

IN THE MATTER between **JOHN WESTERGREEN**, Landlord, and **HANK BIGCHARLES AND ROBIN BIGCHARLES**, Tenants;

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act") and amendments thereto;

AND IN THE MATTER of a Hearing before, **HAL LOGSDON**, Rental Officer, regarding the rental premises at **YELLOWKNIFE, NT**.

BETWEEN:

JOHN WESTERGREEN

Landlord

- and -

HANK BIGCHARLES AND ROBIN BIGCHARLES

Tenants

ORDER

IT IS HEREBY ORDERED:

1. Pursuant to section 41(4)(a) of the *Residential Tenancies Act*, the tenants shall pay the landlord rent arrears in the amount of ten thousand nine hundred thirty dollars and eighty five cents (\$10,930.85).
2. Pursuant to section 41(4)(c) of the *Residential Tenancies Act*, the tenancy agreement between the parties for the premises known as Suite A, 5056 Forrest Drive, Yellowknife, NT shall be terminated on May 31, 2012 and the tenants shall vacate the premises on that date.

DATED at the City of Yellowknife, in the Northwest Territories this 18th day of May, 2012.

Hal Logsdon
Rental Officer

IN THE MATTER between **JOHN WESTERGREEN**, Landlord, and **HANK BIGCHARLES AND ROBIN BIGCHARLES**, Tenants.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a Hearing before **Hal Logsdon**, Rental Officer.

BETWEEN:

JOHN WESTERGREEN

Landlord

-and-

HANK BIGCHARLES AND ROBIN BIGCHARLES

Tenants

REASONS FOR DECISION

Date of the Hearing: May 3, 2012

Place of the Hearing: Yellowknife, NT

Appearances at Hearing: John Westergreen, landlord
Hank BigCharles, tenant
Robin BigCharles, tenant

Date of Decision: May 18, 2012

REASONS FOR DECISION

The landlord's application was filed on March 13, 2012 and the tenants' application was filed on April 16, 2012. As both of the applications pertain to the same tenancy agreement and the same rental premises, both applications were considered at a common hearing.

The landlord alleged that the tenants breached the tenancy agreement by failing to pay rent and utilities. He sought an order requiring the tenants to pay the outstanding rent and utility charges and terminating the tenancy agreement and evicting the tenants.

The tenants alleged that the landlord had discontinued cable and internet service and sought unspecified compensation for loss of the service.

The written tenancy agreement between the parties sets out a monthly rent of \$2400 in article #3 of the agreement.

Article #10 of the tenancy agreement sets out the responsibilities for services.

10. The Tenant will pay, on demand, to the appropriate authority, the costs of the following services: (Water, Telephone and Power are checked)

The accounts for water and electricity are in the landlord's name. From time to time, the landlord demands payment for what he considers to be a reasonable share of the accounts based on how many persons are occupying each suite in the residential complex.

Article #8 of the tenancy agreement sets out responsibilities for cable TV and internet service:

8. The Landlord and Tenant agree the cable TV and Internet service will be provided by the Landlord from NorthwesTel Cable. The connection equipment, modem, router, switch, hub, splitters and internal cables are the responsibility of the Landlord to keep in good working condition. The tenant agrees to pay to the Landlord a service fee of \$ Inc per month for the Landlord maintaining the needed equipment. This fee is payable in addition to the monthly rental. Notice will be given to relocate any of these services.

The landlord charges the tenants from time to time for digital cable TV service which is in excess of the basic analog service.

The landlord provided a statement in evidence outlining charges for rent, power, water, digital cable TV, interest charges on utilities and payments made which indicated a balance owing of \$12,261.13. The landlord sought an order in that amount.

The tenants disputed the amount of interest applied on utilities, several small arithmetic errors and an arithmetic error on the calculation of the utilities dated April 12, 2012. The tenants stated that the landlord failed to notify them of utility charges on a timely basis. The landlord acknowledged the arithmetic errors and that the penalties applied may not be in accordance with the *Residential Tenancies Act*.

The tenants allege that the cable and internet were disconnected by the landlord on February 4, 2012 and was not reconnected until March 16, 2012. The landlord did not dispute the dates and said that it was disconnected because the tenants were not paying for utilities. He stated that he paid \$61/suite for the cable internet service.

Although the tenants acknowledged that they agreed to pay \$2400/month plus the power, water and digital cable costs, the tenancy agreement between the parties is inconsistent with the *Residential Tenancies Act Regulations*.

The definition of “rent” contained in the *Residential Tenancies Act*, includes any amount paid by a tenant to a landlord for the right to occupy rental premises.

"rent" includes the amount of any consideration paid or required to be paid by a tenant to a landlord or his or her agent for the right to occupy rental premises and for any services and facilities, privilege, accommodation or thing that the landlord provides for the tenant in respect of his or her occupancy of the rental premises, whether or not a separate charge is made for the services and facilities, privilege, accommodation or thing.

“Services and facilities” includes utilities and cable television facilities.

"services and facilities" includes furniture, appliances and furnishings, parking and related facilities, laundry facilities, elevator facilities, common recreational facilities, garbage facilities and related services, cleaning or maintenance services, storage facilities, intercom systems, cable television facilities, heating facilities or services, air- conditioning facilities, utilities and related services, and security services or facilities.

Therefore utility charges and cable television charges that are payable to the landlord are considered rent.

Section 10(1) of the Act sets out that all tenancy agreements are deemed to include the provisions of the form of the tenancy agreement contained in the regulations.

