Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNSD MNDC FF

Introduction

This hearing convened via teleconference on July 3, 2014 for 35 minutes, September 9, 2014 for 3 hours 50 minutes, January 26, 2015 for 4 hours 41 minutes, and by written submission on January 29, 2015 for 2 hours and 20 minutes, for a total of 11 hours 26 minutes.

These matters dealt with an Application for Dispute Resolution filed by the Landlords on March 14, 2014, to obtain a Monetary Order for: damage to the unit, site or property; to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Tenants for this application.

On July 3, 2014, at the start of this hearing, I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the hearing would proceed.

The hearing sessions were attended by both Landlords, the Landlords legal counsel (Counsel), both Tenants and witnesses for both parties as indicated on the first two pages of this decision. All of the Landlords' submissions were provided by C.P. The Tenants' switched back and forth, submitting evidence. Therefore, as there are two Landlords and two Tenants listed in the style of cause, terms or references to either the Landlords or the Tenants importing the singular shall include the plural and vice versa, for the remainder of this decision. Each person gave affirmed testimony.

During the July 3, 2014 hearing session I heard arguments pertaining to the service of documents and evidence. The Tenants argued that the Landlords had served the Tenants' former legal counsel with the Landlord's evidence and as a result, the information was not received by the respondent Tenants in a timely fashion. When verifying the Landlord's evidence submission the Tenants stated that they received evidence packages from the Landlords that were different than the evidence package submitted to the Residential Tenancy Branch (RTB). Specifically, the Tenants were sent

black and white photos from the Landlord while the RTB was sent a mixture of black and white and colored photographs.

The Tenants argued that due to the time lapse of when they actually received the Landlords' submissions, they were rushed in compiling their responding evidence, which resulted in their evidence being compiled differently for the Residential Tenancy Branch (RTB) than the package that was served upon the applicant Landlords. Based on the foregoing arguments, the Tenants requested an adjournment.

The Landlords' Legal Counsel, hereinafter referred to as Counsel, confirmed that the original documents had been served upon the Tenants' legal counsel, as they had done in the past. Counsel noted that they were never advised that the Tenants were no longer engaged in the services of that legal counsel. Counsel submitted that when they found out that the Tenants were no longer working with that legal counsel his office sent copies of the documents and photos to the Tenants. Those copies did not include the original colored photos.

The Residential Tenancy Branch Rules of Procedure (Rules of Procedure) # 6.3 provides that at any time after the dispute resolution proceeding commences, the arbitrator may adjourn the dispute resolution proceeding to a later time at the request of any party or on the arbitrator's own initiative.

Section 62(3) of the Act stipulates that the director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

After careful consideration of the foregoing, I granted the adjournment request and issued the following Oral Orders, pursuant to section 62(3) of the Act:

1) The Tenants were ordered to serve one package of evidence to the applicant Landlords and one package to the RTB consisting of the exact same documents or photographs compiled in the exact same format with page numbers.
2) The Landlords were ordered to serve the Tenants with one copy of the exact same colored photographs that were previously served upon the RTB. The Landlords were granted leave to submit one package of evidence in response to the Tenants' submission.

Both parties were ordered to serve their evidence as soon as possible, without delay, and were cautioned that this was not an opportunity to submit piece meal evidence. The adjournment was granted and these matters were scheduled to reconvene on September 9, 2014.

On August 18, 2014 the RTB received 12 pages of evidence from the Landlords, in accordance with my order, as listed above. The evidence consisted of the following: a

one page cover letter; a letter dated July 10, 2014 from the municipality; 5 colored photographs; and a three page document titled “Property Maintenance”.

The Residential Tenancy Branch Rules of Procedure # 2.12 provides that in order to schedule a cross application, to be heard at the same time as another application, a party must apply as soon as possible, after being served the initial application; and so that the service provisions in Rule # 3.15 can be met. Rule # 3.15 Residential stipulates that in all events, the respondent’s evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

On August 20, 2014 the Tenants filed an application for Dispute Resolution which was scheduled to be heard as a cross application to the Landlords’ application. The hearing pertaining to the Landlords’ application had already convened on July 3, 2014 and the matter was adjourned specifically to allow service of evidence, as per my orders listed above. The Tenants did not request, nor were they granted leave, to file a cross application to be heard at the same time as the Landlord’s application.

Based on the above, I find that the Tenants’ application was not filed in a timely manner that would allow for the proper service of evidence, as required by the Residential Tenancy Branch Rules of Procedure. Furthermore, the Landlords’ application had already convened and could not be altered by having another application joined to it without an Order from the director granting leave to do so. Accordingly, I declined to hear the Tenants’ application. I dismissed the Tenants’ application, with leave to reapply.

On August 29, 2014 the RTB received a volume of evidence from the Tenants. The Tenants’ evidence consisted of 160 pages with a mixture of documents, emails, invoices, and colored photographs.

The hearing reconvened on September 9, 2014, during which I confirmed service of evidence and heard testimony from three of the Landlords’ witnesses and testimony submitted by the Landlord, C.P. During these submissions I had to remind both parties, numerous times, to present only relevant evidence. A brief explanation was provided describing the Administrative Tribunal process vs the Supreme Court process.

