Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FIRST SERVICE RESIDENTIAL
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes AAT OLC

Introduction

This hearing was convened as a result of the tenants' Application for Dispute Resolution (application) which were combined as a joiner application seeking remedy under the *Residential Tenancy Act* (Act). The tenants applied for an order to allow access to the unit, site or property for the tenant's guests and for an order directing the landlord to comply with the Act, regulation or tenancy agreement. Specifically, the tenants are seeking to have the 14 cumulative days of overnight stays between all of their guests be found to be in violation of the Act, regulation or tenancy agreement and that the landlord be ordered to cease to their blanket policy related to prohibiting any guests from staying more than 14 cumulative overnight stays in a calendar year.

The tenants, an advocate for the tenants, LH (advocate), and an agent for the landlord, AU (agent) appeared at the teleconference hearing and gave affirmed testimony. During the hearing both parties were given the opportunity to provide their evidence orally and respond to the testimony of the other party. I have reviewed all evidence before me that was presented during the hearing and that met the requirements of the Residential Tenancy Branch (RTB) Rules of Procedure (Rules). However, only the evidence relevant to the issues and findings in this matter are described in this decision. Words utilizing the singular shall also include the plural and vice versa where the context requires.

At the outset of the hearing, the agent confirmed that the landlord had been served with the tenants' documentary evidence and that the landlord had the opportunity to review that evidence prior to the hearing. While the advocate confirmed that they had been served with the landlord's 13 pages of documentary evidence, the parties were advised that the RTB had not been served with that evidence, so by mutual agreement of the parties, the advocate was permitted to upload the landlord's 13 pages of evidence during the hearing to avoid an adjournment as the hearing had been scheduled for 2.5

hours, versus as standard 1 hour hearing. Therefore, I find the parties were sufficiently served in accordance with the Act and the hearing proceeded.

Issues to be Decided

- Have the tenants provided sufficient evidence to support the landlord being ordered to cease their 14 cumulative overnight stays per calendar year guest policy (14-day guest policy)?
- If yes, should the 14-day guest policy be struck down as unenforceable under the Act?

Background and Evidence

Each tenant submitted a copy of their tenancy agreement. Tenant NM (NM) began their tenancy in October 2019, while tenant AHM (AHM) began their tenancy in June 2013.

Tenants' evidence

On page 8 of the tenancy agreement for AHM section 14 reads:

Occupants and Invited Guests

The landlord has selected the tenant on the basis of the number of occupants among other criteria. The tenant agrees that only those persons listed as tenants and occupants, including those listed in the List of Additional Tenants and Occupants, if any, are allowed to live in the residential premises during the term of this tenancy, unless the landlord otherwise consents in writing. Any change in the number of occupants is material and of great importance to the landlord and entitles the landlord at its discretion to end this tenancy agreement. The tenant agrees to notify the landlord promptly of any change in the occupants. If the tenant is eligible for a rent subsidy, the tenant agrees that any person that resides with the tenant in excess of 14 days, whether or not consecutive, in any 12 month period, without the written consent of the landlord, will be considered an occupant and:

(a) that person's income must be declared to the landlord immediately;

(b) that person, if 19 years or older, must agree to be a tenant under this tenancy agreement by signing an addendum to this tenancy agreement; and

failure to comply with these provisions entitles the landlord to end this tenancy agreement, and the following also apply:

(c) The landlord may not stop the tenant from having guests in the residential premises under reasonable circumstances. If the number of permanent occupants is unreasonable, the landlord may discuss the issue with the tenant and may serve a Notice to End a Residential Tenancy. Disputes regarding the notice may be resolved through arbitration under the *RTA*.

(d) If the tenant lives in a hotel, the landlord may impose reasonable restrictions on invited guests and reasonable extra charges for overnight accommodation of invited guests.

On page 16 of the tenancy agreement for NM section 14 reads:

14. Guests

(a) Guests may visit the tenant for a maximum of 14 days, whether or not consecutive, in any 12 month period unless the landlord has provided written approval for a short term extension. The landlord may require the tenant to provide proof that the guest maintains a primary residence elsewhere.

(b) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.

(c) The landlord must not impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.

(d) Despite subsection (c) of this section but subject to section 27 of the Act *[terminating or restricting services or facilities]*, the landlord may impose reasonable restrictions on guests' use of common areas of the residential property.

The advocate stated that both of the tenants have been given warning letters for violations of the terms regarding guests found in section 14 of their respective tenancy agreements and have since temporarily stopped with the activity pending the results of this hearing. The advocate stated that the warning letters submitted in evidence were only related to section 14 of the tenancy agreements and were not related to the any behaviour issues or damages done by their guests.

