

## Attachment 6

### *Residential Tenancy Policy Guideline GL08: unconscionable, Unlawful, and Material Terms*

## 8. Unconscionable, Unlawful, and Material Terms

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### A. Takeaway

This policy guideline addresses unconscionable, unlawful, and material terms in a tenancy agreement.

### B. Legislative Framework

The following sections describe how to determine whether terms in a tenancy agreement are unconscionable or material and the process for ending a tenancy on the basis of a landlord or tenant breaching a material term of the tenancy agreement.

<i>Residential Tenancy Act</i> (RTA)	<i>Manufactured Home Park Tenancy Act</i> (MHPTA)
<ul style="list-style-type: none"><li>• <a href="#">section 6(3)</a></li><li>• <a href="#">section 27(1)(b)</a></li></ul>	<ul style="list-style-type: none"><li>• <a href="#">section 6(3)</a></li><li>• <a href="#">section 21(1)(b)</a></li></ul>

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| <ul style="list-style-type: none"><li>• <a href="#">section 45(3)</a></li><li>• <a href="#">section 47(1)(h)</a></li></ul> | <ul style="list-style-type: none"><li>• <a href="#">section 38(3)</a></li><li>• <a href="#">section 40(1)(g)</a></li></ul> |
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### C. Unconscionable Terms

The Residential Tenancy Regulation and the Manufactured Home Park Tenancy Regulation establish that a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party. Unconscionable terms are not enforceable. Whether a term is unconscionable depends upon a variety of factors.

One factor in determining whether a term is unconscionable is whether it grossly impacts the health and quality of living of one party, especially when there is no rational basis for such a term to exist in the tenancy agreement.

Another factor in determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party such as a clause limiting damages or granting a procedural advantage, or exploiting the age, infirmity or mental weakness of a party. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

The burden of proving a term is unconscionable is upon the party alleging unconscionability.

#### ***Prohibitions and limitations on air conditioning units and passive cooling***

Extreme heat events may adversely impact tenants living in units with poor cooling and ventilation systems. Vulnerable populations, such as the elderly, persons with disabilities and/or chronic health conditions, and persons living in neighbourhoods without access to cooling or green space are more susceptible to the negative impacts (including death) of extreme heat events.

#### ***Air conditioning units***

An outright prohibition of air conditioning units in a tenancy agreement without a rational basis for such a term to exist could be considered unconscionable if it grossly impacts the health and quality of life of a tenant. However, if a landlord can show there were safety or building issues around having air conditioners for a particular property or unit, a term prohibiting them may not be considered unconscionable.

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While a blanket prohibition would often be unconscionable, terms in a tenancy agreement that create limitations surrounding air conditioners, such as the following, would likely not be considered unconscionable:

- Restricting the number of air conditioning units that a tenant is permitted to have based on the size of the rental unit (either with respect to number of rooms or square footage);
- Limiting air conditioners to a certain number of BTU (cooling power); and
- Prohibiting window-installed air conditioning units in rental units above the ground level for safety reasons.

An unconscionable term is not simply unfair in the abstract but will always turn on the specific circumstances in question.

### *Passive cooling*

In circumstances where heat levels are not excessive, passive cooling can offer an approach for indoor heat control and heat dissipation that requires low or no energy consumption. Examples of passive cooling strategies to block out direct sunlight and heat include umbrellas, awnings, and reflective window coverings.

An outright prohibition or limitation of such cooling strategies in a tenancy agreement without a rational basis for such a term could be considered unconscionable if it grossly impacts the health and quality of life of a tenant.

### ***Restricting a tenant from having guests***

The standard terms found in the Schedule of the regulation provide that a landlord must not stop a tenant from having guests under reasonable circumstances in their rental unit and must not impose restrictions on guests.

Unless there are compelling circumstances to justify it, terms in a tenancy agreement that prohibit or limit the number of days in a year a tenant can have overnight guests (e.g., "no overnight guests" or "tenants can only have overnight guests 14 times in a year") could be considered unconscionable.

However, a request by the landlord to limit a tenant's guests whose behaviour may be deemed unsafe on the rental premises (e.g., violence, harassment) would likely not be considered unconscionable.