During the September 9, 2014, hearing session, the Tenants confirmed receipt of the Landlords’ evidence as ordered in the July 3, 2014 hearing session. The Tenants argued that they had only received one copy of that evidence. I reminded the Tenants that my order to both parties was to send one package of evidence, therefore, I found that the Landlords complied with my order and I accepted the Landlords’ evidence.

The Landlords confirmed receipt of the Tenants’ subsequent volume of evidence (160 pages) and submitted that due to the late date they had received that evidence, they were not able to provide a written response prior to the reconvened hearing, as granted by my oral order. Counsel argued that, in absence of their written response, they had

arranged to have five witnesses provide evidence at the September 9, 2014 reconvened hearing.

The Tenants disputed the Landlords' request to have witnesses attend and pointed to RTB fact sheet #*RTB-114* and argued that the Landlords' witnesses should not be allowed to provide evidence because the Tenants were not served a document listing the witnesses' names and telephone numbers, prior to the hearing, as outlined in the fact sheet.

RTB Fact Sheets provide guidance and general information to participants about the dispute resolution process and do not take precedence over the Residential Tenancy Act, (the Act), the Residential Tenancy Regulation, (the Regulation), or the Rules of Procedure which are provided for in Section 9(3) of the Act.

The Residential Tenancy Branch Rules of Procedure # 11.10 stipulates that at the start of a dispute resolution proceeding, a party may request that his or her witness or witnesses be permitted to provide evidence from a different location. The arbitrator will consider any prejudice to the other party when deciding whether to grant the request.

Notwithstanding the Tenants' arguments, I found that the Tenants delayed in serving their subsequent evidence package, in breach of my Order issued July 3, 2014, which stated that the Tenants were required to serve their evidence as soon as possible, without delay, and without delay. That delay prevented the Landlords the ability to submit a written response, as was previously granted. I found it would be prejudicial to Landlords if I denied their request to have witnesses attend this proceeding to present that evidence. Accordingly, I granted leave to hear submissions from the Landlords' witnesses.

At no time during the July 3, 2014 or the September 9, 2014 hearing sessions did the Tenants request permission to have witnesses attend the hearing on their behalf.

When the hearing time had expired during the September 9, 2014 session, I confirmed availability of all parties and the matter was reconvened to January 5, 2015 for a full day hearing. Both parties were advised of the importance of not changing this date, due to everyone's schedules and due to how far in advance my hearings were scheduled. Prior to ending the teleconference I issued the following Oral Orders, pursuant to section 62 of the Act:

> *No additional evidence would be accepted or considered; Counsel needed to ensure that his remaining two witnesses were at his office location to avoid delays in adding the witnesses into the proceeding. Additionally, no substitution of witnesses would be allowed.*

Despite my Orders, as listed above, on November 14, 2014 the RTB received a 3 page fax from the Landlords' Counsel which included a fax cover sheet; the Counsel's written request to reschedule the January 5, 2015 reconvened hearing due to "another matter

that was scheduled previous to our September hearing", and the Tenants' written response "reluctantly" agreeing to the rescheduling.

I noted that the alleged "previously scheduled" matter was not disclosed during the September 9th hearing session. After consideration that both parties had agreed in writing prior to the reconvened hearing, I granted leave to reschedule the matter, pursuant to Rules of Procedure # 6.1. Unfortunately, the matter of rescheduling this hearing became nothing more than a power struggle between the parties which caused unnecessary stress upon other unrelated parties who had to have their hearing times changed in attempts to accommodate these parties. The parties were not able to reach an agreement for a rescheduled date so I Ordered that the matter be reconvened on January 26, 2015, pursuant to section 62 of the Act.

The Rules of Procedure # 3.15 stipulates that the respondent must ensure documents and digital evidence that are intended to be relied on at the hearing are served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. In all events, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

The Tenants breached my September 9, 2014 Oral Orders, and breached the Rules of Procedure # 3.15 by submitting additional evidence and a list of 7 witnesses which they intended to rely upon. This evidence was received at the RTB on January 20, 2015.

After careful consideration of the foregoing breaches, I found that my directions and Orders had at times been deliberately ignored, as described above. Those actions thwart the very nature of this process and are considered to be bordering on an abuse of process. In order to avoid any further abuse of process I felt it necessary to provide the parties additional information regarding administrative tribunals and to provide firm directions on how this proceeding would continue. Following is a brief summary of what the parties were advised at the outset of the January 26, 2015 hearing session and how this matter proceeded:

> *This hearing is a Quasi-Judicial proceeding, conducted as an Administrative Tribunal, governed by the Residential Tenancy Act (RTA). It is not a tit for tat process where a party can ignore the Act and Rules of Procedure to ensure they submit the same amount of documentary evidence or the same number of witnesses. Administrative tribunals have been established by statute (Provincial Law), to resolve disputes between a private citizen and a central government department, such as claims to the RTB and involve disputes which require the application of specialized knowledge or expertise, such as the RTA and which by their nature or quantity are considered unsuitable for the ordinary courts, such as fixing a fair rent for premises or disputes for damages less than $25,000.00.*
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> *The main reasons for the creation of administrative tribunals was for the relief of congestion in the ordinary courts, the provision of a* ***speedier and cheaper procedure*** *than that afforded by the ordinary courts as tribunals avoid the*

formality of the ordinary courts; and the desire to have specific issues dealt with by persons with an intimate knowledge and experience of the problems involved. The Residential Tenancy Branch (RTB) has issued policy guidelines which are intended to provide a statement of policy and were developed in the context of common law. However, the RTA is the Statute or law and prevails over the policy guidelines. Section 9(3) of the RTA provides that the director may establish and publish rules of procedure for the conduct of proceedings under Part 5 [Resolving Disputes].

