Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW DECISION

Dispute Codes OLC, FFT

Preliminary Information - Previous Hearings

On January 31, 2019, an Arbitrator appointed pursuant to the *Residential Tenancy Act* (the *Act*) heard the tenants' December 17, 2018 application for an order directing the landlord to comply with the *Act,* the *Regulation* or tenancy agreement, and to recover the cost of the filing fee. Both parties participated in that teleconference hearing. In their January 31, 2019 decision on this matter (see above), the Arbitrator presiding over this matter dismissed the tenants' application with leave to reapply because the tenants had not provided a copy of the Residential Tenancy Agreement (the *Agreement*), which the Arbitrator viewed as being essential to considering the tenants' application.

On March 26, 2019, the tenants' current application of February 11, 2019 was heard by an Arbitrator appointed pursuant to the *Act* with respect to the tenants' application for:

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

In that Arbitrator's decision of March 26, 2019, they provided the following information in which they accepted that the tenants' application adequately set out their request that the order that they were seeking included a request for the recovery of hydro and water charges they had incurred as well as compensation for their loss of use of their backyard and general upkeep of the property.

The Tenants indicated the following on the Details of Dispute Section of their Application:

"OLC-We were shouldering the entire house utilities for 2 years unfairly, against our tenancy agreement and required to comply with a 2/3 1/3 utilities sharing where we were paying 2/3 of the hydro in an 8 person house and all of the water usage. We are seeking monetary compensation for utilities overpaid in an unfair situation. In addition we are also seeking monetary compensation for loss use of yard and unpaid upkeep of the property in general.||FFT-"

At the same time the Tenants filed and served their Application they also filed and srved a a Monetary Orders Worksheet in which the following amounts were claimed:

BC Hydro overpayment	*$642.68*
Water overpayment	*$872.70*
Property maintenance	*$1,800.00*
10% reduction for loss of use of back yard	*$900.00*
TOTAL CLAIMED	***$4,215.38***

I therefore find the Landlord was given notice of the Tenants' specific monetary claim for $4,215.38...

(as in original decision)

When the landlord did not attend that hearing, the Arbitrator presiding over the March 26, 2019 teleconference hearing (the original Arbitrator) heard evidence from the tenants and issued a decision that granted the tenants a monetary award of $4,315.38. To give effect to that award, the original Arbitrator directed the tenants to withhold paying their $1,500.00 in monthly rent for the final month of their tenancy, April 2019. The original Arbitrator also issued a monetary Order in the amount of $2,815.38.

The landlord subsequently submitted an application for review consideration of the original decision. an application considered by a different Arbitrator appointed pursuant to the *Act*. In that Arbitrator's Review Consideration Decision of May 6, 2019, the reviewing Arbitrator allowed the landlord's application for review on the basis that the landlord was unable to attend the March 26, 2019 hearing for reasons that could not have been anticipated and were beyond their control. This was because the reviewing Arbitrator accepted that the landlord was out of the country from November of 2018 to April of 2019, based on the travel documents submitted. The reviewing Arbitrator suspended the original decision and monetary Order and scheduled the tenants' application to be reheard by a new Arbitrator.

Introduction - Current Review Hearing

I was subsequently delegated responsibility to conduct this review hearing of the tenants' application of February 11, 2019 pursuant to section 82 of the *Act*.

At the current review hearing, both parties attended and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. As the landlord testified that they had received a copy of the tenants' dispute resolution hearing package, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* Both parties also confirmed that they had received notification of this review hearing, and the Review Consideration Decision of May 6, 2019.

At the commencement of this hearing, the landlord asked that their own May 12, 2019 application for dispute resolution (as noted above) be included in the matters to be considered at the review hearing. The landlord maintained that the matters included in the landlord's written evidence were interconnected with those raised by the tenants in their February 2019 application, and that it would be advisable to hear both applications together. The landlord entered into written evidence a copy of a registered mail receipt showing that the landlord had sent their written evidence to the tenants by registered mail seven days before this hearing. At the hearing, I noted that the Residential Tenancy Branch's (the RTB's) Rules of Procedure require that written evidence from a Respondent to an application be served at least seven days before a hearing.

