



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## DECISION

### Dispute Codes:

**MNDC, FF**

### Introduction

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenants have made application for a monetary Order for loss or damage and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself, the Application for Dispute Resolution was reviewed, the hearing process was explained to the parties and the parties were provided an opportunity to ask questions in relation to the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present oral evidence and to make submissions to me.

### Issue to be Decided

Are the tenants entitled to compensation for the loss of a facility?

Are the tenants entitled to filing fee costs?

### Background and Evidence

This tenancy commenced in April 2005. The tenants rented a house on a large lot. The tenancy ended on August 1, 2009. Rent was initially \$1,250.00 per month, in 2007 rent had increased to \$1,300.00 and by November rent was \$1,348.00.

The tenants are claiming loss of use of a portion of their backyard based upon the following calculation:

June 2007 – July 2009	- loss of 1,092 sq. feet of the backyard valued at .19 per sq. foot = \$4,772.04
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The tenant testified that in June 2007 the landlord erected a fence along the side of their backyard, effectively cutting off a portion of the yard from their use. The tenant testimony and evidence indicates that the tenants were not displeased at the time, as

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the landlord was hoping to install a driveway along this portion of the lot, which would improve their access to the house. During the hearing the parties agreed that it was expected that the City of Surrey was going to bring sewer lines to the property and that the construction would create an opportunity for the landlord to complete a driveway. The tenant stated that they did park her brother's vehicle in the alleyway created by the fence.

During the hearing the parties agreed that the sewer lines were not installed and that the fence remained. The parties also agreed that in June 2009 the landlord moved the fence toward the house, eliminating a larger portion of the backyard. The tenant stated that the landlord then gave them a rent increase and, at this point, they called the landlord to enquire about the loss of use of backyard space. The tenant testified that they felt the fence had encroached on the yard and eliminated useful space and that when the landlord gave them a rent increase it was unjust, given the reduced size of the yard.

The tenant stated that when contacted the landlord told them that it "was just the way things are going to be around here." The landlord provided photographic evidence, as did the tenants, showing the fence. The landlord stated that the tenant's yard was unkempt and that he moved the fence and reduced the size of the yard in order to block the yard from view.

The tenant stated that they lost the use of approximately 45% of their yard and should be compensated for this loss.

## Analysis

Section 27 of the Act provides:

**27** (1) A landlord must not terminate or restrict a service or facility if

- (a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
- (b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

- (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and



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(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

The Act also provides definitions as to what constitutes a service or facility; garden and backyard space is not included in this definition.

I have considered whether the backyard was a material term of this tenancy. Neither party included as evidence a copy of a written tenancy agreement; however, I have determined that the tenants were given use of a backyard, which was not fully enclosed until June 2007, when a fence was installed. 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 goes to the root of a contract between the parties.

I find that the use of the backyard was not a material term of this tenancy. There is no evidence before me that the parties contracted to include a specific amount of backyard space during this tenancy. The tenants did not provide the landlord with any feedback on the fence or objections until the landlord moved the fence in June 2009. When the fence was moved in June 2009 the tenants continued to have use of a reasonably sized backyard for the final two months of their tenancy and I have determined that a sufficient portion of the backyard remained available for the exclusive use of the tenants. Therefore, I dismiss without leave to reapply the tenant's claim for compensation.

## Conclusion

The tenant's claim for compensation is dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 28, 2009.

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Dispute Resolution Officer