Section 64(3) of the RTA stipulates that subject to the rules of procedure established under section 9 (3) [director's powers and duties], the director may (a) deal with any procedural issue that arises,(b) make interim or temporary orders, and (c) amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 75 of the RTA provides that the director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be necessary and appropriate, and relevant to the dispute resolution proceeding.

In Berezowski V. British Columbia (Residential Tenancy Branch) 2014 BCSC 363, Vancouver Registry, March 5, 2014, The Honourable Madam Justice Fitzpatrick provided:

> *[150] It must be kept in mind that the underlying objective of the Act and the Regulations is to provide a fairly summary and inexpensive proceeding for these types of disputes. This is confirmed by the considerable flexibility afforded to the dispute resolution officer in terms of dictating procedure and the admission of various types of evidence.*

Section 74 of the RTA stipulates that the director may conduct a hearing under this Division in the manner he or she considers appropriate. The director may hold a hearing in person, in writing, by telephone, video conference or other electronic means, or by any combination.

Based on the above, I found it necessary to take a firm stance with how this hearing would proceed to avoid further delay or breaches and in order to avoid a breach of the principals of natural justice. Accordingly, I ordered pursuant to section 74 of the RTA, that the hearing would proceed as follows:

Prior to the January 26, 2015, hearing session the Landlords and their witnesses had completed 2 hours and 50 minutes of oral submissions. After consideration of the fact pattern and documentary evidence before me, I granted the Landlords an additional 1 hour for oral submissions, for a total of 3 hours and 50 minutes. The Tenants were granted an equal amount of time, 3 hours and 50 minutes, for

oral submissions and their witnesses' submissions, to be provided during the January 26, 2015 session.

The Tenants were granted leave to call witnesses during their allotted time for oral submission, in order to ensure administrative fairness, despite the Tenants' breaches of my previous Orders and the Rules of Procedure. The Tenants were instructed to call witnesses who would be providing evidence relevant to the matters before me and who were not simply character witnesses.

Each party was provided an opportunity to present closing remarks prior to adjourning the matters to a written proceeding. The parties were advised that, upon completion of their oral submissions, the hearing would adjourn to a written proceeding during which I would consider the evidence that had been accepted prior to September 9, 2014; and which is listed on the second page of this decision.

Additional procedural issues which occurred during the January 26, 2015 hearing session that were worthy of noting were: (1) neither party utilized the full amount of time that had been allotted to them during the January 26, 2015 session; (2) several times during the hearing the male Tenant, J.T. had to repeat the female Tenant's (C.Q.) submissions in order for them to be heard, despite my constant directions for C.Q. to speak louder and speak directly into the telephone; (3) the Tenants continued to speak over me at times when I attempted to re-direct them; (4) The Tenants stated they were having issues with their "land line cordless telephone" and that it was cutting in and out of service; (6) When TT Witness #1 was called to join the hearing the call was directed to his voice mail. Accordingly, TT Witness # 1 did not provide testimony; and (5) I received notice from the RTB after the conclusion of January 26, 2015 hearing session, that the Tenants had made yet another submission of evidence that was received at the Burnaby RTB via fax on January 23, 2015. That additional evidence will not be considered in my Decision.

Issue(s) to be Decided

Have the Landlords met the burden of proof to be awarded a Monetary Order?

Background and Evidence

A summary of the oral submissions and documentary evidence is provided below and includes only that which is relevant to the matters before me.

The parties executed a written tenancy agreement for a month to month tenancy that began on November 15, 2012. The Tenants were required to pay rent of $2,000.00 on the first of each month and on November 13, 2012 the Tenants paid $1,000.00 as the security deposit. The rental property was a house located on less than 1 acre on an urban municipal lot.

It was undisputed that the Tenants informed the Landlords of their intent to set up a garden at the rental property. The Landlord submitted that he interpreted the Tenants' intentions were to set up what he referred to as being a regular garden, one that would be in a small section of the ground and would grow a few vegetables. He argued that at no time did the Tenants inform him that their intentions were to move more than 80 gravel truck loads of a compost type material onto the rental property to create a garden of such a large size.

The Landlord testified that on or about August 19, 2013, the Municipality (also referred to as the City) informed the Landlords that their property was in breach of City By-law 2007, No. 16393 and ordered the Landlords to rectify the breach within 22 days. A copy of the infraction letter was submitted at page 84 of the Landlords' evidence.

