Claim No: 408849

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

Cite as: Killam Properties Inc. v. Baillie, 2013 NSSM 15

BETWEEN:

KILLAM PROPERTIES INC.

Landlord (Appellant)

- and -

BRUCE A. BAILLIE

Tenant (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on March 6 and 7, 2013

Decision rendered on March 25, 2013

APPEARANCES

For the Landlord	Lloyd Robbins Counsel
For the Tenant	self-represented

REASONS FOR DECISION

[1] This is a decision by the Landlord, Killam Properties Inc., from an order of the Director dated November 2, 2012, which awarded the Tenant a rent abatement in the amount of $660.81 as compensation for the fact that the water supply to the manufactured home community in which the Tenant lives, was subject to a boil water order for what was (at the time of the hearing) eleven months, and which eventually stretched to fourteen months.

[2] The Residential Tenancy Officer based her decision on a breach of statutory condition (2) of section 9 (1) of the *Residential Tenancies Act*, which reads as follows:

> **Services -** where the landlord provides a service or facility to the tenant that is reasonably related to the tenant's continued use and enjoyment of the premises such as, not so as to restrict the generality of the foregoing heat, water, electric power, gas, appliances, garbage collection, sewers or elevators, the landlord shall not discontinue providing that service to the tenant without proper notice of a rental increase or without permission from the Director.

[3] The Landlord is the owner of approximately 30 manufactured home communities in the Atlantic region including the one here in Lake Echo, which is called Mountainview Estates. It is a reasonably large community containing more than 300 home lots. In such communities, it is the responsibility of the Landlord to deliver water to the individual homes. Such water may be supplied to the property by the municipality (where the community is within a municipal water service area) or, as here, must be generated in some other fashion. Here the water was, until very recently, drawn from Lake Echo. Killam Properties actually purchased this community in 2007, and inherited the water system as it was.

[4] As I learned from testimony at the hearing, it is not uncommon for freshwater lakes to provide the source for small communities (even small municipalities), and the amount of treatment that the water receives may vary, depending on the age of the system and other factors. Historically, this community system was reasonably sophisticated. Water was pumped from a relatively deep part of the lake into an area where it was filtered and put into tanks that allowed for further settlement of particles. It was then chlorinated before being further pumped to the homes. The owner also had in place a regime for testing the water from time to time, for various minerals and contaminants that could be harmful to human health. More will be said about this later.

[5] The Nova Scotia Department of Environment is the agency that has responsibility for ensuring safe water supplies for people in the province. There are statutes and regulations pursuant to which such supervision occurs. I believe it is fair to say that enforcement of water standards has not always been rigorous or consistent. Also, the system relies on a certain amount of voluntary self reporting. It is also fair to say that tainted water scandals in places like Walkerton, Ontario, have driven home to government and others how tragic can be the consequences when contaminated water is delivered to unsuspecting consumers.

[6] Against this backdrop is the undeniable fact that from December 8, 2011 until recently in February 2013, the Tenant (and all others in the community) were instructed to boil any of the water that was going to be used for drinking, washing fruits and vegetables, brushing teeth etc. The water supply was still considered safe for all other uses, such as washing clothes, bathing and such.

A minor exception was that for washing dishes by hand, it was recommended that a small amount of unscented household bleach be added to the wash water.

[7] During this fourteen month time frame, the Landlord researched, designed and constructed a brand-new, state-of-the-art water supply system drawing its water from drilled wells. As soon as that system was complete, the previous lake water system was retired and the boil water order lifted. The final cost of this new system is expected to cost the Landlord just under $500,000. There is nothing in the evidence to suggest that the Landlord was proposing to pass any of this cost along to the tenants, at least at this time.

[8] The Tenant appears to have a strongly held belief, as do many of his neighbours in the community, that the extra work and expense caused by the boil water order should be compensated by the Landlord. As he stated at the hearing, the Landlord charges a fee for a service, and if that service is not provided then those receiving something less than they were promised should not have to pay for it.

[9] The Tenant's monthly lot rent is $220.27. The amount of compensation awarded by the Residential Tenancy Officer was the equivalent of three months rent. She noted in her decision that it worked out to be approximately $2.00 per day.

[10] The Tenant's theory supporting his claim for compensation/abatement is that the lease obligates the Landlord to supply the tenants with "water" which he says should be read to mean "potable water."

