

# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards  
Ministry of Housing and Social Development

## **DECISION**

### **Dispute Codes:**

CNC, MNDC, FF, OLC, RP,RR

### **Introduction**

This hearing was convened in response to an application filed by the tenant. Both parties were represented in the hearing and were given an opportunity to participate in the hearing and each provided submissions and affirmed testimony to this proceeding. Via an amended application the tenant seeks:

- Cancellation of a One month Notice to End Tenancy for Cause (the Notice to End) dated June 12, 2009, with and effective date of July 31, 2009.
- Money owed or compensation for damage or loss under the Act, Regulation or Tenancy Agreement
- For the landlord to comply with the Act, regulation or tenancy agreement
- For the landlord to make repairs
- To allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided.
- To recover the filing fee from the landlord for this application in amount of \$50.

The tenant's total monetary claim, on application, is for \$17,050.

During the hearing the landlord made an oral request for an Order of Possession in the event I were to dismiss the tenant's portion of the application seeking to cancel the landlord's Notice to End the tenancy.

I have reflected on all the submissions, testimony and relevant matters in this dispute and have reached a decision

### **Issue(s) to be Decided**

- Should the Notice to End Tenancy for Cause be cancelled? Is the landlord then entitled to an Order of Possession?
- Is the tenant entitled to the monetary amounts claimed?
- Should the landlord be made to comply with the Act/ regulation Tenancy Agreement? to make repairs to the unit, site or property?
- Should the tenant be allowed to reduce rent for a facility agreed upon but not provided ?
- Has the tenant established, on a *balance of probabilities*, that they have suffered a loss due to the landlord's neglect or failure to comply with the Act? And, if so established, did the tenant take reasonable steps to mitigate the loss? The burden of proving loss and damage rests on the claimant, and, there is an obligation upon the claimant to act reasonably to mitigate or minimize the loss.

### **Background and Evidence**

The tenancy is of a 4700 square foot house on acreage. The tenancy began on July 01, 2008. Rent is \$3000 payable on the first of each month. At the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of \$1500. The tenants are a family of 4, including 2 children.

The relevant, submissions, evidence and testimony before me is as follows:

A Residential Tenancy Agreement was entered between the tenant and landlord on June 18, 2008. A move in inspection was performed by the landlord and tenant on July 09, 2008, at which time a condition Inspection report was completed and a quantum of repairs and other conditions were agreed upon by the parties.

In November 2008, and again in January 2009 the landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. These Notices were subsequently withdrawn by the landlord after rent was paid. On June 12, 2009 the landlord served the tenant with a 1 Month Notice to End Tenancy for cause; *reason*: tenant is repeatedly late paying rent.

The parties do not dispute the following late payments of rent were made.

<i>Rent for:</i>	<i>made on:</i>
- November 1, 2008	November 28, 2008
- January 01, 2009	January 23, 2009
- February 1, 2009	March 16, 2009
- April 01, 2009	April 29, 2009
- May 15, 2009	-----
- June 01, 2009	June 11, 2009 – for May and June, 2009

The tenant makes the following claims for compensation:

The parties agree the house came with a lawn mower, but no ‘grass collector’ type of attachment. The tenant claims the landlord promised such a unit which has never materialized. The landlord testified the mower is a mulching mower and doesn’t need a collector, which was not promised – besides, the tenancy agreement is clear the lawn mowing is the tenant’s responsibility – and the landlord provided an adequate mower when he didn’t have to. The tenant is claiming **\$600** for the amount he had to pay to have the lawn raked each time the lawn was mowed, at \$30 x 20 mowing(s).

The tenant claims, and the landlord does not dispute, that the tenancy agreement called for the landlord to supply a dryer. On moving into the house there was no dryer in the rental unit, which was subsequently provided by the landlord – the tenant claims after one month – the landlord’s evidence indicates it was delivered on July 15, 2009. The tenant is claiming **\$200** compensation for breach of the tenancy agreement

The tenant testified, and the landlord does not dispute, they went without a working refrigerator for one month mid December 2008 to mid January 2009. The landlord was immediately advised and determined to obtain a replacement of his choice rather than allow a local retailer to replace the unit sooner. It was replaced after one month. The tenant seeks **\$300** as compensation for breach of the tenancy agreement and disruption of the tenancy.