The Landlord testified that on Christmas Eve (December 24, 2013) they were told by the Tenants that the Tenants would look after everything with the City once their lawyer returned from vacation. The Tenants also told the Landlords that they would cover the Landlords' legal fees in defending this garden on behalf of the Tenants. The Landlord pointed to page 36 of their evidence which consisted of an email that was sent to them from the Tenants on December 26, 2013 which states:

> *Attached is the original Landlord Tenant Garden Agreement that we wrote up in September 2013. As repeated numerous times, we take full responsibility for the garden and materials we brought to the property and have every intention of removing it at the end of our tenancy…*
>
> *… PS. Since our lawyer and the lawyer we were planning to hire for you are both on holiday maybe our only option to reply to the court within the deadline this Saturday, December 28th, 2013 is to take your suggestion for the moment and have your lawyer complete the affidavit and response package. We are open to covering the cost but need to speak to the lawyer first to know what we are agreeing to…*

The Landlords submitted an invoice for the above mentioned legal fees of $1,568.00 at page #160 of their evidence which they now seek to recover from the Tenants.

The Landlords stated that they returned from their vacation near the end of January 2014 when they drove by the property and noticed that the Tenants were in the process of removing some of the compost material. They did not get out of their car and therefore could not see the entire property and could not see that a large quantity of the compost remained spread out over the property. The Landlords argued that they were mistaken when they told their legal counsel that it appeared that the property had been cleaned up. They said that they were not aware of the remaining compost mulch product until they received notice from the City bylaw officers that they were not satisfied with the attempted clean up.

The Landlord pointed to the letter that was submitted at page 131 of the Tenants' evidence, which was written by the Tenant's legal counsel for the July 3, 2014 hearing; which stated the following at paragraph 3 as follows:

> *In the week of January 13, 2014, the tenants (my clients), at their own cost, voluntarily removed their entire garden off of the property (address of property) where they were renting.*

The Landlord then pointed to paragraph 7 of that same letter which states:

> *The City was satisfied and so was the landlord who came by the property and appeared to have communicated through his counsel that all is well.*

The Landlords argued that they had not indicated at that time that the City was satisfied with the cleanup. The Landlord referenced photographs found at pages 150 and 151 of their evidence which displayed the amount of compost that remained on the property after the Tenants finished their clean up. He indicated that the photos were taken during the Landlords' final cleanup that had been conducted by the Landlords' contractors and was completed on June 2, 2014.

After reviewing the actual costs incurred the Landlord stated they wished to reduce their monetary claim from $25,000.00 to $12,710.60. That claim consisted of $745.50 for the geo-engineer report, $10,397.10 in cleanup costs, plus $1,568.00 in legal fees, as supported by the invoices provided in their evidence.

The Landlord adduced that their contractor was hired to do extra work on the property, after he completed the removal of the compost material. He argued that the extra work involved the removal of 4 or 5 old tree stumps and other materials and charges for that extra work were not included in the contractor's invoice of $10,397.10.

LL Witness #1's Evidence:

LL Witness #1 testified that he was the Landlords' former legal counsel and he was involved with the dispute involving the City in the early stages. During the course of his submission the Witness pointed to several documents provided in the Landlords' evidence and he confirmed his knowledge and or involvement in creating those documents.

LL Witness #1 submitted that the Landlords had driven by the property and told him on approximately February 2, 2014, that it had appeared that the Tenants had cleaned up the property by removing the compost material as ordered by the City; which he communicated to the Tenants' lawyer.

Then on February 6, 2014 an email was received from the City which indicated that the City Officers conducted an inspection of the property on February 4, 2014. The email was at page 46 of the Landlords' documentary evidence and stated as follows:

> *There appears to be a large area of the property, especially in the north, where there is still a substantial amount of material including woodchips, manure etc. This is over an area of approximately 680 square metres [sic]. Although most of it has been removed I have been advised that there is still about 4 to 6 inches of material across this area. There is also a pile of material beside a tree on the west side of the property. We request that the aforementioned material be removed as well.*

LL Witness # 1 submitted that he continued to engage in email communications with the Tenants' lawyers and on February 18, 2014, he provided a clear description of what work was still required, as found at page 47 of the Landlords' evidence. On March 13, 2014 the Tenants were given notice, through communications with their lawyer, that failure to remove the material by Monday would result in further action, as provided at page 49 of the Landlords' evidence.

LL Witness #1 stated that based on his knowledge, the City seemed satisfied once the Landlord finished his attempts at cleaning up the compost, which occurred after the Tenants vacated the property. He noted that the Landlords had to take action to clean up the property in order to have the City's Supreme Court Action stopped.

During the Tenants questions to LL Witness # 1, it was acknowledged that LL Witness #1 had sent an email to the Tenants' lawyer indicating that the Landlord had driven by the property and thought it was cleaned up; however, LL Witness # 1 argued that it was obvious that it was not cleaned up to the satisfaction of the City officials as noted in their communications a few days later. LL Witness #1 argued that the facts speak to the actual condition of the property during the City's February 4, 2014, inspection.

