



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      DRI, MNDC, FF

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order regarding a disputed additional rent increase pursuant to section 43;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The landlord confirmed that the tenants handed him a copy of their dispute resolution hearing package on April 11, 2012. I am satisfied that the tenants served this hearing package and that the parties exchanged their written evidence with one another in accordance with the *Act*.

At the hearing, the parties confirmed that the landlord has not issued a Notice of Rent Increase to the tenants on an approved Residential Tenancy Branch form. Rather, the landlord testified that he entered into a new fixed term residential tenancy agreement with the tenants for a higher rent than was set out in the tenants' original fixed term tenancy agreement.

### Issues(s) to be Decided

Has the landlord complied with the terms of the *Act* in the monthly rent currently set for this tenancy? Should an order be issued setting the monthly rent for this tenancy? Are the tenants entitled to a monetary award for losses arising out of this tenancy? Are the tenants entitled to recover their filing fee for this application from the landlord?

### Background and Evidence

While I have turned my mind to all the documentary evidence, including receipts and invoices, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

This tenancy commenced on March 1, 2011 by way of a one-year fixed term tenancy agreement that was scheduled to end on February 29, 2012. Monthly rent in this first fixed term tenancy agreement was set at \$850.00, payable in advance on the last day of each month plus utilities. The landlord continues to hold the tenants' \$425.00 security deposit paid on March 1, 2011.

The parties gave conflicting testimony as to the provisions of their original Residential Tenancy Agreement (the Agreement) which neither side entered into written evidence before the hearing. The male tenant (the tenant) testified that the Agreement allowed the tenancy to continue at the end of the initial fixed term on a month-to-month basis or another fixed term. The landlord testified that both parties initialled the section of the Agreement that required the original tenancy to end on the last day of the original fixed term tenancy committing the tenants to vacate the rental unit on that date. He confirmed that this was the Residential Tenancy Branch's (the RTB's) Standard Residential Tenancy Agreement which he uses for his tenancies.

The landlord gave undisputed oral testimony that he consulted with the tenants as the end to the original fixed term tenancy neared. At that time, he said that the tenants remained uncertain as to whether they wished to remain in the tenancy as the tenant needed to clarify his work situation. The landlord testified that he let the tenants remain in the rental unit for March 2012 at the existing \$850.00 monthly rent, but told them that he would be seeking \$1,100.00 per month if they decided to remain in the rental unit for a new fixed term commencing on April 1, 2012. He said that after some discussion with the tenants, the tenants signed a new fixed term tenancy agreement with a monthly rent of \$1,000.00 plus utilities. The landlord gave undisputed testimony that the tenants provided him with a series of post-dated cheques at the higher monthly rent of \$1,000.00.

Although the tenants did not dispute the landlord's testimony that they had entered into a new Agreement requiring them to pay \$1,000.00 in monthly rent as of April 2012, the tenant said that there was no negotiation with respect to this Agreement. The tenant testified that the landlord never advised the tenants that he was seeking a monthly rent of \$1,100.00 for the new Agreement. Both tenants testified that the landlord told them that he would evict them if they did not pay the higher monthly rent that he intended to charge them. The tenant said that he signed the new Agreement and provided the post-dated cheques under "duress" even though the tenants believed that the landlord was increasing their rent illegally and in contravention of the *Act*.

At the hearing, both parties read the exact wording of the original Agreement with respect to what was to transpire at the end of the fixed term tenancy. As they provided

different accounts of this provision of the Agreement, I asked both parties to send their copies of the portion of the Agreement addressing the Length of Tenancy by fax by the end of the day of the hearing. Both parties sent this portion of the original Agreement by fax later that day.

In addition to those aspects of their application that pertained to the amount of their monthly rent, the tenants applied for a monetary Order of \$2,069.41. Much of this monetary claim resulted from a January 2012 flood to the rental home resulting from a burst pipe that damaged the basement level of their rental unit. In their written evidence, the tenants itemized the monetary portion of their application as follows:

<b>Item</b>	<b>Amount</b>
Physical Damage due to Flooding	\$400.00
Invasion of Privacy; Construction Noise and Disruption; Loss of Peace and Quiet Enjoyment; Loss of Sleep (3 months x \$85.00 per month = \$255.00)	255.00
Loss of 2 bedrooms for 3 months (\$340.00 x 3 months = \$1,020.00)	1,020.00
Rebate of Hydro used during Restoration of Rental Unit (\$304.07 + \$90.34 = \$394.41)	394.41
<b>Total Monetary Award Requested</b>	<b>\$2,069.41</b>

#### Analysis – Monthly Rent as of April 2012

Section 43 of the Act establishes the basis for increasing rents during a tenancy as follows:

- 43** (1) *A landlord may impose a rent increase only up to the amount*
- (a) calculated in accordance with the regulations,*
  - (b) ordered by the director on an application under subsection (3), or*
  - (c) agreed to by the tenant in writing...*
- (3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution....*

*(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.*

In determining the correct monthly rent for this tenancy and whether the landlord has issued an additional rent increase in contravention of the *Act*, I have reviewed and taken into consideration the identical copies of this Agreement the parties faxed the RTB shortly after this hearing.

