Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CLEEN AND CLEER MANAGEMENT INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

For the tenants: MNDCT, FFT
For the landlord: MNRL-S, FFL

Introduction

This hearing was convened as a result of the Applications for Dispute Resolution ("applications") by both parties seeking remedy under the *Residential Tenancy Act ("Act")*. The tenants applied for a monetary order in the amount of $19,259.01 for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement and to recover the cost of the filing fee. The landlord applied for a monetary order in the amount of $1,874.98 plus 50% of future gas and hydro utilities based on unpaid rent or utilities, to retain the tenants' security deposit, and to recover the cost of the filing fee.

The landlord agent ("agent"), landlord owner ("owner"), landlord shareholder ("shareholder") and the tenants attended the teleconference hearing. The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me. I have reviewed all evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

The hearing began on October 12, 2018 and after 52 minutes the hearing was adjourned to provide additional time to have both parties present their evidence. An Interim Decision dated October 12, 2018 was issued which should be read in conjunction with this Decision.

On November 22, 2018, the hearing reconvened and after an additional 124 minutes the hearing concluded.

Neither party raised any concerns regarding the service of documentary evidence, their respective applications and related amendments.

Preliminary and Procedural Matters

At the outset of the hearing and by consent of the parties the name of agent, VH, was removed as a respondent on the tenants' application leaving only the name of the corporate landlord which matches the signed tenancy agreement. This amendment to the tenants' application was made in accordance with section 64(3) of the *Act.*

The parties confirmed their email addresses at the outset of the hearing. The parties confirmed their understanding that the decision would be emailed to both parties and that any applicable orders would be emailed to the appropriate party.

In addition to the above, as the tenancy continues I find that the landlord's claim against the tenants' security deposit is premature. I will not deal with the tenants' security deposit in this Decision as a result.

Issues to be Decided

- Is either party entitled to a monetary order under the *Act*, and if so, in what amount*?*
- Is either party entitled to the recovery of the cost of the filing fee under the *Act?*

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed-term tenancy began on June 16, 2017 and reverted to a month to month tenancy after June 16, 2018.

At the start of the tenancy monthly rent was $1,600.00 per month and was due on the first day of each month. The parties agree that the rent was increased to the current amount of $1,664.00 as of July 1, 2018.

Landlord's claim

The landlord's monetary claim of $1,874.98 is comprised as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Overcompensation to tenants	$1,600.00
2. 50% of hydro utilities (Mar. 28/18 – May 23/18)	$112.94
3. 50% of hydro utilities (May 24/18 – Jul. 23/18)	$83.64
4. 50% of gas utilities (Mar. 15/18 – Apr. 17/18)	$30.79
5. 50% of gas utilities (Apr. 17/18 – May 15/18)	$11.93
6. 50% of gas utilities (May 15/18 – Jun. 14/18)	$11.90
7. 50% of gas utilities (Jun. 14/18 – Jul. 16/18)	$13.20
8. 50% of gas utilities (Jul. 16/18 – Aug. 15/18)	$10.58
9. 50% of future hydro bills	
10. 50% of future gas bills	
TOTAL	**$1,874.98**

Regarding item 1, the landlord testified that they were seeking to have $1,600.00 paid to the tenants as overcompensation related to the inconvenience associated with a renovation project ("project"), which involved renovating the rental unit below the tenants' rental unit between what the landlords describe is a timeframe of October 2017 and ending on March 5, 2018. The tenants disputed the timeframe and claim it was for a longer period, which I will address further below.

The landlord's position is that when the tenants were offered free November 2017 rent in the amount of $1,600.00 that that was the agreed-upon compensation for loss of quiet enjoyment of the rental unit caused by the project. The agent stated that now that the tenants have claimed for additional compensation the landlord seeks the return of what the agent describes as $1,600.00 in overcompensation to the tenants. The landlord indicates in their evidence in terms of compensation paid to the tenants that the tenants have received total compensation of $2,976.63 comprised of free November 2017 rent of $1,600.00, $900.00 of additional compensation, and $476.63, which covers the full hydro utilities during the renovation.

The agent referred to a text from the landlord to the tenants indicating that rent for November 2017 would be waived due to the project and that as of December 2017 that rent would be "reduced until the work is completed"; however, a specific amount was not indicated in that text. The agent referred to the tenants' documentary evidence, which supports that $50.00 in compensation was offered by the landlord to the tenants for every day the project went beyond the projected end date of February 2, 2018, which was included in a text submitted in evidence dated December 29, 2017. The agent testified that new tenants occupied the lower rental unit ("lower unit") as of April 1, 2018.