Although Tenant JM (the tenant) confirmed that they had recently received the landlord's written evidence, the tenant said that they were very confused as to what was to be considered at the current review hearing and what the landlord had provided to them. While the review consideration decision only indicated that the tenants' application of February 11, 2019 would be considered at this review hearing, much of the landlord's evidence, and revised Monetary Order Worksheets seeking a monetary award of $5,917.90, sought compensation for issues that arose after the tenants initiated their application. Some of these claims were for unpaid hydro and water bills for the final months of this tenancy, some were for unpaid rent for April 2019, and some were new claims to be applied against their security and pet damage deposits. This confusion was only exacerbated by the landlord's frequent references during the hearing to evidence that he had submitted for some other file number, which appeared to have been some type of incorrect version of the RTB File Number for the tenants' application of December 17, 2018.

I noted that the only issue properly before me was the matter considered by the Arbitrator on March 26, 2019, the matter that was the subject of the landlord's review consideration application. Issues that have arisen since then or which the landlord has scheduled for consideration by the RTB in August 2019 are not properly before me and cannot be included in the context of this review hearing of the suspended decision.

While I noted that I could not consider the new matters raised in the landlord's application, I attempted to see if there was any common ground between the parties as to whether any of the items identified in the tenants' application were impacted by subsequent withholding of funds that the landlord has identified in his application. As the tenants disputed the amounts claimed by the landlord, the only agreement between the parties was that the tenants did not pay monthly rent for April 2019, in accordance with the now suspended decision of March 26, 2019.

Given the very late provision of written evidence by the landlord and the confusion created by the tenant's mixing of this evidence with evidence related to the landlord's own application, I advised the parties that I was not considering the landlord's late written evidence sent to the tenants seven days before this hearing. I also advised the parties that I was not considering written evidence from the tenants entered two days before this hearing, and which the landlord said he had not received, I make these determinations in accordance with the RTB's Rules of Procedure 3.11 and 3.15. As the landlord confirmed that they had received the tenant's previous written evidence, I find that this evidence was provided in accordance with section 88 of the *Act.*

As I find that the original decision of March 26, 2019 and the tenants' application gave the landlord a proper opportunity to consider and respond to the tenants' application for a monetary award of $4,215.38, plus the filing fee, I have included consideration of the tenants' monetary claim as part of the tenants' application properly before me.

Issues(s) to be Decided

Are the tenants entitled to monetary compensation from the landlord? Are the tenants entitled to recover the filing fee for their application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective

submissions and arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

On December 18 and 22, 2016, the parties signed a one year fixed term Agreement for the upper level rental unit in a two unit home on an acreage property. A copy of the Agreement was entered into written evidence by the tenants. The fixed term ran from January 1, 2017 until December 31, 2017. The tenancy continued as a month-to-month tenancy when the initial fixed term ended. There is another rental unit below the one where the tenants were residing during this tenancy, which shared common areas of the property including the large backyard. According to the terms of this Agreement, monthly rent was set at $1,500.00, payable in advance on the first of each month. There was also the following provision "Tenants set up and pay for their own hydro electricity (heat), water and cable tv."

Although the landlord issued a 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) and a 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) on or about January 14, 2019, both parties agreed that the tenancy ended on April 30, 2019 on the basis of the tenants' own notice to end this tenancy within the time limits for doing so.

The tenants' application for a monetary award of $4,315.38 included the following items noted in their Monetary Order Worksheet;

Item	**Amount**
Overcharged Hydro Payments	$642.68
Overcharged Water Payments	872.70
Property Maintenance (18 months @ $100.00 per month = $1,800.00)	1,800.00
Loss in Value of Use of Backyard (10 % reduction in use Backyard for 9 months @ $100.00 = $900.00)	900.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Requested	**$4,315.38**

In their written evidence and their sworn testimony, the tenant claimed that they were unaware that the hydro account they were being asked to set up by the landlord was also to include hydro use by the tenants who resided below them, as there is only one hydro meter for this rental home. Since there were two rental units in this home, the

tenants maintained that they should only have been responsible for one-half of the hydro for the two equally sized rental unit. There is undisputed evidence that the landlord did reimburse the tenants for one third of the hydro charges; however, the tenants maintained that they were forced to accept this arrangement and should have only been responsible for one half instead of 2/3 of the hydro costs for this tenancy. When the tenants raised concerns about what they considered to be an unfair sharing of these costs, the landlord maintained that it was the tenants' responsibility to sort out this and other problems with the tenants residing below them. The tenants provided copies of emails where the landlord said that he would look into the prospect of obtaining separate hydro meters for the two units. When the landlord discovered the cost of having separate meters installed, the landlord refused to have this work done. The tenants subsequently cancelled their hydro account in early December 2018, leading to the landlord's issuance of notices to end this tenancy. The tenants provided undisputed written evidence and sworn testimony that the difference between the amount they paid for hydro during this tenancy and a 50% split of the hydro costs during their tenancy would have been $642.68, the amount identified on their Monetary Order Worksheet.