The tenant testified that the family room in the house (approximately 600 square feet) had very soiled carpeting when they moved in. Tenants describe the carpet was so dirty that the room was not utilized for one month and items destined for the room were

stored elsewhere. Both parties agree the move in inspection report does not aptly reflect if the carpet was clean. The landlord provided evidence that several days prior to the move in, carpet cleaning was done in the house, but only a portion of the carpeting, and, it is advanced - not the family room. Professional carpet cleaning was done a month after the move in. The tenant seeks **\$400** compensation for loss of enjoyment of / inability to use the room for one month. The tenant claims, in addition, that after the carpeting in the family room was cleaned the odour and condition of the carpeting has made the room unusable – and they have not used it. The tenant testified that other family members, as well as their own children cannot remain in the room without incurring some adverse health implications, unlike other parts of the house. The landlord does not dispute they determined to obtain an assessment for mould in this room and have received the results, but has not disclosed them to the tenant, and did not provide same to this hearing. Regardless of the absence of a verifiable existence of a problem with the carpeting in the family or other aspects of this room, the tenant finds the room sufficiently objectionable that they have not used or enjoyed the room since they moved in. The tenant seeks \$400 x 12 months or **\$4800** compensation for loss of enjoyment.

The parties both testified about the outdoor pool (in ground swimming pool) on the tenancy's property. The tenant testified, and provided photographs of the pool, which is described by both parties as unusable and not operational in its state. The tenant claims it likely needs repairs following an assessment. It currently is covered and has not been serviced for the duration of this tenancy. The tenant claims there was mention that it had been used by the previous tenants with only minor issues. Although a prominent and beckoning feature of the outdoor property, the landlord testified the pool is destined to be filled in as the cost of its remediation is prohibitive. The tenant claims the pool was always part of the tenancy agreement. The landlord testified the pool was never in the tenancy agreement, because of its deteriorated state, and that had it been operational the property would have garnered far more rent. Indeed, there is no mention of the pool in the tenancy agreement or in any part of the Condition Inspection Report. The tenant seeks \$400 x 12 months or **\$4800** compensation for loss of use of a facility agreed upon but not provided.

The tenant further claims that the bathroom, which also houses the built-in hot tub, has been unusable for the duration of the tenancy. The hot tub loses water and there is a

high moisture content in this bathroom which affects the whole bathroom, the painted walls and ceiling are peeling and affected by moisture, the fixtures in the room are deteriorating, and the shower door has been broken since the outset of the tenancy. The tenant provided photographs which indicate peeling paint and a rusting fixture. The tenant testified they have asked the landlord for repairs which have not been done. The landlord provided an invoice showing the hot tub had been professionally cleaned and serviced during late August 2008 of this tenancy. Regardless, the tenant finds the room sufficiently unusable that they have not used or enjoyed this bathroom with hot tub since they moved in. The tenant seeks \$200 x 12 months or **\$2400** compensation for loss of enjoyment.

The tenant seeks compensation for loss of enjoyment due to lack of adequate heating of the house during cold months (October to March). The tenant claims, and the landlord does not dispute, that it has been a challenge to keep the large house adequately warm during the past, especially colder months. The tenant claims some rooms have no heating system to them at all, and for this reason the tenant has had to purchase auxiliary heaters for 2 rooms at a cost of **\$200**. The tenant further claims compensation of \$150 x 6 months, or **\$900** compensation for loss of enjoyment due to this issue.

The tenant testified that because the 3 fireplaces (2 gas, 1 wood-burning) were not professionally inspected to ensure they were safe to operate, they have not used them. They requested of the landlord they be inspected, which has not been done – thus they have not felt comfortable in using them. The tenant does not know if they are safe or unsafe as he has not tried to operate them. However, they are listed as part of the Tenancy Agreement, and at least two fireplaces are listed on the Condition Inspection report (den or family room ) as in good order. However, as previously referenced, the family room, which houses one of the fireplaces is claimed not used it its entirety. The tenant testified he didn't try the gas fireplaces during the move in inspection. The landlord testified that, although not inspected, the fireplaces are known to be operational as they were so during the previous tenancy, and unless the tenant can describe in which way they are not safe they are deemed operable. The tenant seeks \$75 x 6 months, or **\$450** compensation for loss of enjoyment.