The agent referred to a previous decision dated August 8, 2018 ("previous decision"), which relates to a previous dispute between the parties involving cross-applications by both parties. The file numbers of the previous decision have been included on the cover page of this decision for ease of reference. The agent testified that in the previous decision the arbitrator made a binding decision regarding gas utilities:

> **I find that the parties entered into a verbal agreement at the start of the tenancy to amend the term of the tenancy agreement for the Tenants to pay for the gas utility.**
>
> I find that the parties agreed to change the gas utility into the Landlord's name around the time the lower unit was to be occupied and the gas used by both units.
>
> **I find that it would be unconscionable for the Tenants to pay for the gas that is being used by a premises they do not occupy.**
>
> I find that there is no agreement between the parties on how the cost of the gas utility used by the upper and lower rental units will be shared. The tenancy agreement is silent on how these utility costs will be shared. I find that the Landlord cannot unilaterally determine the amount the Tenants will pay and apply that change as a term of the tenancy agreement.
>
> I find that because the tenancy agreement is silent on shared utilities and since there was no agreement reached by the parties on how the gas utility costs will be shared, the Landlord has failed to establish that the Tenants owe the amount of $45.96 as indicated within the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated June 4, 2018.
>
> If the parties could not reach an agreement on the issue, the Landlord could have applied for dispute resolution for an Arbitrator to decide the matter prior to the Landlord unilaterally determining the amount and issuing a notice to end tenancy.

> I set aside the Landlords 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated June 4, 2018.
>
> The tenancy will continue until ended in accordance with the Act.
>
> Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. The Tenants were successful with their application to set aside the 10 Day Notice. I authorize the Tenants to deduct the amount of $100.00 from one (1) future rent payment.
>
> [Reproduced as written with my emphasis added]

In addition, in a correction/clarification decision dated August 22, 2018 from the same arbitrator who issued the previous decision the arbitrator wrote the following:

> With respect to the Landlord's request for clarification; my finding is that despite the written tenancy agreement that indicates the rent includes heat, electricity, and natural or propane gas, **the parties entered into an oral agreement for the Tenants to pay for the gas utility.** My finding only applies to the term of the tenancy agreement related to the gas utility.
>
> With respect to the Landlord's request for information on how to proceed with an application for dispute resolution, a Landlord may select "other" and provide details on what the Landlord is seeking.
>
> Section 62 of the Act provides an Arbitrator the authority to determine disputes in relation to which the director has accepted an application for dispute resolution, and any matters related to that dispute that arise under this Act or a tenancy agreement. The Arbitrator may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act. The Arbitrator may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a Landlord or Tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.
>
> [Reproduced as written]

Based on the above, the gas utilities have already been considered by an arbitrator and a decision was rendered, which finds that the tenancy agreement was amended through a verbal agreement between the parties and that the tenants are responsible for their portion of gas utilities and that it would be unconscionable for the tenants to pay for the gas utility that is being used by a premises they do not occupy. In other words, the tenants would not be responsible for the other 50% of the gas utility. The landlord agent's position is that the electrical utilities should also be the same decision as the gas utility, namely 50% the tenants' responsibility with the other 50% being the responsibility of the lower unit tenants.

The tenants' response to item 1 was that the project did not end as of March 5, 2018, as there was debris still outside and continued smell related to the project. The tenants referred to a text that was not dated which reads in part:

> our house keeps a strong smell of paint.
> …
> had to open his window and now the house is very cold.
> …
> [owner] is painting downstairs.
>
> [Reproduced as written, except names]

The tenants also testified that they only agreed to pay utilities until separate meters were installed for the utilities. While the owner disputed that separate meters were promised to the tenants, the tenants presented a text on or about February 13, 2018 which reads in part from VH:

> …2) Re: electrical meters, I was wrong. They won't be separate. I apologize for telling you otherwise."
>
> [Reproduced as written]

The tenants presented photo evidence in support that the project lasted longer than March 5, 2018; however, the agent testified that the photo evidence was not dated and even though it showed renovation material ("material") in the yard, that that material had been cleaned up as of March 5, 2018 and that the tenants' photo evidence does not support that the project lasted longer than March 5, 2018 as a result.

The agent testified that the rental unit and the lower unit are the same size and that both should share 50% of the both the gas and electrical utilities. The tenants did not dispute that the lower unit was larger or smaller than their rental unit upstairs. The parties agreed that as of March 15, 2018, the landlord placed the gas utilities in the landlord's name. The agent testified that the electrical utilities have always been in the landlord's name since the start of the tenancy.

