



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes PSF, OLC, LRE, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) that was filed by the Tenants under the *Residential Tenancy Act* (the “Act”), seeking:

- An order for the Landlord to provide services or facilities required by the tenancy agreement or law;
- An order for the Landlord to comply with the *Act*, regulation or tenancy agreement;
- An order restricting or setting conditions on the Landlord’s right to enter the rental unit; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenants R.R. & R.C., and the Landlord, all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) state that the respondent must be served with a copy of the Application and Notice of Hearing and I confirmed service of these documents as explained below.

The Tenant R.R testified that the Notice of Dispute Resolution Proceeding, including a copy of the Application and the Notice of Hearing, and all the documentary evidence before me, were sent to the Landlord by registered mail on January 21, 2020. The Tenants provided me with the registered mail tracking number and the Canada Post website confirms that the registered mail was sent as described above and Received on January 23, 2020. In the hearing the Landlord also confirmed receipt. As a result, I find that the Landlord was served in accordance with the *Act* and the Rules of Procedure on January 23, 2020.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; however, I refer only to the relevant facts, evidence and issues in this decision.

At the request of the Tenants, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided in their Application. At the request of the Landlord, a copy of the decision will be mailed to them at the mailing address listed for them in the Application.

Preliminary Matters

Matter #1

In the hearing the Tenants stated that they did not receive any evidence from the Landlord in relation to this matter and the Landlord acknowledged that the evidence they submitted to the Residential Tenancy Branch (the “Branch”) was not served on the Tenants.

As the Landlord’s evidence was not served on the Tenants, I find that it would be a breach of the *Act*, the Rules of Procedure, and the principles of natural justice to accept this documentary evidence for consideration in the hearing. As a result, I excluded this documentary evidence from consideration, but I advised the Landlord that they were entitled to provide verbal evidence and testimony for my consideration in the hearing, including but not limited to reading the documentary evidence to me.

Matter #2

At the outset of the hearing the Landlord stated that English is not their first language and requested an interpreter. Rule 6.7 of the Rules of Procedure states that a party to a dispute resolution hearing may be assisted by an interpreter, or any other person whose assistance the party requires in order to make their presentation. I advised the Landlord that it is their obligation to prepare appropriately for the hearing, including arranging an interpreter for themselves, if one is required, and that the Branch does not provide interpreters for parties in the hearing. I asked the Landlord if they wished to have another person call into the hearing either to assist them or to act on their behalf, and they advised me that no one was currently available to assist them.

The hearing proceeded as scheduled and I made every effort to ensure that the Landlord understood the proceedings and had ample opportunity to present their

evidence, respond to questions or the Tenants' evidence or ask questions for clarification.

Issue(s) to be Decided

Are the Tenants entitled to an Order for the Landlord to provide services or facilities required by the tenancy agreement or law?

Are the Tenants entitled to an Order for the Landlord to comply with the *Act*, regulation or tenancy agreement?

Are the Tenants entitled to an Order restricting or setting conditions on the Landlord's right to enter the rental unit?

Are the Tenants entitled to Recovery of the filing fee?

Background and Evidence

In the hearing the parties agreed that the fixed-term tenancy began on October 1, 2019, and ends on March 31, 2020, and that rent in the amount of \$1,900.00 is due on the last day of the month (for the following month). The parties agreed that heat, water, hot water, electricity, a washer, and a dryer are included in the cost of rent. The parties also agreed that the tenancy agreement includes the following terms:

- A fee for overnight guests of \$20.00/day for approved guests and \$40.00/day for guests not approved by the Landlord;
- A requirement that the Tenants give 45 days notice to end the tenancy;
- A requirement for the Tenants to pay a penalty equal to half a month's rent for breaching the tenancy agreement and ending the tenancy early; and
- A \$100.00 fee for late payment of rent.

A copy of the tenancy agreement was submitted for my consideration.

The Tenants stated that the Landlord has cut off their heat several times and that it was off for 3-4 days in a row in December of 2019. The Tenants stated that they believe the Landlord is doing this because utilities are included in rent and the Landlord does not like how much utilities they are using. The Tenants stated that they have electrically heated floors and that when they turn up the thermostat, nothing happens, and they suspect this is because the Landlord periodically turns off the breaker to their heated

floors. The Tenants sought an Order for the landlord to comply with the terms of the tenancy agreement and not restrict their access to heat.