10. (1) A tenancy agreement is deemed to include the provisions of the form of a tenancy agreement set out in the regulations and, subject to subsection 12(1), any provision of a tenancy agreement that is inconsistent with the provisions of the form of tenancy agreement set out in the regulations has no effect.

The tenancy agreement set out in the regulations contains the following form for rent:

4. RENT

The Tenant agrees to pay the Landlord \$_____ on the____ day of every____, plus the following charges:

\$_____ for parking for each vehicle

\$_____ for_____

\$_____ for_____

If the Tenancy Agreement is made for a fixed term and the rental premises are not subsidized public housing check one of the following:

☐ **The rent shall not be increased during the term of the Tenancy Agreement.**

☐ **The rent may be increased during the term of the Tenancy Agreement, 12 months after the last rental increase on these rental premises and with notice to the Tenant. (Section 47 of Act)**

The date of the last rental increase for the rental premises was_____, 20__.

[NOTE: A tenant who does not pay his or her rent on the date specified in the tenancy agreement may be liable to a penalty. (Section 41 of Act)]

The regulations also set out what is included in the rent and what is not.

5. SERVICES AND FACILITIES

The following services and facilities are included in the rent:

The following services and facilities are the responsibility of the Tenant:

Clearly, rent is not intended to be a variable monthly charge. The Act permits a landlord to charge an amount for each rent period as well as separate charges for other services and facilities billed by the landlord during that period, but the form of the tenancy agreement contained in the regulations suggests that the additional charges are intended to be fixed, not variable. This is further reinforced by the provisions for rent increases set out in sections 47(1) and 47(2). In order to meet these provisions, one can not have a rent which increases more than once in a year or without notice.

- 47. (1) Notwithstanding a change in landlord, no landlord shall increase the rent in respect of a rental premises until 12 months have expired from**
- (a) the date the last increase in rent for the rental premises became effective; or**
 - (b) the date on which rent was first charged, where the rental premises have not been previously rented.**
- (2) The landlord shall give the tenant notice of the rent increase in writing at least three months before the date the rent increase is to be effective.**

The landlord's methodology of dividing the electrical and water costs for the residential complex on a per capita basis does not accurately reflect the costs of the services provided to each of the premises. Both electrical and water consumption are related largely to lifestyle and there is no assurance that a division of costs according to the number of persons occupying the premises reflects actual consumption or cost.

Nevertheless, the parties have agreed to this method of charging for utilities and applying a broad and liberal interpretation of the regulations, I believe the rent (including the charges for electricity, water and cable TV) could be different each month provided the total amount does not increase. The rent increase provisions only apply to increases in rent, not reductions. Therefore, in my opinion, a landlord could charge a constant base rent plus variable service charges as long as the service charges in each month were lower than those charged in the first month of the tenancy. Any increase in the service charges or the base rent would have to be in accordance with the rent increase provision contained in section 47 of the Act. While I do not recommend this, in my opinion, it is permissible.

This tenancy agreement commenced on February 1, 2011. That month the landlord charged the tenants \$2400 plus charges for water, electricity and digital cable. The water charges for the residential complex for the period February 1-28 were \$150.11. Using the formula to allocate costs to the tenants' premises results in a water charge of \$100.07. Calculating the electrical costs between February 1-28 for the residential complex results in a cost of \$413. Using the allocation formula, the tenants' share is \$275.34. The digital cable charges for February were \$87.55. This results in a total rent for February, 2011 of \$2862.96. Any monthly rent (including the charges for electricity, water and digital cable) for any following month may not exceed this amount.

Calculating the monthly rents charged from the commencement of the tenancy agreement and adjusting any that exceed \$2862.96 to \$2862.96, I find the following monthly lawful rents:

February/11	\$2862.96
March/11	\$2800.57
April/11	\$2862.96
May/11	\$2773.44
June/11	\$2817.68
July/11	\$2764.41
August/11	\$2852.13
September/11	\$2862.96
October/11	\$2862.96
November/11	\$2792.56
December/11	\$2849.19
January/12	\$2862.73
February/12	\$2773.99
March/12	\$2778.66
April/12	\$2481.91
May/12	<u>\$2400.00</u>
Total	\$44,399.11

The landlord's statement indicates total payments of \$23,624.26. Adding the payments of rent for

February, March, April and May, 2011 (4 months x \$2400) which are not shown on the statement, brings the total amount paid by the tenants to \$33,224.26. The resultant rent arrears are therefore \$11,174.85.

The failure of the landlord to provide the basic internet and cable service between February 4 and March 16, 2012 is acknowledged by both parties. After March 16, the tenants established their own account with the cable provider. The landlord has testified that the basic service costs are \$61/month. In my opinion compensation for four months or \$244 is reasonable.

The penalties for late rent charged by the landlord are denied. I can not determine how they were calculated nor could the landlord do so at the hearing. It is clear that some exceed the maximum amounts pursuant to the *Regulations*, and some may not. The landlord's practice of not charging utilities or cable TV charges monthly make the determination of allowable penalties difficult. I am not prepared to do the proper accounting on behalf of the landlord.

I find the tenants in breach of their obligation to pay rent and find rent arrears of \$11,174.85. I find the landlord in breach of his obligation to provide basic cable and internet service in accordance with the tenancy agreement and find reasonable compensation to be \$244. Therefore the net amount owing to the landlord is \$10,930.85. In my opinion there are sufficient grounds to terminate the tenancy agreement.

An order shall issue requiring the tenants to pay the landlord rent arrears of \$10,930.85 and

terminating the tenancy agreement on May 31, 2012. An eviction order to be effective on June 1, 2012 shall be issued separately.

Hal Logsdon
Rental Officer