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### ***Rent increases higher than the prescribed amount***

Terms in a tenancy agreement that impose a significant rent increase on an ongoing basis where there is no compelling reason to justify it (e.g. an initial reduction in the rent being charged in relation to market value) could be considered unconscionable.

### ***Excluding liability of landlord***

Terms that exclude the landlord from being liable for any damages and loss caused to the tenant by the landlord, including through the landlord's negligence, are likely to be considered unconscionable. Even if these terms are only intended to capture what cannot be excluded because of the RTA provisions relating to damage, they may still meet the threshold for unconscionability especially if their presence in the agreement would have the effect of preventing a tenant from obtaining insurance (e.g. tenant's insurance or accidental death and dismemberment insurance).

### **D. Unlawful Terms**

The RTA and MHPTA establish that a term of a tenancy agreement is not enforceable if it is inconsistent with the Act or regulations.

Some of the examples provided above as unconscionable terms would also be considered terms that are inconsistent with the RTA and MHPTA and respective regulations. As a result, they would not only be unenforceable, but they would also be subject to administrative monetary penalties.

For example, the standard terms found in the Schedule of the regulations provide that the landlord may increase the rent only in the amount set out by the regulation. Therefore, terms imposing a significantly higher rent increase on an ongoing basis without justification could not only be considered unconscionable but could also attract administrative monetary penalties.

### **E. Material Terms**

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the arbitrator will consider the importance of the term in the overall scheme of the

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tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the arbitrator will consider the true intention of the parties in determining whether or not the clause is material.

### **F. Ending a Tenancy Agreement for Breach of a Material Term**

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Before serving a Notice to End Tenancy for breach of a material term, the party alleging the breach must first let the other party know in writing of the alleged breach and give them a reasonable opportunity to fix the problem. The written notice of the alleged breach should inform the other party that:

- there is a problem;
- they believe the problem is a breach of a material term of the tenancy agreement;
- the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- if the problem is not fixed by the deadline, the party will serve a notice to end the tenancy.

If the other party does not fix the problem by the deadline, the party alleging the breach can serve a Notice to End Tenancy for Cause for breach of a material term of the tenancy agreement.

If a dispute arises related to a Notice to End Tenancy for Cause for breach of a material term, an arbitrator must find that all of the following conditions are satisfied before upholding the Notice to End Tenancy:

1. The party breached a term of the tenancy agreement,

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2. The term being breached is a “material term,”
  3. Following the breach, the party alleging the breach provided written notice of the problem to the party,
  4. The written notice indicates that the other party must correct the breach and sets out a deadline by when the breach must be corrected,
  5. The party was given a reasonable amount of time to correct the breach, and
  6. The party continued to breach that material term of the tenancy agreement after the reasonable period for correction had passed (See Section F).

If the Notice to End Tenancy is disputed, the party alleging the breach bears the burden of proof. The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the arbitrator will consider the true intention of the parties in determining whether or not the clause is material.

### G. Case Law

- [\*Ali v. British Columbia \(Residential Tenancy Branch\)\*, 2023 BCSC 1336](#)

### H. Policy Guideline Intention

The Residential Tenancy Branch issues policy guidelines to help Residential Tenancy Branch staff and the public in addressing issues and resolving disputes under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*. This policy guideline may be revised and new guidelines issued from time to time.

### I. Changes to Policy Guideline

Section	Change	Notes	Date Guideline Changed
All	Am	Revised for clarity	April 5, 2017
All	Am	Formatted to new template	February 28, 2024

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C	Am	Removed legislative reference since it is now referenced in Section B	February 28, 2024
D	Am	Revised “Residential Tenancy Branch” to “arbitrator” for accuracy.	February 28, 2024
E	Am	Section significantly rewritten for clarity. Additional content added about the conditions that must be met to uphold a Notice to End Tenancy for Cause on the basis of a breach of a material term.	February 28, 2024
G	New	Reference to new case law.	February 28, 2024
C	New	Added examples of unconscionable terms.	May 28, 2024
C	New	Added examples of unconscionable terms.	August 15, 2024

### Change notations

am = text amended or changed

del = text deleted

new = new section added