

8. Unconscionable and Material Terms

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A. Takeaway

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

Keywords: unconscionable terms, material terms, oppressive, grossly unfair.

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">• section 6(3)• section 27(1)(b)• section 45(3)• section 47(1)(h)	<ul style="list-style-type: none">• section 6(3)• section 21(1)(b)• section 38(3)• section 40(1)(g)

C. Unconscionable Terms

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.

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A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. 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.

D. 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 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.

E. Ending a Tenancy Agreement for Breach of a Material Term

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

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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,
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.

F. Case Law

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

G. 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* or the *Manufactured Home Park Tenancy Act*. This policy guideline may be revised and new guidelines issued from time to time.

H. Changes to Policy Guideline

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Section	Change	Notes	Date Guideline Changed
All	Am	Revised for clarity	April 5, 2017
All	Am	Formatted to new template	February 28, 2024
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
F	New	Reference to new case law.	February 28, 2024

Change notations

am = text amended or changed

del = text deleted