The Landlord stated that the Tenants often keep the rental unit unnecessarily hot, which is not good for the heated floors, and that they leave the heat on with the windows and/or doors open. The Landlord also stated that the Tenants had a guest for 45 days in December 2019, significantly increasing the cost of utilities. The Landlord denied ever intentionally turning off the breaker or otherwise restricting the Tenants access to heat but stated that the Tenants often use too many appliances at once, blowing the breaker. The Landlord stated that whenever the Tenants blow the breaker, they are supposed to let them know so they can turn it back on and that in December they were out of the country and received no correspondence from the Tenants in relation to the loss of heat. The Tenants denied having a guest for 45 days, stating that their father visited for a brief time before the Landlord went on vacation in December and then again close to the time the Landlord returned and that the Landlord has incorrectly assumed that their father was in their rental unit the entire time, which is untrue. The Tenants also stated that the Landlord was refusing to turn on the heat until the Tenants paid the guest fees requested, which the Landlord denied.

The Tenants stated that the guest fee's, the late rent fee, the penalty for ending the tenancy early, and the requirement to give 45 days notice to end the tenancy are all in contravention of the *Act*. As a result, the Tenants requested an Order that these terms are therefore unenforceable and that if applicable, the correct terms of the *Act* apply. The Tenants also stated that a new tenancy agreement was served on them by the Landlord on March 18, 2020, containing an increase in rent for utilities and requested an Order that they are not required to sign or abide by the terms of this new tenancy agreement and that the Landlord must instead comply with the requirements of the *Act* in terms of rent increases.

The Landlord stated that the Tenants have resided in the property for four years and have never taken issue with these terms before. Further to this, the Landlord stated that the Tenants were aware of the terms when they signed the tenancy agreement and therefore, they should have to comply with them.

The Tenants stated that the Landlord has entered their rental unit without permission and without complying with the requirements set out under section 29 of the *Act* on several occasions and sought an Order that the Landlord comply with section 29 of the *Act* in relation to entering the rental unit. The Landlord denied entering the rental unit without the consent of the Tenants or without complying with section 29 of the *Act*.

Analysis

Section 29 of the *Act* sets out for what purposes a landlord may enter a rental unit and the notice requirements for entry. Although the Landlord denied entering the rental unit without authorization or proper notice, I am concerned that some of the testimony provided by them in the hearing in relation to the temperature of the rental unit could not reasonably have been obtained without entering the rental unit. As the Tenants denied authorizing entry and the Landlord has not submitted any evidence that they complied with section 29 in relation to any such entry, I am satisfied that the Landlord has entered the rental unit on at least one occasion without proper notice or authorization under section 29 of the *Act*. I therefore Order that the Landlord comply with section 29 of the *Act* in relation to entering the rental unit.

Section 27 of the *Act* states that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation. In the hearing the parties agreed that heat was included in the cost of rent and I find that heat is essential to the Tenants' use of the rental unit as living accommodation. Although the Tenants stated that the Landlord has turned off their heat intentionally on several occasions, the Landlord denied this allegation and the Tenants have not provided me with any evidence to corroborate their testimony that the heat has been turned off or to suggest that any loss of heat was initiated by the Landlord. As a result, I am not satisfied that the Landlord has restricted their access to heat. Despite this finding, the *Act* is clear that a landlord must not terminate or restrict a service or facility that is essential for the use of the rental unit as living accommodation and I have already found above that heat is essential for this purpose. As a result, and in an effort to prevent future disputes between the parties on this matter, I Order the Landlord to comply with section 27 of the *Act* and refrain from terminating or restricting the Tenants' access to heat.