Regarding items 2 and 3, the landlord has claimed 50% of hydro (electrical) utilities comprised of $112.94 for March 28, 2018 to May 23, 2018, and $83.64 for May 24, 2018 to July 23, 2018, respectively. The landlord submitted invoices which support these amounts. The tenants' position is that they should not be responsible for hydro bills as the tenancy agreement indicates that utilities are included.

Regarding items 4 to 8, the landlord has claimed 50% of gas utilities comprised as follows:

4. 50% of gas utilities (Mar. 15/18 – Apr. 17/18)	$30.79
5. 50% of gas utilities (Apr. 17/18 – May 15/18)	$11.93
6. 50% of gas utilities (May 15/18 – Jun. 14/18)	$11.90
7. 50% of gas utilities (Jun. 14/18 – Jul. 16/18)	$13.20
8. 50% of gas utilities (Jul. 16/18 – Aug. 15/18)	$10.58

The landlord submitted invoices which support these amounts. The tenants' position is that they should not be responsible for hydro bills as the tenancy agreement indicates that utilities are included. While the tenants do not agree with the previous decision made by the previous arbitrator, a decision has already been made which has found that the tenants made a verbal agreement to pay for gas utilities which I will address later in this decision.

The agent stated that the landlord attempted in good faith to negotiate a settlement with the tenants to avoid having to apply for dispute resolution, but was unable to reach a settlement agreement with the tenants. The tenants stated that they only accepted the rental unit based on a promise of separate meters, which the landlord denies was ever promised and that the landlord's text has been taken out of context and that there must have been miscommunication between the parties in terms of the discussion relating to meters. The tenants stated that as the utilities are not listed in the tenancy agreement, they should not be required to pay any portion of them.

Tenants' claim

The tenants' claim of $19,259.01 is comprised as follows:

ITEM DESCRIPTION	**AMOUNT CLAIMED**
1. Return of full rent for 6 months: October 1, 2017 to April 4, 2018	$9,600.00

2. Unhealthy environment: October 1, 2017 to April 30, 2018	$7,000.00
3. Compensation to finish with music recording	$2,000.00
4. Heat (gas) utility	$659.01
TOTAL	**$19,259.01**

Regarding item 1, the tenants have claimed $9,600.00 for the return of 100% of their rent for a period of six months due to what the tenants describe was an illegal suite renovation while they were living upstairs. The tenants did not deny their responses in several texts where they agreed to compensation by the landlord in the amount of $1,600.00 for November 2017 rent plus $50.00 per renovation day from December 2017 onwards, until the renovation was completed. The tenants confirmed that no audio recordings of the sounds they described were submitted for my consideration although the tenants stated that the noise started in August yet there was no supporting evidence submitted for my consideration for that time period.

Most of the texts referred to in evidence were not dated, and the November 2017 rent was already agreed upon by the parties as compensation for the impact that renovation had on their right to quiet enjoyment under the *Act.*

I find the tenants were very unprepared in terms of presenting their evidence and struggled to find documents to draw my attention to during the hearing. The tenants eventually presented a February 13 to February 16, 2018 complaint in a text to the landlord regarding sawdust and air quality, but when asked how this impacted them, they claimed they had to leave the rental unit and go to the mall for a few hours. In addition, the tenants referred to a March 3, 2018 text regarding paint smell coming into their unit. In another text, the tenants write that they had to open their windows for the whole afternoon to get the paint smell out, which made their unit cold. The tenants admitted that the text dated March 6, 2018 did not indicate that they had to leave the rental unit, as the tenants had originally testified to during the hearing. There were no other documents presented dated after March 6, 2018.
The tenants claim that the rental unit wood flooring cracked due to vibration from the renovation below, which the landlord denied, saying it was from the rental unit being too warm which caused a crack in the flooring. The photographic evidence presented by the tenants was very close to the flooring and was not clear.

The landlord's position regarding item 1 is that the tenants' are trying to extort almost $20,000.00, in addition to the $2,976.63 already provided in compensation to the tenants. The landlord also asserts that if a decision is made to compensate the tenants for less than the $2,976.63 already provided to the tenants that the tenants be ordered to pay the landlord back the difference.