[11] From a practical point of view, what the boil water order imposed on this Tenant was a regime of boiling water on the stove in sufficient quantity to serve his family's needs for drinkable water. Of course, as appears to have been the case at times, the Tenant had the option of purchasing bottled water either in bottles or in some other bulk container. The Tenant was quite vague in his testimony as to how much bottled water he used as a result of this boil water order, given that the use of bottled water was a regular part of his and his family's life even beforehand. The Tenant brought into court with him the very pot that he used to boil water during the time in question. Although I did not inspect it closely, it probably holds somewhere between 4 and 6 litres of water. The Tenant testified that it was part of his daily routine to boil a pot of water in the morning, which took approximately 11 min. on the stove, after which it would be allowed to cool down and then transferred to the refrigerator. He stated that his family purchased jugs of water as well as cases of smaller bottles, on approximately a weekly basis. He testified that he had to be especially vigilant with his eleven-year-old daughter, and even more so if she had friends coming over to visit. Very clearly this became not just an issue for this Tenant, but for many others in the community who became quite worked up over the issue and raised it in the media.

[12] Although the Tenant did not produce any receipts for actual water purchases, he testified that the two dollar a day amount which was ordered by the Residential Tenancy Officer was actually quite conservative.

[13] The Tenant complained that during this period of time, had he wished to sell his home and transfer his lease to someone else, he would've had a difficult time given the lack of drinkable water. On the other hand, he conceded that the new system probably would be an asset if he needed to sell his property.

[14] Prior to making his claim to the Director, the Tenant attempted to express his frustration by withholding rent, which provoked a stern response from the Landlord and the Tenant decided not to take that any further. The Tenant also conceded in cross-examination that he never actually complained directly to the Landlord, but simply decided to make his claim to Residential Tenancies. He also went to the media who published and broadcast some stories about this issue.

[15] The Landlord called a number of witnesses to explain how this particular problem developed and how it was dealt with.

[16] One area of evidence sought to illustrate the scope of the issue, by differentiating the amount of water that the typical person consumes in the course of the day versus the amount that he or she may use for other purposes, such as showering. The gist of that evidence is that the average person may consume up to 2 litres per day of fluids, which includes other types of beverages, out of the total of some 329 litres per day of water that the average person typically uses in the course of the day. What this statistic is said to illustrate, among other things, is that drinkable water (without treatment) is a very small percentage of the amount of water supplied and used.

[17] The Landlord called as a witness Ms. Jackie Lavallee, who occupies the job of Operations Manager for the Landlord's manufactured home communities in the Atlantic region, of which Killam owns approximately 30. She has credentials as a public health inspector, having spent approximately 30 years working for the Nova Scotia Departments of Health and Environment in areas of responsibility involving, among others, water treatment plants. She explained at

some length the regulatory scheme which governs water systems. She also explained from the point of view of an expert, the various problems that can present themselves in the water supply.

[18] Ms. Lavallee was in charge of this water system from 2007 when she first began working for Killam. One of her initiatives was to introduce more stringent testing protocols, not just more stringent than those that had been used before, but even more stringent than the ones required by the Government. Ironically, it was this additional diligence that probably precipitated the demise of the previous water system.

[19] As she explained, there are four basic issues with water that are tested. Government requires that water be tested for its microbial content, such as coliform or E. Coli, quarterly. A test for chemicals and metals is only required annually. The regulations require a daily test for chlorine residue. And they require a test annually for turbidity, which is the issue that affected the water supply here.

[20] Turbidity means cloudiness, which is caused by the suspension within the water of very small solid particles. To quote the entry in Wikipedia:

> Turbidity is the cloudiness or haziness of a fluid caused by individual particles (suspended solids) that are generally invisible to the naked eye, similar to smoke in air. The measurement of turbidity is a key test of water quality.
>
> Fluids can contain suspended solid matter consisting of particles of many different sizes. While some suspended material will be large enough and heavy enough to settle rapidly to the bottom of the container if a liquid sample is left to stand (the settlable solids), very small particles will settle only very slowly or not at all if the sample is regularly agitated or the

> particles are colloidal. These small solid particles cause the liquid to appear turbid.

[21] It appears that there are a number of different ways to measure turbidity, and the one here is NTU - which I understand refers to something called Nephelometric Turbidity Units.

[22] In 2010, Killam began testing for turbidity on a daily basis rather than the rather lax standard of once annually required by the Regulations. The only reason to do this would be out of a concern for the safety of the water supply, and for the well-being of tenants. It also instituted weekly, rather than quarterly, tests for coliform and E. Coli. Killam's testing protocols involved separate testing at each of the two pumphouses that supplied water to this community, and the data was entered into a computer which kept track of not only the measurements of the various tests but also of weather conditions.