The tenants also provided undisputed evidence that they were required to pay all of the costs to secure water for this rental home during their tenancy. They said that when they signed the Agreement, they were unaware that they were being held fully responsible for the water utility's costs for this home. The tenants provided undisputed testimony and written evidence that the $872.70 they were claiming was the overcharged amount for their assumption of 100% of the water utility cost as opposed to the 50% they believed they should have been charged for this service.

On the issues of the hydro and water costs, the landlord maintained that the tenants had signed the Agreement and should be bound by this contractual commitment. The landlord maintained that everything had gone well in this tenancy until new tenants moved into the lower unit. Although the tenants denied this, the landlord alleged that the tenants were biased against the lower level tenants because of their heritage. The landlord said that since he does not live near the rental property it was up to the tenants to work things out with one another. The landlord said that on occasions when he did attend the rental property, he found the tenant's wasteful of electricity and water. The tenants denied these allegations.

The tenants maintained that their request for a monetary award of $1,800.00 for ongoing maintenance of the landlord's rental property was justified because this one

acre property is large and the landlord refused to hire anyone to look after such issues. The tenants believed that transferring this responsibility to them was unfair as their living area was the same as that occupied by the lower level residents. The items cited by the tenants included:

- painting;
- general maintenance;
- weeding;
- lawn mowing;
- shoveling of snow; and
- paying for gasoline for yard equipment.

The tenants alleged that their $100.00 monthly claim for such maintenance activities was not unreasonable, given the charges that maintenance companies would demand. They noted that the landlord does not live on the island where this rental property is located and travels frequently. The tenants maintained that they had been forced to act as the landlord's property managers without receiving any allowance for doing so.

At the hearing, I asked the tenants to confirm whether they had signed a 4 page Addendum to the Agreement, which the landlord provided as written evidence, but the tenants did not attach to their copy of the Agreement. Although the tenant said that they were not provided with a copy of that Addendum by the landlord, the tenant eventually confirmed that the tenants did sign the Addendum which forms part of the Agreement. In the Additional Notes section of the Addendum, the tenants committed to accept that "Minor landscaping maintenance - weeding - grass-cutting, hedge trimming, is the responsibility of the renters." When asked about this segment of the Addendum, the tenant maintained that they understood that their agreement to this provision was to be shared with the lower level tenants as they were to be the responsibility of "the renters", which the tenant claimed included the lower level tenants.

On this point, the landlord asserted that this is a shared rental home, not a multi-unit building, where the rules would require a landlord to have professional property managers ensuring that regular landscaping, lawn mowing, snow shovelling and such similar minor maintenance would be provided. The landlord said that he had looked into the possibility of arranging for professional property managers to take care of this rental property for him while he was away, but discovered that these costs were exorbitant. The landlord asserted that in a rental property of this type that the landlord had the right to tell tenants to look after the property where they were residing. The landlord said that whenever the tenants called him to seek some type of repair or maintenance that he

would call the appropriate tradesperson to perform such work. The landlord saw no need to hire a professional property manager to look after such duties.

Both parties provided considerable sworn testimony regarding the tenants' concern about the dog feces problem that the tenants said prevented them from using their backyard since the lower level tenants moved into these premises nine months before the tenancy ended. Tenant JK said that access to the backyard was a key element of the tenants' decision to live in this property as they have two young children who needed a place to run and play. The tenants said that the lower level tenants had two large dogs which deposited dog feces on the backyard at an alarming pace. They gave undisputed sworn testimony that the lower level tenants were remiss in picking up these feces, and at times there were two dozen droppings and garbage all over the backyard. Although there is undisputed evidence that the tenants asked the landlord to address this ongoing problem, and the landlord did raise it with the lower level tenants, this problem continued to the point where the tenants could not use the backyard or even mow the lawn at times due to the dog feces caused by the lower level tenants' dogs. The tenants arrived at their estimate of the value of their loss of use of the backyard as being a loss of 1/3 acre of this property, which they estimated at a monthly loss of $100.00 for the final nine months of their tenancy. Although the landlord did not deny this was a problem, the landlord believed that this was a problem that the tenants of the two rental units should have been able to address between themselves and without his involvement.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator 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. In this case, the onus is on the tenants to prove on the balance of probabilities that the landlord's contravention of the *Act,* the *Regulation* or the Agreement led to a loss in the value of their tenancy or to losses that the tenants should not have been required to absorb.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