Regarding item 2, this was dismissed in full during the hearing as $7,000.00 was not broken down as to how they arrived at that amount. In addition, the tenants had already applied for 100% of the return of rent in item 1 and I find the evidence submitted by the tenants fails to support any amount in addition to what was claimed in item 1 above, which I will address later in this decision. As a result, item 2 is dismissed without leave to reapply due to insufficient evidence.

Regarding item 3, the tenants applied for $2,000.00 in compensation because one of them could not work from the rental unit as a recording artist. As this tenancy agreement is not a commercial tenancy, this item was dismissed without leave to reapply. I find the tenants are not entitled to loss of work related matters as this tenancy is a residential tenancy agreement which provides no terms specific to working from home or of a commercial nature such as place for recording music.

Regarding item 4, the tenants presented gas bills, which totals $659.01 for the time period of June 17, 2017 to March 14, 2018, and includes a gas account application fee of $25.00. There is no dispute that the landlords eventually placed the gas utilities into their name as of March 15, 2018. The tenants are seeking reimbursement of the full amount of $659.01, according to their updated monetary order worksheet submitted in evidence.

<u>Analysis</u>

Based on the documentary evidence, testimony, and on the balance of probabilities, I find the following.

<u>*Test for damages or loss*</u>

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;

3. The value of the loss; and,
4. That the party making the application did what was reasonable under the *Act* to minimize the damage or loss.

In the matter before me, both parties have the burden of proof to prove their respective monetary claims.

Landlord's claim

Item 1 - I find the landlord has failed to meet parts one and two of the test for damages and loss, as they have already compensated the tenants with November 2017 rent in the amount claimed of $1,600.00. Therefore, I dismiss this portion of the landlord's claim due to insufficient evidence without leave to reapply. I do note, however, that the landlord offered this compensation in good faith to the tenants and that the tenants agreed to that compensation for time period up to and including November 30, 2017 based on the evidence before me.

I also note that in terms of the gas utilities, that in the previous decision the arbitrator already considered this and made the following findings:

> **I find that the parties entered into a verbal agreement at the start of the tenancy to amend the term of the tenancy agreement for the Tenants to pay for the gas utility.**
>
> I find that the parties agreed to change the gas utility into the Landlord's name around the time the lower unit was to be occupied and the gas used by both units.

> **I find that it would be unconscionable for the Tenants to pay for the gas that is being used by a premises they do not occupy.**
>
> [Reproduced as written with my emphasis added]

As a result, I cannot re-hear and change or vary a matter already heard and decided as I am bound by the earlier decision under the legal principle of *res judicata*. Res judicata is a rule in law that a final decision, determined by an Officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent application involving the same claim.

With respect to *res judicata*, the courts have found that:

> …the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

Mr. Justice Hall of the Supreme Court of British Columbia, in *Leonard Alfred Gamache* and *Vey Gamache v. Mark Megyesi* and *Century 21 Bob Sutton Realty Ltd.,* Prince George Registry, Docket No. 28394 dated 15 November, 1996, quoted with approval the above passage from the judgement of *Henderson v. Henderson,* (1843), 67 E.R. 313.

In light of the above, I find the tenants are responsible for 50% of the gas utilities since the start of the tenancy, <u>less any gas utilities already compensated to the tenants by the landlord.</u> I am satisfied that the rental unit and the lower unit are the same size, based on the undisputed testimony of the agent in this regard during the hearing. Therefore, to be consistent with the previous finding, I find the tenants are also responsible for 50% of the hydro (electrical) utilities since the start of the tenancy, with the exception of the compensation already provided to the tenants by the landlords, which makes up the $2,976.63 described above; I find the landlord is not entitled to withdraw this amount as the compensation was already offered and accepted by the tenants. I am satisfied that there was a miscommunication between the parties that was not malicious regarding separate meters for the rental property and that the tenants are not entitled to separate meters under the *Act.*

Items 2 and 3 - The landlord has claimed 50% of hydro (electrical) utilities comprised of $112.94 for March 28, 2018 to May 23, 2018, and $83.64 for May 24, 2018 to July 23, 2018, respectively. The landlord submitted invoices which support these amounts. The tenants' position is that they should not be responsible for hydro bills, as the tenancy agreement indicates that utilities are included.

I find the landlord has met the burden of proof and that the tenants are liable for the costs as claimed for items 2 and 3 based on my findings above. I find the tenants are also responsible for 50% of the hydro (electrical) utilities since the start of the tenancy, with the exception of the compensation already provided to the tenants by the landlords which makes up the $2,976.63, described above. I find the landlord is not entitled to withdraw that amount as that compensation has already been offered and accepted by the tenants. Therefore, I find the tenants owe the landlord **$196.58,** which is comprised of $112.94 and $83.64 as noted above for 50% of electrical utilities for the time period of March 28, 2018 to July 23, 2018.