For AHM, the warning letters relates to visits from his wife on a weekly basis. The advocate writes that AHM and his wife married in 2018 and that AHM's wife lives in North Vancouver with her sister and that North Vancouver is where AHM's wife works. The advocate stated that it takes AHM's wife between 1.5 and 2 hours one-way to take public transportation to visit her husband, which is up to a 4-hour round-trip journey. The advocate stated that the landlord has by limiting the wife's visits to 14 days a year, has caused difficulties both financially and emotionally in their marriage. The advocate writes that the couple cannot see each other as much as they would wish, due to the time constraints for each 4-hour round-trip, plus the financial impacts of purchasing more transit tickets due to not being able to stay overnight as many times as they wish.

For NM, the advocate stated that she suffers from COPD (chronic obstructive pulmonary disease), which entails difficulty with breathing. The advocate writes that in March 2020, at the start of the pandemic, NM's daughter travelled to be near NM and her brother, with a focus on assisting her mother through the period of time as NM is extremely high risk of dying if she contracted the virus, due to being a senior and having a prior lung condition. NM's daughter would assist her mother with purchasing groceries and housework and sometimes stay overnight through a period of a few days, even though NM's daughter maintained her primary residence at her brother's home. The advocate writes that due to the landlord threatening eviction in this scenario, NM had to expose herself to additional risks of contracting COVID as NM felt they could not get as much help if the strict 14-day guest policy had not been in place.

The advocate stated that based on the current 14-day guest policy, the tenants can have only a single overnight visit once every 26 days. The advocate writes that the current 14-day guest policy robs the tenants of the ability to have a fulfilling, dignified and meaningful social life and to enjoy their right to be free from unreasonable restrictions on their guests.

The advocate submitted a comparison to demonstrate what the advocate stated was the absurdity of the 14-day guest policy by comparing that inmates in federal Canadian prisons currently enjoy 72 hours of private overnight visitors every 2 month or 18 day

per year, which is 4 more days of overnight visits than the tenants in this matter are permitted to enjoy in their tenancies. The advocate concedes that while the tenants are not inmates and can move, it is absurd to imagine that tenants could be held to more restrictive rules than federal inmates.

Furthermore, the advocate cited *Berry and Kloet v. British Columbia,* 2007 BCSC 257 (*Berry and Kloet* decision) that found that the overriding purpose of the Act is to bestow tenants with rights against the perceived superior strength of landlords:

> [11] I start from the accepted rules of statutory interpretation. I conclude that the Act is a statute which seeks to confer a benefit or protection upon tenants. Were it not for the Act, tenants would have only the benefit of notice of termination provided by the common law. In other words, while the Act seeks to balance the rights of landlords and tenants, it provides a benefit to tenants which would not otherwise exist. In these circumstances, ambiguity in language should be resolved in favour of the persons in that benefited group: See (Canada Attorney General) v. Abrahams, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2: Henricks v. Hebert, [1998] B.C.J. No. 2745 (QL)(SC) at para. 55:
>
> I think it is accepted that one of the overriding purposes of prescribing statutory terms of tenancy, over and above specifically empowering residential tenants against the perceived superior strength of landlords, was to introduce order and consistency to an area where agreements were often vague, uncertain or non-existent on important matters, and remedies were relatively difficult to obtain

The advocate writes that based on the *Berry and Kloet* decision, landlords can only restrict the rights of tenants to the degree the Act allows and that the rules must be interpreted in favour of tenants. Section 30 of the Act was described:

> 30(1) A landlord must not unreasonably restrict access to residential property by
> (a) the tenant of a rental unit that is part of the residential property, or
> (b) a person permitted on the residential property by that tenant.

The advocate further writes that a landlord can therefore only restrict the guests of a tenant if it is reasonable to do so, in a specific situation and argues that in the matter before me, the 14-day guest policy was applied sweepingly and without any reason specific to the tenants in this matter. The advocate submits that the tenants are required to sign the tenancy agreement and agree to the 14-day guest policy and the advocate submits that under section 5 of the Act, the landlord 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 regulations is of no effect given that section 5 of the Act states:

> **This Act cannot be avoided**
>
> **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.

