Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0924537 BC Ltd. dba Arbor Lodge
and [Tenant name suppressed to protect privacy]

DECISION

Dispute Codes DRI, OLC

Introduction

The Tenant filed an Application for Dispute Resolution (the "Application") on March 15, 2022 seeking to dispute a rent increase by the Landlord, and to ensure the Landlord's compliance with the legislation and/or the tenancy agreement. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on July 7, 2022.

Both parties attended the conference call hearing. I explained the process and both parties had the opportunity to ask questions and present oral testimony during the hearing.

At the start of the hearing, the Tenant stated they provided the Notice of this hearing, as well as evidence to the Landlord. This included later updates in their evidence. The Landlord confirmed they received the same. Reciprocally, the Tenant confirmed they received the evidence prepared by the Landlord. On these assurances, I proceeded with the hearing as scheduled.

Issue(s) to be Decided

Is the Landlord obligated to comply with the legislation and/or the tenancy agreement, as per s. 62 of the *Act*?

Did the Landlord increase the rent in accordance with s. 41 of the *Act*?

Background and Evidence

The Tenant presented a copy of the "Residential Tenancy Agreement" in place, dated September 1, 2018. The parties are named as "Landlord" and "Resident" on the cover page. The agreement, signed by both parties on August 20, 2018, contains the following:

- The tenancy exists on a month-to-month basis.
- The rent at the time of signing was $1,695 payable on or before the first day of each month.
- "This amount is Subject to rent increases given in accordance with the [Residential Tenancy Act]."
- The Resident paid a security deposit of $500 on August 2, 2018.
- "The Resident rent may be increased in accordance with the [Residential Tenancy Act], not more than once every 12 months with 90 day written notice in advance of the fee increase. The landlord may increase the rent in the amount set out by the regulation."

The agreement is explicit on the point that "monthly rent will include all items in Schedule A (Inclusions)" and "any additional services will be at an additional cost". The agreement on its final page lists "Occupancy Agreement Inclusions" which includes "24 hour on-site attendant" and "weekly housekeeping" and "weekly laundry" and "Daily check-in". The list also includes 3 meals daily. There are additional services available for a fee, these include "personal care (interior health or private service provider)."

In the hearing the Tenant presented that the rent increased each year effective July 1st, with notice from the Landlord 3 months in advance. The rent increased over the course of the tenancy: by letters dated May 21, 2019 ($1,729), April 30, 2020 ($1,759 after only 11 months prior), and March 23, 2021 ($1,784). By the time of the hearing, another rent increased became effective on July 1, 2022 ($1,811). For each of these letters, the Tenant detailed how they did not accept the rent increase in writing; also, the Landlord did not use the "RTB-7 form" which is the "Notice of Rent Increase Residential Rental Units". For the rent increase in 2020, the Tenant noted the effective date after March 30, 2020 which was during the rent freeze in effect to December 2021, when landlords were prohibited by statute from raising rents.

The Tenant is disputing this rent increases undertaken by the Landlord here. They submit the *Act* applies to the Landlord here. Specifically, while s. 4 in the *Act* states what the *Act* does *not* apply to, the Tenant here submits these categories governed by separate legislation do not apply to their situation. Thus, with the *Act* governing this the tenancy agreement and the

landlord-tenant relationship here, the Landlord increased the rent illegally, and for this the Tenant deserves recompense.

The Tenant also presented advertisements for the rental unit, wording in the tenancy agreement and application form that states it is part of the "independent living community", the business license stating the same, Residential Tenancy Branch "Levels of Care" describing "independent housing": "supportive housing", "assisted living" (with the rental unit facility not listed with the Assisted Living Registrar), and "residential care."

The Tenant also presented their efforts at communication with the Landlord over the rent increases and whether the *Act* applies to this rental unit facility. In this communication, according to the Tenant, the Landlord would refer to the fact that they provide services, and are thus exempt from the *Act*. As part the Tenant's application process before the start of the tenancy, they were assessed as being capable of looking after themself adequately, and thus removed from any assisted living or any services provided.

Each year, the Tenant queried the rent increases/freezes and the applicability of the *Act*. The consistent response from the Landlord was that they offer services; therefore, they were exempt from the rent freeze. The services to residents referenced were meals, washing bedding, cleaning the floors, and washroom cleaning. The Tenant in one dialogue drew the distinction between these services and "personal care services" more in line they described as more in line with the "assisted living" category.