Both parties agree that the central vacuum system is part of the tenancy agreement and has not been operational since the outset – the tenant has cleaned it and tried to fix it –

requested it of the landlord as well – to no avail. The tenant claims that in such a large house and in the manner that it is laid out, a central vacuum system is desirable over the vacuum cleaner they had to purchase. Tenant seeks \$100 x 12 months or **\$1200** compensation for a facility not provided under the tenancy agreement.

The tenant's amended claim is for \$16,250.

The tenant further seeks a quantum of repairs to the house, as well as a reduction of future rent for unattended repairs and conditions of the tenancy agreed upon but not provided.

### **Analysis**

The tenant applies to cancel the Notice to End, and, the landlord made an oral request for an Order of Possession. I am obligated to first make a finding in respect to the tenant's application and the landlord's request. Section 55(1) of the Residential Tenancy Act (the Act) states:

#### **Order of possession for the landlord**

**55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director **must** grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,

(a) the landlord makes an oral request for an order of possession, and

(b) the director dismisses the tenant's application or upholds the landlord's notice.

Based on the above testimony and evidence submitted by the landlord, and on the landlord's oral request for an Order of Possession I find the landlord had sufficient cause to issue a Notice to End for repeated late payments of rent. **I find** the landlord's Notice to end is valid and therefore **I dismiss** the tenant's application to cancel the Notice to end and I must grant the landlord an Order of Possession. Therefore, **I find** the Order of Possession will be effective **August 31, 2009**, and the tenancy will end. **I grant** the landlord such an Order. The Order has no effect if it is not served on the tenant. If the landlord serves the Order upon the tenant and the tenant fails to comply

with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

As I have found that the tenancy is ending, I expressly decline to make an Order that the landlord must make repairs to the rental unit, or an Order that the tenant is entitled to reductions of future rent.

As to the tenant's request for a monetary order in satisfaction of alleged damage or loss, it must be emphasized that in order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. Moreover, the applicant must satisfy each component of the test below:

#### Test For Damage and Loss Claims

1. Proof the damage or loss exists,
2. Proof the damage or loss were the result of the actions or neglect of the other party in violation of the *Act* or Agreement
3. Verification of the amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the *Act* by taking reasonable steps to mitigate or minimize the loss or damage.

Therefore, the claimant bears the burden of establishing each claim on *the balance of probabilities*. The claimant must prove the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally, the claimant must show that reasonable steps were taken to address the situation and to mitigate the damage or losses that were incurred.

Having stated the above, the Act and Regulations are clear as to where a landlord and tenant enter into a tenancy agreement, each is expected and obligated to perform their respective part of the contractual bargain with the other party, regardless of the circumstances. A tenant is expected and obligated to pay rent, and the landlord is expected and obligated to provide, for that rent, the premises as agreed to. This is the fundamental basis of a tenancy agreement. If the tenant does not pay all or part of the rent, the landlord is entitled to damages, and if the tenant is deprived of the use of all or

part of the premises, through no fault of their own, the tenant may be entitled to damages, in some cases, even where there has been no direct negligence on the part of the landlord. Such compensation would be in the form of an authorized abatement of rent or a monetary award for the portion or facility of the contracted premises which are affected. Therefore;

**I find** the tenant is not entitled to their claim for lawn maintenance in the absence of the landlord providing the requested mower attachment. The tenancy agreement aptly speaks to the parties' responsibilities. I prefer the landlord's testimony that the landlord provided the tenant with the key tool for the tenant to perform their respective part of the agreement. This portion of the tenant's claim is **dismissed** without leave to reapply.

**I find** the tenant is entitled to compensation for the lack of a dryer for one half month; and, in my determination as to the reason and degree of disruption to the tenant, as well as the landlord's effort to minimize any disruption to the tenant, I determine that **\$100** aptly compensates the tenant in this regard.

**I find** the tenant is entitled to compensation for the lack of a refrigerator for one month. In my determination as to the reason and degree of disruption to the tenant, as well as the landlord's effort to minimize any disruption to the tenant, I determine that the tenant's claim of **\$300** compensation aptly speaks to the tenant's disruption in this regard.