The advocate also writes:

> This is echoed by the honorable Mr. Justice McEwan of the Supreme Court of British Columbia in *Atira v. Richardson*, 2015 BCSC 751, (*Atira* decision) in paragraph 39, page 47-48:
>
> "In submitting that the Arbitrator failed to consider and apply the statutory requirement of "reasonableness" the petitioner is only arguing that the arbitrator was wrong because she did not agree with the petitioner's position. The arbitrator clearly rejected the notion that the statutory protection afforded to tenants under S.30(1)(a) and (b) could be limited or abrogated by landlords implementing "policy" decisions. If the meaning of reasonable restrictions was intended to include general policies adopted by landlords, regardless of the individual situation or behavior of the tenant, the statute could have said so. It does not, and I am of the view that the Arbitrator correctly assessed the intention of the statute to be to protect individual tenants and their guests from unreasonable interference by landlords. **It would be wrong in principle to permit the protection offered by the statute to be eroded by ad hoc non-statutory "policy" instruments promulgated by landlords, however well-intentioned."** [advocate emphasis]

In addition to the above, the advocate also writes that in the older of the two tenancy agreements, the 14-day guest policy term originated as a term only applicable to people in subsidized housing, and argues that it is discriminatory against people of low-income who need their housing subsidized. The advocate referred to a previous RTB decision about the 14-day guest policy and other rules of a similar nature said as follows:

> "Overall, I consider the basis for the landlord's check in and overnight stays policy to be repugnant, oppressive and paternalistic. Every tenant regardless of the community they live in, their socio-economic status, their occupation or their personal hardships have equal rights under the act."

The advocate writes that a tenant in low-income housing can have no more restrictions placed on the amount and number of visits than people living in a market-price or luxury apartments. The advocate also concedes that while prior RTB decisions are not binding on the arbitrator, they can be persuasive and submits that in the *Atira* decision on paragraph 25 the BC Supreme Court found:

> "while [prior RTB] decisions are not precedential, and each arbitrator is free to decide on his or her own interpretation, consistency in the approach to a particular right or provision may be of assistance in determining the reasonableness of a given outcome. The facts here are analogous to those in the RTB decision found at pages of the tenant's evidence package, and I submit that similar reasoning should be applied to this case."

And in a previous RTB decision the advocate writes that a previous arbitrator has written:

> "I also note that while I am not bound by previous decisions, I concur with my colleagues and I find that Section 30 of the Act and Section 9 of the schedule do not allow for a restriction for guest access to be made based on the neighbourhood or type of building. As a result, I find the landlord's restrictions to require guests present and surrender their identification and to not stay overnight are unreasonable and infringes on the rights granted to the tenant under Section 30 of the Act"

In addition, the advocate cited *Rutherfoord v. Neighbourhood Housing society,* 2012, BCSC 2177 (*Rutherfoord* decision) in paragraph 7 that reads:

> "[7] It appears that the arbitrator, in violation of this provision of the Act, attached a proviso similar to that contained in s. 32 relating to the provision of decoration and repair of premises, that the right varies with the nature and character and location of the rental unit. **In my view, that is a patently unreasonable interpretation of the Act and, on the face of the record, it appears rather discriminatory against the tenant. A tenant who has limited resources and is therefore forced into a neighbourhood that may have problems with**

> **neighbours is entitled to the same standard, according to s. 28 of the Residential Tenancy Act, that is accorded to all other tenants.** It seems to me that the arbitrator, if he in fact interpreted s. 28 in this fashion, has engaged in patently unreasonable reasoning. More likely, it is apparent from the lack of reference to s. 28 and a reference to the right to be free from unreasonable disturbance that the arbitrator failed to consider s. 28 at all." [advocate emphasis]

The advocate also mentioned that the written warnings sent by the landlord to the tenants referred to the incorrect section number of the tenants' respective tenancy agreements, which the advocate stated demonstrates that even their form letters are not specific to the tenants and are generic.

NM testified that the landlord was encouraging her to move to assisted living across the street and NM refused as NM stated that she does not require that level of care. NM also stated that she was glad she refused to move across the street as they had a severe COVID outbreak and many seniors died there as a result.

Landlord's evidence

The agent stated that the landlord feels that 14 overnight days is not unreasonable. In addition, the agent stated that AHM's wife sometimes is there 2-3 days per week which is 40% of the time and that the landlord has given AHM the option to add his spouse to the tenancy agreement. The agent stated that the offer was made to AHM as the rental building is operated by BC Housing and that rent is geared towards income and that 30% of their household income is what the tenants pay, with the remainder of the rent being paid by BC Housing. The agent also stated that each year, annual reviews are conducted for all tenants to ensure all tenants are paying 30% of their household income. The agent stated that AHM refused to have his spouse added to the tenancy agreement due to not being able to afford more rent.

