



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC

### Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was personally served on the landlord on March 20, 2014.

### Issue(s) to be Decided

The issue to be decided is whether the tenant is entitled to a monetary order and if so how much?

### Background and Evidence

The parties entered into a written Non-profit Housing Tenancy Agreement dated January 4, 2002 that provided that the tenancy would begin on February 1, 2002 and continue on a month to month basis. The tenant paid a security deposit of \$301 on January 4, 2002. She testified that she has subsequently paid a pet damage deposit of \$301.

The tenant is presently 83 years of age and is low income. At all material times the parties recognized that the tenant's rent would be subsidized according to her income under BC Housing guidelines.. The tenant's portion of the rent has varied between \$330 per month and \$532 per month.

The written tenancy agreement dated January 4, 2002 provided that electricity and heat were included in the rent. However, the landlord demanded and the tenant paid a monthly electrical surcharge of \$12 to \$29 per month since the start of the tenancy. The surcharge was levied against on rental units depending on the type of unit and is to recover the actual cost of the electricity expense.. In 2013 the tenant reviewed her tenancy agreement with respect to another issue and recognized that the tenancy agreement provided that electricity was included with the rent.

The tenant demands the landlord return the surcharge amount that she had paid for the last two years. The parties agree this surcharge amounts to \$676 for the last two years. The tenant has not claimed the surcharge she has paid for the entire 11 years of the tenancy. At the hearing the tenant asked if she was entitled to make a claim for the entire period of the tenancy. I stated that it was not my role to give legal advice. I gave the tenant the option of withdrawing her claim and re-filing for the entire 11 years or proceeding with the hearing for the 2 years claimed in the Application for Dispute Resolution. The tenant was alerted that it may be that proceeding with the claim for 2 years may prevent her from claiming the entire 11 years. After consulting with her Advocate the tenant stated she wished to proceed with the claim for 2 years.

The landlord is a not for profit housing society. The landlord administers 170 rental unit in 28 buildings many of which are heritage buildings. Approximately 60% of the units are subsidized with the remainder paying market rent. The landlord testified that they have conducted a review of all of the tenancy agreements and there are 31 tenancy agreements in which the box indicating electricity was included in the rent was ticked. The electricity surcharge is levied against all rental units depending on the type of unit. The representative of the landlord testified that reimbursing the tenant and other tenants

like her would have enormous repercussions as the landlord does not have a contingency fund to cover this and they are not in the business of making a profit. The landlord does not have the ability to repay these sums and it would be unfair to all tenants. The landlord is facing other extraordinary expenses including \$400,000 for geothermal upgrades and roof replacements.

The tenant identified the problem in the summer of 2013. The tenant's solicitor wrote a without prejudice letter to the landlord dated August 6, 2013 advising the landlord that the tenant would not be paying the additional hydro charge. The solicitor for the landlord responded in a letter dated August 27, 2013 stating that a clerical error had been made when electricity was included as part of the rent but that the tenant would not be charged with this surcharge unless she subsequently consents. The tenant has not paid the electrical surcharge since September 2013.

On April 7, 2014 the landlord wrote the tenant stating that they took the position that their agreement that the tenant was not required to pay the electrical surcharge was without prejudice to the determination of a residential tenancy adjudicator.

Landlord's Submission:

Briefly, the landlord submits the tenant is not entitled to reimbursement of the surcharge paid and that the tenant's claim should be dismissed on the following basis:

- At all material times the parties conducted themselves on the basis that the landlord was entitled to recover the electrical surcharge. The tenant paid this sum the clerical error evidenced in the tenancy agreement which ticked the box indicating rent was included with the rent should be rectified..
- The tenant has never paid the amount of rent sent out in the tenancy agreement as she has always received a rental subsidy.
- To allow the tenant to recover this surcharge would result in unjust enrichment for the tenant.

- The landlord is a not for profit housing society which does not have the financial resources to reimburse the tenant and other like her. The electricity surcharge is levied against all rental units on the basis of their type and it would be unfair to the other tenants as they would be paying for the electricity used by the Tenant.
- If the landlord is ordered to reimburse the tenant the landlord will be facing claims by some 31 other tenants resulting in a financial burden which a not for profit society could not pay.

Tenant's Submission:

Briefly the tenant submits as follows:

- The written tenancy agreement sets out the rights and obligations of the parties. It provides that electricity was included as part of the rent. This is binding on both parties and the tenant should be reimbursed the \$676 claims plus \$1000 for breach of the covenant of quiet enjoyment.
- The fact the tenant receives a rental subsidy from BC Housing is not relevant to whether the landlord is entitled to charge an electrical surcharge not included in the rent.
- The decision of an arbitrator in this case does not bind other arbitrators should there be further claims.
- The tenant is elderly and has limited income.

Analysis:

After carefully considering all of the evidence and submission of the parties I determined the tenant is entitled to recover the sum of \$676 being reimbursement of the surcharge she has paid for the following reasons:

- The parties are bound by the provisions of the tenancy agreement they enter into. In this case the tenancy agreement provides that electricity is part of the rent. The landlord is not entitled to charge an additional sum where it is included in the rent.

- I do not accept the submission of the landlord that the landlord is entitled to the electrical surcharge because the tenant has never paid the full amount of the rent as set out in the tenancy agreement. Where a tenant is entitled to receive a rental subsidy based on income this does not give the landlord the right to charge a surcharge where it is included as part of the rent. The landlord has received the full rent – a portion in the form of a rental subsidy and a portion directly from the tenant.
- I do not accept the submission of the landlord that to require the landlord to reimburse the rent would amount in unjust enrichment. This is situation where the landlord has taken the tenant's money where the landlord did not have a legal right to do so. There is no unjust enrichment involved. The tenant is seeking to recover her money which was paid to the landlord in error.
- The difficult financial situation which faces the landlord does not relieve the landlord of their legal obligations as set out in the tenancy agreement.
- I do not accept the submission that the principles of fairness and equity relieve the landlord of its legal obligations.

I determined the tenant has failed to prove her claim of \$1000 for damages for loss of quiet enjoyment due to stress and financial hardship. The tenant failed to produce medical evidence to support this claim. The fact that the landlord takes a different view of the parties' legal rights is not a basis of a breach of the covenant of quiet enjoyment. The tenant's solicitor advised the landlord that they took the position that the tenant was not required to pay the surcharge on August 6, 2014. The landlord's solicitor responded in two weeks agreeing that the tenant would not be required to pay that surcharge commencing September 1, 2014. While the landlord was not prepared to pay the two years claimed this does not give the tenant a right to claim additional monetary compensation for breach of the covenant of quiet enjoyment.

Monetary Order and Cost of Filing fee

**I ordered the landlord(s) to pay to the tenant the sum of \$676.**

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order 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: May 07, 2014

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Residential Tenancy Branch