The Tenant prepared a calculation of the overcharged rent amounts from the effective date of September 1, 2019 through to 2022. There are two important points from the Tenant's perspective: one, recompense for the rent increase imposed by the Landlord during the 2020 – 2021 "rent freeze"; two, all rent increases were not served properly, and should be recovered.

The Tenant provided their calculations with detailed explanations in their evidence. This is their calculation for all rent increases since the start of the tenancy that the Landlord did not properly implement. The key details are:

item	rent	increase	months	overpaid 2019/2020	overpaid 2020/2021	overpaid 2021/2022	overpaid 2022/2023	OVERPAY
1	$1,729	$34	11	$374	$374			$374
2	$1,759	$30	11		$330			$704
3	$1,784	$25	12	$408	$360	$150		$918
4	$1,811	$27	1	$34	$30	$25	$27	$116

The key dates for each line item are:

1. Notification on May 19, 2019, effective September 1, 2019.
2. Notification on April 20, 2020, effective August 20, 2020. The Tenant noted only 11 months passed since the previous rent increase, meaning the effective date should have been September 1.
3. Notification on March 23, 2021, effective July 1, 2021. Similarly, the effective date should have been September 1. The Tenant withheld their payment of the $25/month amount in early 2022, then made a single $75 payment to cover the possibility of eviction for unpaid rent.
4. Notification on April 1, 2022, effective July 1, 2022. This incorporates the month of the scheduled hearing in this matter. The Tenant also requested an additional $116 in the event this decision is finalized after July 31, 2022. This essentially adds another single month, as per item 4 above.

The above amounts calculated to the total overpayment amount of $2,112 to July 30, 2022.

The Tenant also claims for the cost of preparing materials and sending registered mail for this hearing. This is the amount for which they provided receipts in their evidence, totalling $53.60.

In response to what the Tenant presented, the Landlord confirmed that they are an "independent living facility", with residents having varying needs. There is no nurse or medical staff present; however, staff is present at all times in case of emergencies. In short, this is assistance of some kind to residents who require care – they "provide meals and do extra things whenever required."

The Landlord brought a witness to the hearing; that staff member at the rental unit facility described their own experience with the Tenant. Their individual care and attention to the Tenant is ensuring the Tenant is fed, and able to get to appointments. The Tenant remains active in the community.

The Landlord reiterated that they are an "independent living facility" that is distinguished by s.4(g) of the *Act*. This means there is nothing barring a rent increase as was done over the last few cycles with the Tenant here. Regarding the rent increases, they sent out letters and gave proper notice to the Tenant and the increase is intended to occur annually. The best way to describe the facility, in the Landlord's opinion, is as being "in between" – that is, an independent living facility, and "unofficial assisted living.

The Landlord provided a written response dated May 23, 2022. This re-stated the Landlord's key point that the rental unit that the Tenant rents is part of a facility where the Landlord

provides meals and services included with the rent; this is not the same as a rental apartment which just has the room and nothing else. This entails increasing costs each month that is passed to the residents.

The Landlord also wrote: "Based on the information we sought out on our own, we have continued with annual increases of 1.4% throughout Covid and did not operate under the "Rent Freeze." They also note the Tenant here "refused to pay for July to December 2021 rent of $25 per month for 6 months = $150.00".

Analysis

The *Act* s. 4(g) provides that the *Act* does not apply to living accommodation in a community care facility, a continuing care facility, or a public/private hospital, each falling under legislation that is separate and distinct from the *Act*.

The *Act* s. 5 provides that it cannot be avoided:

> (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.

I find the *Act* applies to the rental unit facility in which the Tenant resides and for which they have a tenancy agreement in place.

The tenancy agreement in place makes reference to the *Act* on various points and provides on page 11 that "the [Residential Tenancy] Act will prevail . . . [and] any provisions that are required by the Act are incorporated into this Agreement." I find this is the Landlord's explicit acknowledgement that the *Act* applies to the rental unit facility, and this tenancy agreement.

Further, and directly on point, the tenancy agreement states that "The Resident rent may be increased in accordance with the RTA [*i.e.*, the *Act*] not more than once every 12 months with 90 day written notice in advance of the fee increase. The landlord may increase the rent in the amount set out by the regulation." [emphasis added]

On September 1, 2021 the Landlord provided information to the Landlord on different types of housing under "Seniors Housing". This is not explicitly stated in these terms in the *Act*; however, I assign weight to this material as being evidence directly on point that succinctly phrases the present scenario in this tenancy:

> Independent Housing, which is not defined in any legislation, typically refers to seniors who may live in retirement communities or other housing geared toward seniors. These may be stand alone seniors' housing facilities, or there may be independent living units co-located within assisted living and long-term care facilities. As part of a tenancy agreement with the landlord/facility operator, services such as leisure activities, dining or housekeeping may be offered. These types of tenancies generally fall under the *Residential Tenancy Act*.