**I find** the tenant is entitled to compensation for a devaluation of the tenancy in respect to their impeded ability to utilize the family room in their first month of occupancy due to excessively dirty carpeting. I prefer to calculate this compensation as a proportional representation of the rent – in this case 12% or **\$360**.

**I find** that the landlord was provided with a 'mould report' to help clarify the understanding of issues and advance a solution to issues with the family room and its purported problems with the carpeting. However, in spite of having been provided with this information I find the landlord has failed to sufficiently disclose the information in a meaningful effort to help minimize disruption to the tenant. I am left to consider only the undisputed reasons and degree of disruption to the tenant on the preponderance of the tenant's evidence and on the balance of probabilities in respect to the tenant's claim. Therefore, **I find** that I prefer the tenant's account of the ongoing problems and issues with the family room carpeting. I find the tenant's inability to utilize this room for its



intended and contracted purpose clearly devalues the tenancy. The tenant is claiming \$400 x 12 month's compensation. In this regard I prefer to award the tenant compensation of **\$2700**.

**I prefer** the landlord's testimony that the outdoor swimming pool, for or without reasons, was expressly never in the tenancy agreement, and not part of the tenancy. Therefore, I decline to grant the tenant compensation in this regard as requested. This portion of the tenant's claim is **dismissed** without leave to reapply.

**I prefer** the tenant's account of the ongoing problems and issues with the bathroom which houses the hot tub. I find the landlord, when requested, tried to address the problem of the hot tub, but other issues prevented the bathroom from becoming a usable choice. It must be acknowledged that a bathroom with a hot tub, by its very nature, is an environment wrought with moisture related issues which require constant vigilance by whom occupies it. Regardless, I am left to consider the reason and degree of disruption to the tenant, as well as the landlord's effort to minimize any disruption to the tenant. I determine that the tenant's claim of \$200 x12 months as compensation for not being able to use this portion of the household, relative to its nature, is unreasonably high. However, the tenant's inability to utilize this room for its intended and contracted purpose clearly devalues the tenancy; and, on the preponderance of the evidence and on the balance of probabilities, I award the tenant compensation of **\$600**.

I find the tenant is entitled to compensation for the lack of heating to portions of the house. I grant the tenant the purported cost of two (2) auxiliary heaters in the amount of **\$200** as I determine this amount is reasonable. I also grant the tenants an additional **\$300** compensation for disruption and loss of enjoyment due to this issue.

**I find** the tenant does not meet the test for damage and loss in respect to their reason and determination for not utilizing the fireplaces and I **dismiss** this portion of the tenant's claim without leave to reapply.

I find the tenant is entitled to compensation for the lack of the central vacuum system as contracted in the tenancy agreement. I find the tenant's claim of \$100 x 12 months or **\$1200** aptly compensates the tenant in this regard.

For those entitlements based on an amount factored for 12 months to June 30, 2009  $(2700 + 600 + 1200 / 12)$  **I grant** the tenant a proportional amount for the month of July 2009 in the amount of **\$375**.

**I Order** the tenant may deduct the amount of **\$375** from the rent for **August 2009**.

As the tenant's claim has merit, the tenant is entitled to recovery of the filing fee in the amount of **\$100**. Therefore, the respective entitlements of the tenant are reflected in the following table:

Lack of a dryer in first month of occupancy	\$100
Lack of refrigerator for one month	\$300
Dirty carpet in family room / lack of use one month	\$360
Devaluation of tenancy re: family room issues	\$2700
Devaluation of tenancy re: bathroom w. hot tub	\$600
Devaluation of tenancy re: lack of central vacuum system	\$1200
Devaluation of tenancy / cost of heaters / lack of heating in portions of house	\$500
Proportional amount of loss for July 2009	\$375
Filing fee to tenant	\$100
<b>Owed to Tenant</b>	<b>\$6235.00</b>

### **Conclusion**

**I am granting** an Order of Possession to the landlord effective **August 31, 2009**. The tenant must be served with this Order of Possession. Should the tenant fail to comply

with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

**I am granting** the tenant an order under Section 67 of the Act for the amount of **\$6235**. if necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated July 13, 2009