The tenants sought compensation for the overpayment of their hydro account which the landlord required the tenants to take out in their name as a provision of their Agreement when this tenancy began. Although the tenants signed the Agreement containing the clause that they set up a hydro account, they did not realize that since this property only had one hydro meter that they were committing to pay hydro for both rental units in this property. They claimed that it was unconscionable that the landlord required them to put the electricity bill in their name when the usage was shared, and they would have little recourse to obtain payments from the other tenants in this building.

Section 5 of the Act provides that the Act cannot be avoided and reads as follows:

> ***5*** *(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.*
>
> *(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.*

As set out below, section 6 of the *Act* provides that unconscionable terms are not enforceable:

> ***6*** *(1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.*
>
> *(2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [determining disputes].*
>
> *(3) A term of a tenancy agreement is not enforceable if*
>
> *(a) the term is inconsistent with this Act or the regulations,*
>
> *(b) the term is unconscionable, or*
>
> *(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a

situation, the stronger party has used their power over the weaker party in an unconscionable manner. The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered.

RTB Policy Guideline 1 provides the following guidance to Arbitrators, which I have taken into consideration in making a determination regarding the utility charges the tenants have applied to recover:

> ***SHARED UTILITY SERVICE***
>
> *1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable as defined in the Regulations.*
>
> *2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.*

In this case, the provision whereby the tenants were to set up the hydro and water accounts was drafted by the landlord. The tenants provided convincing written evidence in the form of emails exchanged with the landlord shortly after they received their first hydro bill that the provision inserted into this standard Agreement by the landlord was one that led to them being unfairly held responsible for an inordinate share of the hydro charges for this building. Since they were already living there, the landlord's subsequent request that the tenants assume 2/3 of the hydro costs for this property was one which I find was based on an inequality of bargaining power between the parties, as the landlord clearly had a stronger bargaining position than was then held by the tenants. Their eventual acquiescence in paying 2/3 of the hydro costs does not lessen the extent to which the landlord was able to avoid incurring costs. In a document authored by the landlord, the landlord advised the tenants that "I will not and cannot afford to install a second electrical meter to satiate your hydro bill concerns." By placing this burden on the tenants, instead, the landlord avoided the cost of having to have separate hydro meters placed in both of the rental units or in placing the account under the landlord's name, and establishing provisions in the Agreements with both sets of tenants to enable the landlord to recover hydro costs.

Under these circumstances, I find that the landlord has contracted out of the *Act* contrary to section 5 by requiring the tenants to absorb an unfair share of the hydro costs for this rental property. Since the Agreement established that the tenants were to have the electrical and water utility accounts put in their names and collect the funds from the downstairs' tenants, this term is unconscionable and unenforceable.

Based on the tenants' undisputed evidence with respect to the amount of relief they were seeking with respect to their overpayment of hydro and water charges, I find that the tenants are entitled to a monetary award of $642.68 for overcharged hydro during this tenancy and $872.70 for water charges.

In the landlord's December 15, 2018 email, the landlord described their impression of their responsibility to assist the tenants with their concerns about hydro consumption and the dog feces' problem in the following terms:

...What was once an amiable agreement/Tenancy agreement has now turn sour and you have thrust your frustrations onto my far away shoulders, that has as its base on an electrical bill consumption and the so called the non cleanup of the backyard. This is not fair as I do not live their and have nothing to do with electrical consumption or dog/human behaviour...

(as in original)

The tone expressed in this email reveals a lack of understanding on the landlord's behalf of the responsibilities the landlord undertakes as a landlord in renting housing to tenants from whom the landlord received monthly rental payments. With all due respect, the tenants did not choose that the landlord does not live on this island, nor did the tenants choose that their landlord was responding to their email in the midst of a five month trip abroad. Whether the landlord resides in the community, lives elsewhere or is on an extended trip abroad, landlords and tenants are required to live up to their obligations set out in the *Act*.