I find that what the Landlord presented equates the rental unit facility as existing in some proverbial "grey zone", neither a completely independent living facility, nor that of assisted living. I apply the rationale of the underlined portion above to find the Tenant here is living in the rental unit facility that does provide services; however, in this Tenant's individual case that does not equate to exemption from the *Act*. I find the Tenant here is in an independent living rental unit, regardless of what other services the facility may provide to other residents. There are services available; however, that does not entitle the Landlord to avoid or contract out of the *Act*.

In this hearing, the Landlord did not provide evidence that outweighs that presented by the Tenant. In their written statement the Landlord alluded to information they "sought out on [their] own"; however, they did not provide this information or refer to the rationale they may have been presented with previously. The Landlord did not provide sufficient evidence in the form of other legislation that applies to the scenario here, such as those listed in s. 4(g) to show explicitly that the *Act* does not apply. I find the Landlord made the statement that they are not under the *Act*; however, they presented no authority for this, and the tenancy agreement, such as it exists in the evidence, shows explicitly that the *Act* does apply. Finally, the Landlord in their description of the rental unit facility described it in terms of a "independent living facility" – I find this is in line with the definition of "independent housing" provided by the Tenant in their evidence, and this type of tenancy falls under the *Act*.

The Tenant has met the burden of proof in showing the Landlord is obligated to comply with the *Act*. In sum, I find the *Act* applies to the present situation, and the Landlord is governed by the rights and obligations therein.

Regarding any rent increases, Part 3 of the *Act* sets out the timing and notice requirements for rent increases. First, s. 41 provides that "A Landlord must not increase rent except in accordance with this Part." As above, I find the tenancy agreement in place between the parties here contains the same provision.

Following this, s. 42 provides more specifics:

> (2) A Landlord must give a Tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

To provide for the amount, s. 43 sets out:

(1) A Landlord may impose a rent increase only up to the amount
(a) calculated in accordance with the regulations,
. . .
(c) agreed to by the Tenant in writing.

It is clear from the evidence that the Landlord accepted an increased amount of rent. The Tenant provided sufficient detail on the specific amounts and the notification dates and rent increase effective dates. I find the Landlord imposed an increase in rent without following the relevant sections of the *Act*, set out above. There was no use of an approved form, and the Tenant did not agree to the increased amounts in writing. Moreover, the rent freeze in effect, with the dates set out clearly in the Tenant's evidence, positively applied to the Landlord here and they were not authorized, as per statute, to increase rent in that timeframe.

I find the Tenant brought a successful challenge to an increase in rent. They provided ample detail on amounts paid, and although they did not dispute the rent increase initially, I find they prudently entered into a dialogue with the Landlord in an attempt to clarify the situation and settle the matter. I see this as an effort at mitigation in line with s. 7 where they are now claiming compensation for monetary loss from the Landlord's non-compliance with the *Act*.

I find the rent increases are of no effect because the Landlord did not follow the *Act* s. 42 (no approved form) and s. 43 (no agreement by the Tenant in writing). It was incumbent on the Landlord to rectify the situation with respect to either party's rights or obligations. Because the Landlord did not rectify and maintained rent increases not in line with the *Act*, I find they must recompense the Tenant for the full amount of rent increases over the course of this tenancy. That full amount, as I have verified in the Tenant's detailed calculations, is $2,112. I also add the single month for August 2022, with this decision coming after the month in which the hearing took place.

Going forward, I order the Landlord to comply with the *Act*, the regulations, and the tenancy agreement in all aspects of this tenancy. The rent amount shall remain at $1,695 as it was at the start of the tenancy.

The Tenant made an additional claim for reimbursement of the costs associated with preparing for this hearing. The *Act* does not provide for recovery of other costs associated with serving

hearing documents; therefore, the cost of registered mail and document preparation is not recoverable.

Conclusion

I find the Landlord did impose a rent increase that was not in compliance to what is set out in the *Act*. They shall not accept future payments or make demands for an amount greater than what the original agreement set out until they implement a legally valid rent increase in line with the legislation.

Pursuant to s. 67 of the *Act*, I grant the Tenant a Monetary Order in the amount of $2,228, for past increased rent amounts including August 2022. The Tenant is provided with this Order in the above terms and the Landlord must be served with **this Order** as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: August 5, 2022

Residential Tenancy Branch