LL Witness #2's Evidence:

LL Witness # 2 submitted evidence that he has 30 years of experience working for a municipality in development planning. He stated that he had seen the rental property in the fall of 2012, prior to these Tenants moving in, and would describe it as being a nicely landscaped property, approximately 1 acre in size, with one house.

LL Witness # 2 stated that he had attended the property with the Landlord after the Tenants had brought a large amount of composting material onto the property. He described the material as being "hog fuel and smelling of hog manure"; a mixture consisting of chewed up bark mulch and unknown products.

LL Witness # 2 testified that the composting material had been spread on the ground, everywhere on the property and in addition, there were several piles of the compost material that had not been spread out. He argued that the bulk of the composting material was on the North side of the property.

LL Witness # 2 stated that he attended the property a third time, in March 2014, after the Tenants had moved out. At that time he saw that the hills of composting material had been removed but there was still quite a lot of the composting material that remained and was spread around on the ground. He argued that the compost material had been flattened out or smoothed out over the property. He did not measure the depth of the compost material that remained spread out on the property in March 2014. He stated that he has not been back to the property since March 2014.

The Tenants' questioned LL Witness # 2 during which LL Witness #2 acknowledged that he had attended a City meeting, with the Landlord, regarding the presence of the compost material and how that breached the bylaws. He said that it was during that meeting when he heard the City officials take a hard stand against the Landlords regarding the broken by-laws. LL Witness #2 said he recalled the City Officials mentioning by-laws relating to zoning and sanitation during that meeting.

LL Witness #3's Evidence:

LL Witness #3 testified he was a Geo-Engineer and that he was hired by the Landlords in early March 2014 to conduct an inspection of the rental property to determine the volume of compost material that had been spread on the property. He conducted the inspection on March 5, 2014, and he authored the report which included two typed pages, a map created through the City mapping system, and 12 photographs, which were submitted at pages 152 to 157 in the Landlords' documentary evidence. LL Witness #3 submitted that the Landlord had been invoiced $745.50 for the cost of his inspection and written report and that invoice has since been paid.

LL Witness #3 submitted that, based on is experience, there was approximately 1156 square meters of composting material that remained spread out over the property. He determined that it would take approximately 32 truckloads to remove the remaining compost material. He noted that when that type of material is disturbed, after being flattened on the ground, it would bulk up to a higher volume and may take a few more truck loads than what was initially estimated, in order to have it all removed. LL Witness # 3 clarified that his references to truckloads were equal to the size of a standard gravel truck load.

The Tenants questioned LL Witness # 3 to clarify if his volume estimates included the concrete cylinders and tree stumps that were on the property. LL Witness #3 replied that the estimate provided in his report was based solely on the wood chip (composted) material. LL Witness #3 argued that it was a very simple calculation (area x depth) to determine the order of magnitude. He noted that the pictures in his report spoke for themselves and the average depth was determined by looking at the depth of the compost fill material at the corner which was 12 inches and along the driveways which was 4 to 6 inches.

LL Witness # 4's Evidence:

LL Witness # 4 was introduced as the current tenant of the subject rental property. He submitted that he first viewed the property in late February 2014, from the street, and while standing in both driveways, as the Tenants were still occupying the property. He was not able to view the full property until just prior to the start of his tenancy in mid-March 2014, at which time he saw the yard had a lot of wood chips or mulch spread throughout from around the side, to the right/back of the house, half way down the back, and on the left of the driveway.

LL Witness # 4 submitted that there were a lot of bugs and flies that were attracted to the mulch material and that it was very difficult to cut the grass where the mulch had been spread. He noted the mulch material was not removed by the Landlords' contractor until June 2014

LL Witness # 5's Evidence:

LL Witness # 5 submitted that he is a contractor and has worked on various projects with the Landlord since approximately 2002. He testified that he was hired by the Landlords to remove the organic compost/mulch material from the Landlords' rental property. He noted that when he viewed the property in June 2014, he saw an organic mat, big piles of the compost mulch that were higher than 24", above normal grade on the north side of the property, and compost mulch spread loosely on the south side.

LL Witness # 5 testified that he removed 27 loads of the compost mulch material for which he billed the Landlords for truck loading, 12 hours machine time, and dump fees; as per his invoice at page 159 of the Landlords' evidence. That invoice has since been paid by the Landlords. He confirmed that there were other materials on the property, such as the fibre / filter mat, tree stumps, and concrete cylinders which he did not remove.

Through questioning from the Tenants LL Witness # 5 was insistent that the work he completed on the rental property June 7, 2014, was strictly for the removal of the compost mulch material and did not involve removing anything else. He noted that when he finished the removal of the compost mulch material he was at the grade level and not below. LL Witness # 5 stated that he has knowledge that the Landlord brought his own equipment onto the property to conduct other work, such as stump removal, after LL Witness # 5 had completed his work to remove the compost mulch material.

Tenants' Submissions

In response to the Landlords' submissions, the Tenants testified that they brought 60 to 80 truckloads of compost material onto the property after they received the Landlords' permission to create their garden. They stated that the first load of compost mulch was delivered to the rental property on June 6, 2013.