Neither party is incorrect in the sworn statements they entered into oral testimony regarding the content of this provision of the Agreement. Section 2(b) of the Agreement, entitled Length of Tenancy for a fixed term tenancy asked the parties to “(please check one option, i or ii).” The parties placed an “x” in the box for Option (i) of this section of the Agreement which signified that “the tenancy may continue on a month-to-month basis or another fixed length of time”. The parties did not place anything in the box for Option (ii), which was to be used if the parties agreed that “the tenancy ends and the tenant must move out of the residential unit”. However, they both initialled boxes on the right side of this option which was to be used “if you choose this option, both the landlord and tenant must initial in the boxes to the right.” The way that the parties completed this portion of the Agreement lends credence to both of their interpretations as to what was supposed to happen at the end of this tenancy.

I find that there is ambiguity in the way that the parties have completed this portion of the initial fixed term Agreement. The tenants maintained that the only option of the two provided that was filled in by either party was Option (i) which did not end the tenancy and require them to move out at the end of the fixed term. The landlord asserted that both parties specifically initialled the boxes to the right of Option (ii) which he claimed established that the tenancy was to end on February 29, 2012 and the tenants were to vacate the premises.

The courts have relied on the legal principle of *contra proferentem* when confronted by an ambiguous provision of a contract. This principle establishes that if there is an ambiguous clause in a contract it will be interpreted against the party responsible for drafting the clause. In a 2010 written decision of the B.C. Supreme Court (*Horne Coupar v. Velletta & Company, 2010 BCSC 483*), the Honourable Justice Romilly explained why this legal principle is applied against the party responsible for including an ambiguous term in a contract.

*Contra proferentem is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the*

*contract. This interpretation will therefore favour the party who did not draft the term presumably because that party is not responsible for the ambiguity therein and should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely. This rule also encourages a party drafting a contract to turn their mind to foreseeable contingencies as failure to do so will result in terms being construed against them. That there is ambiguity in the contract is a requisite of the application of this rule, however, once ambiguity is established, the rule is fairly straightforward in application...*

In this case, I find that the principle of *contra proferentem* establishes that the ambiguity in the interpretation of what was to happen at the end of the original fixed term tenancy agreement should be decided in the tenant's favour. Although the landlord was using a Standard Tenancy Agreement authorized by the RTB, the landlord as the party providing the Agreement for signature bears responsibility for ensuring that this provision of the Agreement was completed properly and left no room for ambiguity. Rather than following the clear instructions of this portion of the Agreement to select one of the two available options, the landlord allowed a hybrid of the two options by completing portions that apply to both options.

I should also note that even if I am wrong with respect to the ambiguity in this provision of the Agreement, I would find that on a balance of probabilities the "x" placed beside Option (i) aligns more closely with the instructions provided in this portion of the Agreement. As such, in this event I would find that the tenancy was to continue on a month-to-month basis or another fixed length of time.

Had the landlord immediately signed a new fixed term tenancy agreement with the tenants for a higher monthly rent, it is possible that the landlord would still be able to claim that he was entitled to a higher monthly rent on the basis that the parties had signed an agreement for "another fixed length of time." However, the landlord agreed to let the tenancy continue for one month at the existing monthly rental of \$850.00. Based on this evidence, I find that the landlord continued the original fixed term tenancy on a month-to-month basis as set out in the first portion of Option (i) of Section 2 of the Agreement.

I reject the tenants' claim that they signed the new fixed term tenancy commencing on April 1, 2012 under duress. However, I find that the tenants did not obtain extra consideration from the landlord when they entered into the new Agreement. In order to alter what was a legal extension of the original Agreement by entering into a new contractual agreement, the parties would have needed to have both received extra consideration that extended beyond the terms of their existing Agreement. The landlord

clearly received extra consideration in the form of \$150.00 in additional monthly rent under the terms of the new Agreement. However, I find that extra consideration was not obtained by the tenants in this new Agreement. The new Agreement was for the same rental unit and provided them with the same services and facilities as they were already obtaining under the month-to-month extension of the original Agreement. Since the new Agreement did not involve an exchange of extra consideration for both parties, I find that the original contractual Agreement entered into by the parties is still in place and the new Agreement does not supersede it.

