



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT, DRI, OLC, FFT**

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- 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.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

At the outset of the hearing the tenants withdrew the portions of their application pertaining to a monetary award and determination of a rent increase.

Issue(s) to be Decided

Are the tenants entitled to any of the relief sought?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This periodic tenancy began on October 31, 2020. The current monthly rent is \$3,237.00 payable on the first of each month. Utilities are included in the rent. The rental unit is a suite in a detached home with three units. There is one meter for the utilities of the rental building.

The parties entered a standard term tenancy agreement. The landlord drafted additional rules for the tenancy and an additional term includes that:

11. Utilities are included in the cost of rent, but excessive consumption may result in overage charges to the tenants; Average costs for the property calculated by equal monthly billing from Fortis, BC Hydro and information from [the municipality] are as follows: Fortis (gas) \$73/month, BC Hydro (electricity) \$235/month, [Municipality] (water, waste, garbage, compost) \$187/month. If total consumption exceeds by 20% overage charges may be billed to the tenants. Failure to make these overage payments will be considered a breach of contract and notice will be given. You accept the terms of this contract and agree the landlord's decision is final in determining usage and overage when calculating.

The landlord says that they calculate the usage of the utilities in the rental unit to be 50% of the total utilities for the property based on the size of the suite, the number of occupants and past data. The landlord testified that they calculated the reasonable monthly consumption amount based on past experience and drafted this clause to prevent excessive usage by the tenants. The landlord says they did not make demand of the overage charges when the bills and invoices from the utility companies were received as they believed there may be fluctuations attributable to the time of year. Instead, the landlord made demand of the overages in a lump sum for the past year in January 2022.

The parties agree that the tenants have not paid any amount for excessive usage as the tenants disagree that the clause is enforceable. The tenants further submit that they do not feel it is accurate that their rental unit is charged 50% of the utilities for the property or that overages are attributable to their activities.

Analysis

Section 14(2) provides that a tenancy agreement may be amended to add, remove or change terms when the parties agree to the amendment. In the present case the parties signed the Additional Terms of the tenancy agreement showing they both agreed to the amendment.

However, I find that the clause, as drafted by the landlord contains ambiguities which render the term unenforceable. I accept the submission of the parties that the utilities for the rental property are all measured by one meter and bills are for the property as a whole, rather than the individual rental units. I find the reference made to consumption in the clause fails to clarify that the consumption is for the whole rental property rather than the individual units. As the tenants submit, the effect of such an interpretation would be that they are responsible for overage payments regardless of their actual usage of the utilities for the property.

The parties also note that the landlord has not charged any amount for the utility excess during the first year of the tenancy until making a lump sum demand for all usage they deemed excessive during 2021 in January 2022. While I note that the clause does not state when the landlord may make demand for utility overages, I find the conduct of the landlord in expecting an annual payment to be unreasonable.

The legal principle of *contra proferentem* provides that ambiguities in an agreement will be construed against the party who drafted and seeks to rely upon the clause. I find that it is not open to the landlord, who has drafted this term, to interpret the silence as to the date when utility overages are payable as authority that they may make demand for the past year at any time.

I further find the unilateral ability of the landlord to calculate usage and overages and charge the tenant for these amounts to be too broad and excessive that it becomes unconscionable. An ordinary reading of the clause in question is that the landlord has

the full authority to determine if the tenants have used utilities in excess of what they deem acceptable and to unilaterally calculate and charge the tenants what they deem is appropriate. I find these powers of the landlord to be too excessive such that it is unreasonable.

As drafted in the tenancy agreement, I find the clause pertaining to excess utility usage and potential charges to be unenforceable due to its unconscionable nature and the ambiguities inherent in the way that the clause was drafted by the landlord. Under the circumstances I find it appropriate to order that Clause 11 of the additional terms of the tenancy agreement is unenforceable and of no force or effect.

As the tenants were successful in their application, I award them the recovery of their filing fee. As this tenancy is continuing I allow them to satisfy this monetary award by making a one-time deduction of \$100.00 from their next scheduled rent payment.

Conclusion

I find that Clause 11 of the additional terms of the tenancy agreement is of no force or effect.

The tenants may make a one-time deduction of \$100.00 from their next scheduled rent payment.

The balance of the application is withdrawn and dismissed without leave to reapply.

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: September 1, 2022

Residential Tenancy Branch