The Tenants asserted that they removed 92 truckloads of that compost material, prior to vacating the property at the end of February 2014. The Tenants submitted that the Landlords breached the Act first, by failing to complete a move in or a move out condition inspection report form. The Tenants argued that, in absence of a condition inspection report form, the Landlords lacked evidence to show that the material that the Landlords had removed from the property was material brought onto the rental property by the Tenants. As a result, the Tenants request that the Landlords' application be dismissed and they be awarded the return of double their security deposit.

The Tenants submitted evidence of the condition of the exterior rental property, yard, and land, prior to the onset of their tenancy, which included: oral testimony; pictures; photographs downloaded from the internet which were taken in 2010 and 2013; and photographs taken by themselves in 2013 and 2014. The Tenants argued that there were large sections of blackberry bushes and toxic hogweed growing up to 15' high that were present prior to the start of their tenancy.

The Tenants submitted that the Landlords delayed until June 2013 before bringing in a contractor to remove the hogweed; and when they did, the Landlord failed to excavate the toxic hogweed properly. The Tenants argued that because the hogweed was not properly removed they buried the weed under piles of their compost material to prevent the hogweed from growing back. C.Q. stated that "the sole purpose" they brought the compost onto the property was to "bury the hogweed". She immediately began to argue that the Landlords knew about their intent to build their garden and they authorized them to do so.

The Tenants turned to their evidence pages 64 and 65 which included a copy of a brochure on the creation of tree wells. The Tenants stated that they submitted this evidence to support that their actions of placing the compost mulch around the base of the trees was to create tree wells and that was a benefit to the health of the trees, as they had previously been neglected.

The Tenants testified that they had their contractor remove 50 truckloads, which were 18.35 cubic meters (gravel truck plus pony trailer), and by their calculations that would be 3 to 4 times more than the amount the City stated had to be removed. They referenced pages 46, 152, 159, of the Landlords' evidence and argued that the City Engineer's and the Landlords' Contractor's estimates did not add up to their calculations; therefore the Landlord would have had other material removed, other than their compost mulch.

The Tenants referenced several pages of photographs provided in their evidence and argued that their evidence supports that they had completely removed their garden. In addition, they argued that the photo at page 122 of their evidence, taken after they had moved out, shows a pile of material that was a mixture of the material the Tenants left behind, earth, stumps, hogweed, and blackberry bush material. The Tenants argued that the photographs from before and after the Landlords' excavation of their garden material shows a lower grade than what the property was at the start of their tenancy.

The Tenants acknowledged that they had sent an email to the Landlords December 26, 2013, which was provided at page 36 of the Landlords' evidence, and that the second last paragraph stated:

> *PS. Since our lawyer and the lawyer we were planning to hire for you are both on holiday maybe our only option to reply to the court within the deadline this Saturday, Dec. 28th, 2013 is to take your suggestion for the moment and have your lawyer complete the affidavit and response package. We are open to covering the cost but need to speak to the lawyer first.*

The Tenants argued that that agreement was contingent on the Landlord agreeing to a five year tenancy.

The Tenants alleged that they "did not break City bylaws"; rather, they were given notice that the property was unsightly. The Tenants confirmed that they had agreed to clean up the property. When asked how many loads were brought onto the property the Tenants confirmed that they did not know how many loads were dumped on the property because the compost mulch material had been donated to them. They stated that many of the loads were brought onto the property at times when they were not home. They stated that they determined the number of loads of compost mulch to be 60 to 80 based on the number of loads they had removed.

Counsel questioned why the Tenants had submitted two invoices, from different companies, as evidence for the removal of the compost mulch. The Tenants responded that they had their garden material moved to the new location of their garden and the other invoice was for the excavator work. The Tenants submitted that the last load was removed mid- January on the 14th or 15th, 2014. Counsel requested further clarification and noted that the excavator's invoice showed work on January 20, 2014. The Tenants responded by pointing to their evidence page 146, which included the invoice dated January 14, 2014 and argued that January 14, 2014 was the date the last load was removed from the property.

During cross examination Counsel reviewed emails issued between the Tenants' lawyer and the Landlords' formal legal counsel in February and March 2014. The Tenants submitted that they had no knowledge of and they had not seen those documents prior to the start of this hearing because they did not retain the services of their legal counsel after the end of January 2014.

Counsel argued that when considering the responses written by the Tenants' lawyer and after considering the letter written by the Tenants' lawyer for the July 2014 hearing, submitted at page 131 of the Tenants' evidence; those responses give the impression that the Tenants' lawyer was still retained by the Tenants. Furthermore, the Tenants did not provide the Landlords with instructions that they no longer retained the services of their lawyer. The Tenants held firm to their submissions that their lawyer did not inform them of any communications after the end of January 2014.

TT Witness # 2's Evidence:

TT Witness #2 testified that he was the contractor hired by the Tenants to remove 50 plus loads of the compost mulch from the rental property. He submitted that he hauled 25 loads which included the regular tandem dump truck box plus the pony or pup trailer. He stated that the tandem box was 14 or 15 cubic yards and the pony trailer was 11 or 12 cubic yards.

TT Witness # 2 submitted that he was hired to remove the garden. He indicated that he followed the instructions provided by the Tenants on what to remove and that he knew to stop when he hit the ground.