[23] It appears that there was not at the relevant time a hard and fast acceptable measurement for turbidity. It appears that 5.0 NTU was considered acceptable, at least under some circumstances or by some inspectors, while others insisted upon 2.0. Because of her beliefs, the level of acceptability established by Ms. Lavallee on behalf of Killam was only 1.0 NTU.

[24] The regime under the *Water and Wastewater Facilities and Public Drinking Water Supplies Regulations* made under sections 66 and 110 of the *Environment Act* of Nova Scotia, places the onus on the owner of a drinking water supply to make a voluntary report to the Minister of the Environment (i.e. to a staffer in the Department) whenever the owner becomes aware of certain conditions, namely (among others) that "(a) the public drinking water supply does not meet the microbiological, chemical or physical criteria set out in the

Guidelines for Canadian Drinking Water Quality" or "(e) ineffective disinfection due to high turbidity, equipment malfunctions or high chlorine demand." In such a case, the owner is required to take such corrective action as may be required by the Department.

[25] In practical terms, the reason that turbidity is problematic at low levels is not because of the almost invisible solids themselves, but because the presence of solids tend to make chlorination less effective.

[26] As the daily turbidity testing began to occur starting in early 2010, it appears that turbidity levels only very rarely exceeded the established measure of 1.0 NTU, and such events were often explainable by heavy rainfall a day or two before, or on the day of thereof, which has the effect of stirring up the water. At the levels being experienced, consumers would not even notice any cloudiness in the water, as visible cloudiness does not even begin to show up to the naked eye until levels of about 5.0 or higher. According to Ms. Lavallee, given how infrequently water had been tested for turbidity prior to 2010, it is very likely that occasional hide turbidity levels would have been experienced without anyone being the wiser.

[27] Killam's procedure was to issue a boil water advisory to the community if there were two unacceptable readings on successive days, and a report would then be made to the Department of Environment. Until the events of December 2011, these occasional boil water advisories would be lifted with the approval of the inspector employed by the Department. This all changed on December 8, 2011, when a unusually high reading of 9.99 NTU was registered at pumphouse #2, after a fairly heavy rainfall. As it had done on previous occasions, Killam issued a boil water advisory, and decided that it was timely to engage in a

cleaning of the storage tanks. Even so, the turbidity readings went down in the coming days, but as a precaution the boil water advisory was left in place until Killam went to the Department on December 19, 2011 to ask for the advisory to be lifted.

[28] It was at this time that Killam received surprising news. The Department of Environment issued a report which found that Killam had "inadequate water treatment" in this community. Killam was also told that the department was acting under some new policy guidelines, which Killam has never actually seen in any written form. The directive to Killam was essentially to correct the problem, by whatever means necessary. Efforts to negotiate with the Department were unsuccessful, and in the end the Department made the boil order permanent until a solution was found.

[29] Admittedly, this view of the events presented by the Landlord is not unbiased, in the sense that no one from the Department of Environment was present in court to give its perspective. Nevertheless, it does not really matter whether the permanent boil water order was necessary, or overkill. There does seem to be some evidence to the effect that Killam was being inadvertently penalized for having instituted a tougher standard and more rigorous testing protocols than the law required. Nevertheless, the situation it found itself in was simply that its existing water system had to be replaced. And in the interim, all of the people in the community would have to manage without fully drinkable water coming out of their taps.

[30] I am satisfied on the evidence that Killam behaved totally responsibly in how it approached this challenge. It would've been foolhardy to rush into something, or to look for a Band-Aid solution of some kind. Instead, it retained

engineers to advise as to the alternatives, which eventually resulted in the decision that the best and most durable solution was a groundwater supply; i.e., drilled wells.

[31] I am also satisfied that the amount of time it took to respond to the situation, decide upon the system, obtain all the necessary government approvals and issue tenders, was not unreasonable. Supplying water to a community of several hundred homes and upward of a thousand people is not as simple a matter as drilling the well for a private home. Geologists had to be engaged to study the area to ensure that the ground was suitable for wells supplying this amount of water. The wells had to be drilled, water tested, pumps sourced and installed, and other tests had to be done, all to the satisfaction of the Department of Environment which was being kept apprised of every stage. In the end, the system was complete by February 8, 2013, some fourteen months to the day when the last boil water advisory was issued. As stated by Ms. Lavallee, “I would challenge anyone to do it quicker, with all approvals.” I accept the premise of this statement, namely that Killam did not drag its heels in any fashion.

[32] During the time before the new system could be brought on stream, the community had no choice but to use the existing surface water system. All of the testing protocols continued to be conducted. It was not within Killam’s power to lift the boil water order, and so the residents had to continue to follow the guidelines which they had previously been given.