Section 32 of the *Act* outlines the responsibilities of landlords and tenants with respect to maintaining rental premises, including common areas.

> ***32*** *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*

> *(a) complies with the health, safety and housing standards required by law, and*
>
> *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.*
>
> *(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.*
>
> *(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.*

Responsibility to ensure that tenants' reports of contraventions of section 32 of the *Act* rests with the landlord not the tenants involved in such disputes about shared premises. In this case, I accept that the landlord has taken insufficient action to ensure that the tenants were able to enjoy the shared space in the backyard of this rental property, a feature that Tenant JK said was quite important to the tenants due to their family composition.

Sections 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement." In this case, I find that there has been a loss in the value of the Agreement due to the landlord's failure to address the tenants' concerns about dog feces that the lower level tenants were not removing in a timely fashion..

While I accept that this problem may have happened over an extended period of this tenancy, I find that the tenants' entitlement to a retroactive reduction in rent does not extend to the full nine months since the lower tenants moved into their rental unit. It would normally take some time for the parties to see if something could be done about this situation before the landlord could be held responsible for a loss in the value of the tenancy. I thus limit the tenants' eligibility for a retroactive rent reduction to the period from August 1, 2018 until April 30, 2018, an eight month period, instead of the nine month period claimed by the tenants. As much of the period claimed by the tenants for this rent reduction occurred during times of the year when extended use of the backyard would not likely have been as frequent, I allow the tenants' a retroactive rent reduction of $50.00 per month, as opposed to the $100.00 monthly reduction they requested. I

find that this is a more accurate estimate of their true loss in the value of their overall tenancy over the eight month period in question.

I have also considered the tenants' claim for a monetary award of $100.00 per month for maintenance and general upkeep of the premises for the duration of their tenancy. While the tenants no doubt may have performed tasks to make the rental premises more suitable to their needs, the tenants provided little evidence to demonstrate any agreement by the landlord to act as their property managers. They signed an Addendum to the Agreement at the time the tenancy began, which I note they did not attach to the copy of that Agreement they entered into written evidence. This Addendum established their agreement to bear responsibility for undertaking minor maintenance and landscaping. I find nothing unconscionable about this provision that the tenants perform minor maintenance tasks of the order provided as examples in the Addendum. Some of the items listed in the tenants' summary supporting their request for a monetary award for tasks such as weeding, lawn mowing and gasoline for yard equipment, would clearly fall within the specific examples provided in the Additional Notes section of the Addendum. There is also written evidence that would suggest that on at least one occasion when the tenants offered to do some work for the landlord, provided they were paid an hourly wage and expenses, the landlord refused their offer. In fact, the tenants submitted little evidence that would demonstrate that the landlord ever agreed to compensate them for anything they may have done to maintain the premises. This is consistent with the term included in the Addendum to the Agreement. I attach little weight to the tenant's statement that the tenants thought that because the Note in the Addendum identified the tenants as being "renters" that this was somehow a responsibility to be shared with other tenants in this building. Separate from the express wording they agreed to in this section of the Addendum, I also find the tenants provided very little detail in their written evidence to demonstrate their entitlement to the type of monetary award they have claimed for this item. For these reasons, I dismiss the tenants' application for a monetary award for property maintenance tasks without leave to reapply.

As the tenants have been successful in their application, I allow them to recover their $100.00 filing fee from the landlord.

Since there is undisputed sworn testimony that the tenants have followed the direction of the original decision in refraining from paying rent for April 2019, I reduce the tenants' monetary award by $1,500.00, the amount of rent they have already deducted from the original monetary award.

Conclusion

I set aside the original decision and monetary Order of March 29, 2019, which are no longer of any force or effect. That decision and monetary Order are replaced with the current decision and monetary Order.

I issue a monetary Order in the tenants' favour under the following terms, which allows the tenants to recover utility overpayments, a loss in the value of their tenancy and their filing fee for this application:

Item	**Amount**
Overcharged Hydro Payments	$642.68
Overcharged Water Payments	872.70
Loss in Value of Use of Backyard (8 months @ $50.00 = $400.00)	400.00
Recovery of Filing Fee for this Application	100.00
Less Tenants' Non-Payment of Rent for April 2019 as per original decision	-1,500.00
Total Monetary Order	**$515.38**

The tenants are provided with these Orders in the above terms and the landlord must be served with this Order 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: June 20, 2019

Residential Tenancy Branch