Counsel questioned TT Witness # 2 during which it was confirmed that TT Witness # 2 removed long piles of wood chip material from the garden. He stated that he could not recall how many piles were actually removed only that they were about 3 feet wide and 30 feet long. TT Witness # 2 stated that when he finished removing the piles there was nothing left imbedded in the ground in the garden. He clarified that he had been there 3 or 4 days removing the piles and that it was pretty clean once he finished in mid-January 2014.

TT Witness # 3's Evidence:

TT Witness # 3 testified that he has lived in the same neighbourhood as the subject rental property since the summer of 2008. He submitted that he viewed the rental property in May 2014, and late December 2014 or early January 2015, after the Tenants had moved out and at that time he could see that "all of the garden was gone".

Through questioning TT Witness # 3 confirmed that during his aforementioned viewings of the property he saw the property from the driveway, inside his vehicle, and that he did not walk around the property.

TT Witness # 4's Evidence:

TT Witness # 4 testified that she was attending on behalf of the excavating company that was hired by the Landlords to "flail mow" the north side of the property. She confirmed that there was the presence of hogweed in that area of the property and that hogweed material was chipped up, mowed, and left on the ground.

TT Witness # 5's Evidence:

TT Witness # 5 was introduced as a Public Health Inspector currently employed as a health inspector in a different city than where the rental property is located. He submitted that he witnessed when the garden was removed. He said that when he drove by the rental property after the Tenants moved out, late February or March 2014, he noted that all traces of the garden were removed and the lawn appeared to be ready

for lawn seeding. He confirmed that when he attended the property and had walked around the house he saw some wood chips / compost material on the ground but he did not see any tree stumps at that time.

During Counsel's questions TT Witness # 5 testified that the only time he got out of the vehicle to view the property was after the Tenants had moved out, at which time he saw that the land was flat and the garden was removed.

Counsel referenced a letter on page 69 of the Tenants' evidence and confirmed that TT Witness # 5 authored that letter. Counsel questioned whether TT Witness #5 was aware of the City by-laws in which the rental property was located, to which TT Witness # 5 replied "I can't say that I am".

Final Submissions

Counsel submitted that in addition to their written statement they wanted to point out that the Tenants viewed the property inside and out prior to signing the tenancy agreement; the Tenants never complained about issues not getting resolved during the tenancy; the Tenants removed some of the compost mulch material but not all of it; ; the City was not satisfied with the Tenants' clean up; the Landlords then had to remove the remaining compost mulch material; on February 26, 2014 the Tenants' legal counsel was sent further communication regarding these matters; the evidence supports the Landlords hired an engineer to prepare a report, hired a company to remove the remaining compost material, and had to pay legal costs for which the Tenants had assured would be paid for by the Tenants. Counsel argued that he found the Tenants' submissions that they had no contact from their legal counsel after the end of January 2014 to be remarkable when considering the communications that were being sent to that counsel and provided in the documentary evidence.

The Tenants asserted that the Landlords cannot prove that the material the Landlords had removed was left by the Tenants. Their evidence proves that they removed 92 truckloads of compost material and that the estimates submitted by the Landlords were exaggerated, based on the Tenants' calculations. The Tenants noted that a condition inspection report form was not completed at move in or at move out; therefore, they are seeking the return of double their security deposit. The evidence proves that on January 29, 2014, the Landlords told their legal counsel that he and the City were satisfied with the cleanup and the file would be closed. The Tenants were insistent that their lawyer did not act on their behalf in any matter after the end of January 2014 and therefore, they did not receive, see, or know about the communications between their former lawyer and the Landlords' formal legal counsel that occurred in February and March 2014.

The following relevant information was submitted in the Tenants' documentary evidence and was provided at:

1) Page 88, an email issued by the Tenants to the Landlords on December 26, 2013 at 1:45 p.m. and states at paragraph 2, sentence # 2

> *As repeated numerous times, we take full responsibility for the garden and materials we brought to the property and have every intention of removing it at the end of our tenancy.*

2) Page 101 an email sent on March 19, 2014 at 11:17, by the Tenants' lawyer to the Landlords' former legal counsel, not their current Counsel who had served the documents, which states at paragraph 1, sentence # 1

> *…,our office received from your client [Landlords' name], the arbitration documents. Please be advised that our clients are handling this arbitration for your client, withholding the damage deposit.*
>
> *Please ask your client to directly contact our clients at their new address… [Address listed]*

3) Page 148 a Statement of Account issued to the Tenants from their lawyer for services rendered between January 13, 2014 up to February 19, 2014 and which provides a list of services including:

Jan 30, 14	Email to City
Feb 18, 14	Email to client: Instruction
Feb 18, 14	review of email from [Landlords' lawyer's name]
Feb. 18, 14	Email to [Landlords' lawyer's name]
Feb 19, 14	Conversation with client
Feb 19, 14	Review the file
Feb 19, 14	Draft Letters to [Landlords' lawyer's name]
Feb 19, 14	Conversation with Client

The following relevant information was submitted in the Landlords' documentary evidence and was provided at

1) Page 45, an email sent by the Tenants' lawyer to the Landlords' Counsel on February 03, 2014 which states:

> *Hopefully a by-law enforcement officer has already inspected the property.*

2) Page 46, an email sent by the City to the Landlords' Counsel on February 06, 2014; which states:

> *Further to our conversations on this matter, the City's By-law Enforcement Officers conducted an inspection of the property on February 4th. There appears to be a large area of the property, especially in the north, where there is still a substantial amount of material including woodchips, manure*

etc. This is over an area of approximately 680 square metres. Although most of it has been removed I have been advised that there is still about 4 to 6 inches of material across this area. There is also a pile of material beside a tree on the west side of the property. We request that the aforementioned material be removed as well.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*.