[33] The Tenant, Mr. Baillee, explored on cross examination of Ms. Lavallee the possibility that the high turbidity that began to be experienced in 2011 was as a result of something that Killam had done (relating to a wind turbine) since

taking ownership of the property. Ms. Lavallee disagreed, and there was no evidence that Killam, in effect, brought this problem on itself.

[34] Also called as a witness was Gordon Balcombe,a civil and environmental engineer who was one of the consultants on the project. It was his evidence also that Killam acted expeditiously. He also was familiar with the history, and was a bit surprised that the December 2011 boil order became permanent, because it was consistent with experience that these orders tended to be lifted once the turbidity returned to normal. In fact, it was his opinion that Killam was treated somewhat more strictly by the Department than some municipalities, who despite being directed to upgrade their systems, are not put on permanent boil orders during the transition.

Issues

[35] One issue may be expressed somewhat technically, namely, whether the definition of “water” must be read as if it said “potable water.” Counsel for the Landlord argues that this is implying a term that is not there.

[36] Implied terms are appropriate and necessary to do justice in the case of contracts that do not try to define every term to the nth degree, or cover every eventuality. The usual test for an implied term is sometimes called the “officious bystander test.” One imagines a reasonably intelligent bystander being asked the question whether he or she would interpret the word used to include something else. In this case, such a bystander would be asked whether the language “water” was just referring to water in its most basic sense, or drinking water or potable water. The reason a bystander is the touchstone, is the assumption that he or she has no personal stake in the matter.

[37] I believe that an officious bystander would probably say that the Landlord had obligated itself to provide water that was, or could be made to be drinkable. He or she would probably have to concede that while perfectly acceptable drinking water would be the typical expectation, one might expect circumstances to arise where the water could not be used for every purpose without some additional step, such as boiling.

[38] I do not think that any officious bystander would accept that a landlord under the circumstances could get away with supplying water that could not be drinkable at all, or that would be subject to a never-ending boil water order, or water that could not be used for baths or showers.

[39] In other words, I do not believe that it is as simple a question as the Tenant would have me see it. Under the lease, the Landlord has an obligation to provide water, and typically water that comes out of domestic taps is drinkable. On the other hand, any tenant coming to this community would surely understand where the water is coming from. Upon being told that it was lake water, and having the treatment system explained, such a tenant would surely conclude that there might be situations when the water would not be drinkable straight out of the tap.

[40] In any event, what this case ultimately comes down to is whether or not there is a breach of the lease and further, whether such a breach merits the imposition of either damages or a rent abatement.

[41] The decision of the Residential Tenancy Officer approached that question by looking at the statutory conditions under the lease. She expressly found that

the Landlord was not in violation of statutory condition 9 (1) 1 which provides that the Landlord must “keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.” Instead, she based her decision to award compensation on a breach of 9 (1) 2 which states that “where the Landlord provides a service or facility to the tenant that is reasonably related to the tenants continued use and enjoyment of the premises such as, but not so as to restrict the generality of the foregoing, heat, water, electric power, gas, appliances, garbage collection, sewers or elevators, the landlord shall not discontinue providing that service to the tenant without proper notice of a rental increase or permission from the Director.”

[42] Dealing first with 9 (1) 1, I believe the Residential Tenancy Officer was correct in her conclusion that the Landlord was not in breach of this condition. It would be a gross exaggeration to say that the Tenant’s home was unfit for habitation, because of the boil water order. Furthermore, there is no evidence that the Landlord failed to comply with any statutory enactment or law respecting health or safety. Indeed, the opposite is the case in the sense that the Landlord observed all applicable laws and met all of its required obligations by obeying the directives of the Department of Environment and ensuring a long-term solution to the water supply problem would be put in place.

[43] The Residential Tenancy Officer’s reliance on 9 (1) 2 is something with which I do not agree. My reading of that statutory condition, is that it equates the withdrawal of a service with the imposition of a rental increase. The point is that where a Landlord withdraws the service, it decreases its own cost and increases the cost directly to the tenant. As such, consistent with how rental increases occur, there must be proper notice given to the tenant that a service is going to

be withdrawn. This is not at all the type of situation that occurred here. The Landlord never sought to withdraw the service. It simply found itself, rightly or wrongly, with a water supply system that no longer met all the requirements of the Department of Environment, and which had to be replaced. That replacement necessarily took some time, and in the meantime the tenants were inconvenienced, but no one's health was in danger and no essential service was withheld. Accordingly, in my view the Residential Tenancy Officer made an error in her application of 9 (1) 2, and I do not support that conclusion.