Items 4 to 8 - Regarding items 4 to 8, the landlord has claimed 50% of gas utilities for the time period of March 15, 2018 to August 15, 2018, and which the 50% amount totals $78.40. Based on the previous decision, which is binding on the tenants to pay for gas utilities, but not for a space they are not occupying, and on my finding that the tenants are required to pay 50% of the gas utilities for the remainder of the tenancy, I find the landlord has met the burden of proof and is owed **$78.40,** as claimed for items 4 to 8.

Tenants' claim

Item 1 – Although the tenants have claimed $9,600.00 for the return of 100% of their rent for a period of six months, I find the tenants were very unprepared for this hearing and failed to establish that they are entitled to any additional compensation then what the landlord has already provided to them. I find that the tenants have failed to meet the burden of proof and that their monetary claim is unreasonable and unsupported by the evidence before me. Therefore, I dismiss item 1 due to insufficient evidence without leave to reapply.

I find the compensation already paid by the landlord to the tenants which total $2,976.63 is reasonable to address the tenants' loss of quiet enjoyment for the project and that the tenants failed to meet the burden of proof for additional compensation. I also find that the tenants failed to provide sufficient evidence that the project lasted longer than March 5, 2018.

Item 2 – As noted above, this item was dismissed in full during the hearing as noted above. I find the tenants failed to meet the burden of proof and I find this portion of their claim to be unreasonable. Therefore, I dismiss this item without leave to reapply due to insufficient evidence.

Item 3 – As noted above, I have dismissed the tenants' application for $2,000.00 in compensation as one of the tenants could not work from their rental unit as a recording artist. This tenancy agreement is not commercial in nature and I find the tenants are not entitled for work-related losses in a residential tenancy living arrangement. Therefore, this item is dismissed without leave to reapply due to insufficient evidence. I also note that there were no audio recordings of noise for me to consider and that the tenants were unprepared for what I find to be an unreasonable claim.

Item 4 – As noted above, although the tenants are only responsible for 50% of gas utilities since the start of the tenancy based on the previous decision, I find that it was not reasonable of the landlord to have the tenants put the gas utility in the tenants' name at the start of the tenancy. Therefore, I grant the tenants the **$25.00** gas account fee and 50% of the remaining amount as follows:

> $659.01 (June 17, 2017 to March 14, 2018) - $25.00 gas account fee = $634.01
> 50% of $634.01 = **$317.01**

Based on the above, I find the landlord owes the tenants **$317.01** which is 50% of gas utilities for the time period of June 17, 2017 to March 14, 2018, plus the **$25.00** gas account fee for a total of **$342.01**. I find the tenants have met the burden of proof in support of the amount for item 4 of **$342.01.**

To be clear, for the remainder of the tenancy the tenants must pay 50% of the gas and electrical utilities, which is consistent with the previous decision and this decision. The landlord must provide a copy of the gas and electrical utility bills to the tenants so they know what their 50% portion is for each gas and electrical utility bill.

As both parties have been partially successful, I offset both filing fees pursuant to section 72 of the *Act* for an amount owing of $0.00 to each party for the respective filing fees.

In summary, the landlord has established a total monetary claim of **$274.98** as described above and the tenants have established a total monetary claim of **$342.01** as described above. As a result, I offset the landlord's monetary claim from the tenants' monetary claim and I award the tenants the balance owing by the landlord in the amount of **$67.03.** Pursuant to section 67 of the *Act* I grant the tenants a <u>one-time rent reduction</u> from a future month's rent in the amount of **$67.03** in full satisfaction of the tenants' net monetary claim which has been offset from the landlord's monetary claim.

I do not grant a monetary order as a result.

<u>Conclusion</u>

Both parties have been partially successful.

The landlord has established a total monetary claim of $274.98 as described above.

The tenants have established a total monetary claim of $342.01 as described above.

After offsetting the monetary claims of the parties, and pursuant to section 67 of the *Act* I grant the tenants a <u>one-time rent reduction</u> from a future month's rent in the amount of $67.03, in full satisfaction of the tenants' offset net monetary claim.

For the remainder of this tenancy, the tenants must pay 50% of the gas and electrical utility bills. The landlord must provide a copy of the gas and electrical utility bills to the tenants so they know what their 50% portion is for each bill.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: December 10, 2018

Residential Tenancy Branch