For the reasons outlined above, I find that the original Agreement establishing the monthly rent for this tenancy at \$850.00 is still in effect. As the landlord has not issued a Notice of Rent Increase in accordance with the *Act*, I order that the correct monthly rent for this tenancy is set at \$850.00.

I direct the landlord to refrain from cashing any existing monthly rent cheques in the amount of \$1,000.00 provided by the tenants for this tenancy. I direct the landlord to return all post-dated cheques provided by the tenants in the amount of \$1,000.00. If the landlord wishes post-dated cheques for this tenancy, I direct the tenants to re-issue cheques to the landlord for the period of time requested by the landlord in the amount of \$850.00 while this remains the legal monthly rent established for this tenancy.

#### Analysis – Tenants' Application for a Monetary Award

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

There is no dispute between the parties as to a flooding incident that occurred in January 2012 as a result of a burst pipe in the rental unit. Although the tenants testified that they incurred water damage from this flood to their possessions, the female tenant said that they have not replaced these items and have no receipts to quantify their losses. They provided no photographs to support their claim for flooding damage. I dismiss this portion of their application without leave to reapply.

The tenants submitted detailed evidence to support their assertion that they incurred increased hydro costs as a result of the restoration work that the landlord undertook

after the January 2012 flooding incident. The parties agreed that the landlord's insurer has received the tenants' claim for increased hydro costs in the amount of \$280.00. The landlord testified that he has been advised by his insurer that the insurer is planning to send a \$280.00 cheque to the tenants. The tenants maintained that they had received a more recent February 29, 2012 email from the insurer advising them that the insurer would be sending the \$280.00 cheque to the landlord who would then be responsible for forwarding these funds to the tenants.

Based on a balance of probabilities, I find it more likely than not that the landlord's insurer is intending to forward the \$280.00 payment to its insured, the landlord. If the landlord's insurance company does send the \$280.00 cheque directly to the landlord, I direct the landlord to pay the tenants \$280.00 to reimburse them for a portion of their costs associated with the flooding incident. The landlord is not responsible for this amount if the insurance company pays the \$280.00 cheque directly to the tenants.

In addition to the above payment, I find that the tenants have provided sufficient receipts to demonstrate that they are entitled to a further \$114.41 monetary award. This monetary award recovers the remainder of the \$394.41 entitlement that they have demonstrated for February 2012 (\$304.07) and March 2012 (\$90.34).

I have also considered the tenants' application for a monetary award for their loss of quiet enjoyment of the premises for the three-month period following the January 2012 flood. Some of the tenants' application in this regard resulted from the construction noise that occurred during the day when the male tenant who works the night shift was trying to sleep. As discussed at the hearing, the landlord cannot be expected to restore the flooding damage at hours that worked around the tenant's sleep schedule. While I recognize that the tenants are entitled to some form of compensation for the loss of quiet enjoyment that they experienced over the three-month period in question, I limit this entitlement to 5% of their overall monthly rent, resulting in a monthly rent reduction of \$42.50 per month, for a total reduction of \$127.50.

The tenants maintained that the flooding deprived them of the use of two of their four bedrooms in this four bedroom house and asked for a 40% reduction in their rent to compensate them for their loss of facilities that the landlord committed to provide when he rented the premises to them. The landlord testified that the two rooms in question are basement level rooms which are not used nearly as often as the main floor living space. Since I agree with the landlord's assertion that the basement rooms would not have the same rental value in this tenancy as living space on the main floor, I allow the tenants a retroactive monthly rent reduction of 10 % of their monthly rent for January,

February and March 2012 for their loss of this living space. This results in a monthly reduction of \$85.00, for a total reduction of \$255.00 for this item.

I also find that the tenants are entitled to recover \$150.00 in rent from their April 2012 monthly rent payment. In addition, based on the timing of this decision and the location of the parties, it is possible that the landlord may not receive this decision before May 1, 2012. If the landlord does not receive this decision until after he has cashed the tenants' May 2012 rent cheque, I allow the tenants to reduce their next monthly rent cheque by an additional \$150.00 to reflect this overpayment.

As the tenants have been successful in their application, I find that they are entitled to recover their filing fee from the landlord.

### Conclusion

I issue a monetary award in the tenants' favour under the following terms:

<b>Item</b>	<b>Amount</b>
Loss of Quiet Enjoyment (3 months @ \$42.50 per month = \$127.50)	\$127.50
Loss of Use of a Portion of the Premises for 3 months (\$85.00 x 3 months = \$255.00)	255.00
Rebate of Hydro used (including amount to be forwarded by Landlord's Insurer) (\$280.00 + \$114.41 = \$394.41)	394.41
Recovery of April 2012 Rent	150.00
Filing Fee	50.00
<b>Total Monetary Order</b>	<b>\$976.91</b>

The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: April 25, 2012

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Residential Tenancy Branch