[44] The Residential Tenancy Officer commented also in her decision that "the Landlord did not offer bottled water to the tenants at any time since the boil water advisory. This offer would have shown the Landlord's concern and would give the tenants some relief from constantly boiling the water." She then went on, without much in the way of logical justification, to award three months rent as compensation.

[45] I believe the comments about the Landlord supplying bottled water to be slightly unfair. More importantly, the Landlord kept all of the tenants in this community fully informed of the problem and what it was doing to solve it. Given the extensive physical work involved, it could hardly have escaped the notice of the tenants that a brand-new system was being constructed. Perhaps it might have been a good public relations gesture for Killam to have supplied water, but from my perspective the question is whether it was legally obligated to do so.

[46] As indicated earlier in this decision, the process of boiling enough water for those important uses was not a lengthy one, and based on evidence before me the amount of electricity needed to boil a large pot of water daily is relatively insignificant, indeed insignificant enough that the legal principle of *de minimis*

non curat lex applies [the law does not concern itself with trivialities]. Again, I do not mean to suggest that there was no inconvenience involved, but not every inconvenience must necessarily be compensated for.

[47] My understanding of the law is that a rental abatement is only applicable where the Landlord is in breach of its obligations under the lease. My own research has taken me to numerous cases where landlords have allowed their rental premises to become rundown and/or deteriorated to the point where they are no longer safe or barely habitable, and in such cases courts have not hesitated to allow substantial abatements. In some of these cases, landlords were subject to dozens if not hundreds of municipal work orders requiring them to upgrade the properties, which orders were either being ignored entirely or only attended to in a lackadaisical fashion. In such cases, the imposition of an abatement is not simply compensation for the lack of enjoyment by the tenants, but some measure of denunciation of the landlord's conduct and the view that it should not benefit by being allowed to collect full rents, notwithstanding its failure to provide a suitable premises.

[48] I have concluded that it is not a breach of the lease for the Landlord to have been faced with an unexpected need to upgrade one of the systems, and for it to have imposed a relatively minor inconvenience on its tenants during the time it took to rectify the problem. As such, there is no legal basis for damages or an abatement.

[49] Even if I am wrong in this conclusion, the amount of the abatement ordered was out of proportion to the problem being experienced. The Tenant was awarded three months of rent for what was at that time eleven months of inconvenience. This amounts to an abatement of approximately 27% of the rent.

I realize that this could also be expressed as two dollars per day, which makes it sound like something less, and which could be seen as the cost of buying bottled water. However, any abatement ought to take into account all of the things the Landlord is providing, and it should not seek the most expensive alternative. If I had found an actionable breach of the lease, I would have been inclined to order an abatement of something between 5% and 10%. However, as noted, I do not accept that there is a case here for the rental abatement.

[50] The Tenant supplied the court with a precedent, but it really does not assist. That case, *Window on the Commons Management v. Harper* [1997] NSJ No. 175, a decision of the Nova Scotia Court of Appeal, upheld a lower court's assessment of an abatement of rent equal to 25% of the rent during a period of time when the tenant's enjoyment of his apartment was severely diminished because of noise from jackhammering in the building during several months when major renovations were taking place. There was also a finding that water quality was affected, the elevators could not be used at times and building security was diminished. The circumstances described in that case are substantially more serious than those here.

[51] I was also referred to a Small Claims Court decision of adjudicator Stephen Johnston in a case (the names were redacted) involving a mobile home park landlord who had sought a rental increase during the time when the water supply was unfit, even after boiling. The adjudicator treated this as a withdrawal of service, and disallowed any such increase.

[52] Perhaps the closest case supplied by the Landlord was a decision of a different Residential Tenancy Officer in September 2011, involving its own manufactured home community in Enfield, Nova Scotia. The facts in that case

were that there had been a boil water advisory in effect for more than a year, and one of the tenants brought an application seeking compensation by way of reduced rent. The Residential Tenancy Officer in that case concluded that there was no violation of the *Residential Tenancies Act*, specifically 9 (1) 1, and concluded that "although the tenant has been inconvenienced by the continual water boil orders, no evidence has been presented to establish that the Landlord is responsible to compensate the tenant for such inconvenience." Although this decision is certainly not binding upon me, it is noteworthy that it involves the same landlord and that this would have been, to its knowledge, the prevailing view of the law at the Residential Tenancy Officer level.

[53] I agree with the conclusion of the officer in that case and, in the result, the appeal is allowed and the application of the Tenant for an abatement of rent or other compensation is dismissed.

Eric K. Slone, Adjudicator