The agent testified that if a guest is living there part-time they become an occupant and then the agent later used the term tenant instead of occupant. As a result, the agent was using the term tenant and occupant synonymously in describing the guests of the tenants. The agent stated that if a guest stays more than 14 overnight days per calendar year they become a tenant, which I will address later in this decision.

The agent summarized their position by stating that they feel the 14-day guest policy is valid and beyond that, each tenant agreed to it and signed the tenancy agreements confirming they would comply with it. The agent also testified that the 14-day guest

policy has nothing to do with the rights of a tenant and that all the landlord is doing is providing affordable housing and argue that they are complying with the Act.

The agent responded to NM by stating that caregivers that attend rental units to assist tenants do not stay overnight and that is the difference between NM's daughter staying over 14 nights per calendar year and any other caregiver that is attending the building.

Analysis

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

Firstly, I disagree with the agent when they state that guests that stay overnight more than 14 nights per calendar year become tenants as the Act does not speak to a threshold of 14 days or any specific number of days under the Act.

Secondly, I agree with the advocate that 14 days per calendar year is too restrictive and I find the blanket 14-day guest policy to be both oppressive and more restrictive than what federal inmates enjoy in federal prison, which is 18 overnight visits per calendar year.

Thirdly, I agree with the advocate that section 30(1) of the Act applies and states:

> **Tenant's right of access protected**
>
> **30**(1) A landlord must not unreasonably restrict access to residential property by
>
> (a)the tenant of a rental unit that is part of the residential property, or
>
> (b)a person permitted on the residential property by that tenant.

I find that the landlord has failed to comply with section 30(1) of the Act and although the agent is claiming they are not restricting guests by not denying them entry, they are in essence doing so by writing warning letters to the tenants for violating the 14-day guest policy. Furthermore, the *Berry and Kloet* decision speaks to the Act providing protections for tenants that would not otherwise exist and I find that section 30(1) of the Act protects the tenants from such arbitrary 14-day guest policies.

In addition, I reject the agent's assertion that the tenants are required to comply with the 14-day guest policy because it is part of the tenancy agreement they signed due to section 5 of the Act, which I find applies and states:

This Act cannot be avoided

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.

Therefore, I find that the landlords have attempted to contract outside of the Act by having tenants sign a tenancy agreement which includes what I find to be an unlawful 14-day guest policy. I also find the 14-day guest policy to be oppressive to the tenants and does not take into account the personal circumstances of each tenant.

My decision is supported by prior RTB decisions, where arbitrators have found similar guest policies to be oppressive, repugnant, and paternalistic. Furthermore, the Supreme Court in the *Atira* decision found that:

> …It would be wrong in principle to permit the protection offered by the statute to be eroded by ad hoc non-statutory "policy" instruments promulgated by landlords, however well-intentioned."

Based on the evidence before me, I find that the 14-day guest policy is an ad hoc non-statutory policy of the landlord that only serves to be oppressive to the tenants.

In addition, the Supreme Court in the *Rutherfoord* decision confirmed that tenants, regardless of their housing location, share the same protections as other tenants under the Act. As a result, I afford very little weight to the agent's claim that it is due to the BC Housing rent geared to income requirement that they have the 14-day guest policy as I find the landlord has provided insufficient evidence to support that after 14 overnight stays per calendar year that a guest becomes a tenant or an occupant under the Act.

I find the advocate's evidence to be logical, well-reasoned and I agree with the advocate that the 14-day guest policy should be struck down and pursuant to section 62(3) of the Act I make the following order.

I ORDER the landlord to immediately cease the 14-day guest policy.

I find the 14-day guest policy violates section 5 of the Act and has no force or effect under the Act.

As a result, I find the tenants' application to be fully successful.

I caution the landlord not to include the 14-day guest policy in any future tenancy agreements and that by doing so, could lead to the landlord being recommended for investigation by the RTB Compliance and Enforcement Unit (CEU).

If the landlord truly believes that a guest has become a tenant or occupant under the Act, the landlord has the ability to serve a notice to end tenancy under the Act. The tenants would then, in that scenario, have the ability to file an application to dispute such a notice.

Conclusion

The tenants' joined applications are fully successful.

The landlord has been ordered to immediately cease the 14-day guest policy. The 14-day guest policy has no force or effect under the Act.

As the filing fees were waived, they are not granted.

This decision will be emailed to the parties.

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: March 19, 2021

Residential Tenancy Branch