

8. Unconscionable and Material Terms

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This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.

This guideline deals with unconscionable and material terms in a tenancy agreement.

Tenancy agreements contain terms where one party or the other promises to do or not to do something.

Unconscionable Terms

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms which are unconscionable are not enforceable¹. Whether a term is unconscionable depends upon a variety of factors. To be unconscionable the term must be oppressive or grossly unfair. A test for determining unconscionability is whether the agreement is so one-sided as to oppress or unfairly surprise the other party. Such terms may be a clause limiting damages or granting a procedural advantage. Use of small print or unintelligible language may indicate an unconscionable term. The burden of proving a term is unconscionable is upon the party alleging unconscionability. Please refer to the definition of unconscionability in the regulation for further information.

An example of a term which may be found to be unconscionable could be a term which is printed in text which is smaller than the rest of the agreement and is difficult to read and understand, or which uses unusual words, to disguise the term or its meaning. Another example of a term which has been found to be unconscionable is where one party took advantage of the ignorance, need or distress of a weaker party which left that party in the power of the stronger. Exploiting the age, infirmity or mental weakness of a party to secure their agreement to the term may be important factors.

Material Terms

To end a tenancy agreement for breach of a material term a landlord must establish that the tenant breached a material term and that the tenant did not rectify the breach within a reasonable time after notice to do so by the landlord². To determine the materiality of a term, an arbitrator will focus upon the importance of the term in

¹ *Residential Tenancy Act*, s. 6(3); *Manufactured Home Park Tenancy Act*, s. 6(3)

² RTA, s. 47(1)(h); MHPTA, s. 40(1)(g)

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the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was 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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely 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. The arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Where a tenant elects to give written notice ending a tenancy agreement on the basis that the landlord has breached a material term of the tenancy agreement³, if a dispute arises as a result of this action the tenant bears the same burden as the landlord as noted above, except that the tenant is not obligated to give the landlord the opportunity to rectify the breach prior giving the landlord notice to end the tenancy. The landlord would not normally be found in breach of a material term if unaware of the problem.

³ RTA, ss. 45(3) and (4); MHPTA ss. 38(3) and (4)