The parties agreed that the tenancy agreement allows the Landlord to charge \$100.00 for the late payment of rent, however, section 7 (1) (d) of the *Residential Tenancy Regulation* (the "*Regulation*") states that a landlord may charge an administrative fee of no more than \$25.00 for the late payment of rent. The parties agreed that the tenancy agreement allows the Landlord to charge guest fee's, however, section 5 (1) of the *Regulation* states that a landlord must not charge a guest fee, whether or not the guest stays overnight. The parties also agreed that the tenancy agreement requires the Tenants to give 45 days notice to end the tenancy; however, sections 44, 45, 45.1, 45.2,

45.3, and 50 of the *Act* state how and when a tenant may end a fixed-term or periodic tenancy.

Section 5 of the *Act* states that landlords and tenants may not avoid or contract out of the *Act* or the *Regulations* and that any attempt to avoid or contract out of the *Act* or the *Regulations* is of no effect. I find that the terms of the tenancy agreement requiring 45 days notice to end the tenancy, allowing the Landlord to charge a \$100.00 late fee, and allowing the Landlord to charge various guests fees are attempts by the Landlord to contract out of the above noted sections of the *Act* and *Regulation*. I therefore Order that these terms of the tenancy agreement are unenforceable.

The parties agreed that the tenancy agreement allows the Landlord to charge the Tenants a penalty equivalent to half a months rent if they end the tenancy early; however, Residential Tenancy Policy Guideline 8 (the "Policy Guideline") states that clauses that constitute a penalty for ending the tenancy, rather than a genuine pre-estimate of loss, will be unenforceable. As the tenancy agreement explicitly states that the half a month's rent to be charged in the event the Tenants' break the agreement and end the tenancy early is a penalty, I find that it is a penalty and pursuant to Policy Guideline 8 I therefore find that it is unenforceable.

The Landlord should be aware that failure to comply with these Orders could result in administrative penalties under the *Act*, and/or constitute reasonable grounds for the Tenant's to file a subsequent Application seeking enforcement of these Orders, and/or a monetary claim for loss of use, loss of quiet enjoyment, or other monetary loss under the *Act*.

In the hearing the Tenants also stated that the Landlord served them with a new tenancy agreement on March 18, 2020, containing a requirement that they pay for utilities. As utilities are included in their rent under their current tenancy agreement, a requirement for them to pay for utilities under a subsequent agreement may be found to constitute a rent increase under the *Act*. Section 44 (3) of the *Act* states that if, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

In the event that the Tenants have not already signed the new tenancy agreement, the parties should be aware that there is no obligation for them to do so and that pursuant to section 44 (3) of the *Act*, the fixed-term tenancy therefore became a month-to-month

tenancy on April 1, 2020. In the even that the Tenants have signed the aforementioned tenancy agreement, or a different tenancy agreement with the Landlord, the parties should be aware that pursuant to section H of Policy Guideline 30, a rent increase between fixed term tenancy agreements with the same tenants for the same rental unit is subject to the rent increase provisions of the Legislation, including requirements for timing and notice. The Landlord should also be aware that to raise the rent above the maximum annual allowable amount, the Landlord must have either the Tenants' written agreement or an order from an arbitrator. If the Tenants agree to an additional rent increase, the Landlord must issue a Notice of Rent Increase along with a copy of the Tenants signed agreement to the additional amount and the Tenants must be given three full months' notice of the increase.

As the Tenants were successful in their Application, I grant them recovery of the \$100.00 filing fee pursuant to section 72 of the *Act*, which they are entitled to withhold from the next months rent, or otherwise recover from the Landlord, pursuant to section 67 of the *Act*.

Conclusion

The Tenants' Application is granted.

I Order the Landlord to comply with section 27 of the *Act* and refrain from terminating or restricting the Tenants' access to heat.

I Order that the Landlord to comply with section 29 of the *Act* in relation to entering the rental unit.

I Order that the terms of the tenancy agreement requiring the Tenants to give 45 days notice to end the tenancy, allowing the Landlord to charge a \$100.00 late fee, requiring the Tenants to pay guests fees, and requiring the Tenants to pay a penalty of half a month's rent for breaking the agreement and ending the tenancy early are unenforceable.

Pursuant to sections 67 and 72 of the *Act*, the Tenants are entitled to deduct \$100.00 from the next month's rent, or to otherwise recover this amount from the Landlord, for recovery of the filing fee.

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 15, 2020

Residential Tenancy Branch