is dismissed without leave to reapply. The Notice is cancelled and the tenancy continues.

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: August 15, 2011.

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Residential Tenancy Branch