In the case of verbal testimony when one party submits their version of events, in support of their claim, and the other party disputes that version, it is incumbent on the party making the claim to provide sufficient evidence to corroborate their version of events. In the absence of any evidence to support their version of events or to doubt the credibility of the parties, the party making the claim would fail to meet this burden.

The undisputed evidence in this case is that the Landlords gave the Tenants permission to create a garden on the rental property. I accept the Landlords' submission that it is reasonable to conclude that when a person states they are going to create a garden to grow their own food they intend to plant seeds in the ground in a manner that is common to regular sized vegetable gardens normally found in an urban residential neighborhood.

The Tenants argued that they had verbally told the Landlords' of their intent to build a garden large enough to feed their family; however, there was no documentary evidence before me that would prove that the Tenants informed the Landlords of their intent to create a garden of such a large scale or that they would be moving 60-80 loads of a compost / mulch / manure product onto the property in order to establish a "permaculture" garden. Accordingly, there is insufficient evidence to prove the Landlords had prior knowledge of the Tenants' plan to bring the compost mulch product onto the property.

Section 21 of the Regulations provides that in dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The Tenants submitted extensive evidence and oral testimony as to the condition of the rental property prior to the start of their tenancy and both parties submitted volumes of evidence and oral testimony to prove the condition of the property at the end of the

tenancy. Accordingly, I dismiss the Tenant's submissions that this application should be dismissed on the basis that condition inspection report forms, detailing the condition of the land in which the rental house sits upon, were not completed. I dismiss the Tenant's submission as there was a preponderance of evidence to prove the condition of the property before and after this tenancy, as provided under Section 21 of the Regulations.

Notwithstanding the Tenants' argument that they removed all the product and were not responsible for anything left on the property once their lawyer received the Landlords' Counsel's email on January 30, 2014 that stated "…*As the property has now been cleared to the satisfaction of the City and my client…"*; and after consideration of the circumstances which provided that the Landlord simply drove by the property and did not walk through it to conduct a full inspection or the fact that the City had not completed their final inspection at that time, I find that Counsel made an innocent misrepresentation of the facts in his January 30, 2014, email.

The aforementioned facts were clarified in the Tenants' lawyer's email to the Landlords' Counsel on February 3, 2014 where she states: "*Hopefully a by-law enforcement officer has already inspected the property".* Additional clarification was provided in the City's email to the Landlords' Counsel on February 6, 2014, which was subsequently forwarded to the Tenants' lawyer, regarding the City's February 4, 2014 inspection, where the City wrote:

> *…There appears to be a large area of the property, especially in the north, where there is still a substantial amount of material including woodchips, manure etc…*
>
> *…Although most of it has been removed I have been advised that there is still about 4 to 6 inches of material across this area. There is also a pile of material beside a tree on the west side of the property. We request that the aforementioned material be removed as well.*

Based on the above, I find that the facts, relating to the presence of compost mulch material still on the rental property, were clarified in a reasonable amount of time after the innocent misrepresentation that was made on January 30, 2014.

The Tenants submitted contradictory evidence on several occasions throughout their submissions. In their opening statement the Tenants submitted that there were 60 to 80 gravel truck loads of compost mulch brought onto the property after receiving permission to establish a garden. Then they stated that they did not know how many truck loads were brought onto the property as it had been donated to them and delivered at times when they were not home. However, in their final submission the Tenants stated that they removed 92 truckloads of compost and yet TT Witness # 2 submitted that he removed 50 plus loads which included 25 loads of the tandem box plus 25 smaller loads in the pony trailer. The Tenants argued that the compost mulch material was donated for the purpose of establishing their "permaculture" garden and

later argued that “the sole purpose” they brought the compost onto the property was to bury the hogweed and/or to create tree wells.

The Tenants then argued that all of their garden material had been removed from the rental property and that the last load was removed on January 14, 2014. I note that the Tenants and their witnesses’ submissions focused on the “garden” having been removed and did not speak to compost mulch material that had remained in other areas of the rental property. The Tenants submitted a large amount of information about the formation of tree wells and hogweed, but never clarified if that was their excuse for leaving compost mulch on the property. Despite Counsel’s questioning about why the excavator invoice showed charges for work on January 15, 16, and 20, 2014, the Tenants held their position that all of the material from their garden had been removed and moved to the location of their new garden on or before January 14, 2014.

The Tenants were insistent that that they had no contact with their lawyer, after January 31, 2014, and that they had no prior knowledge of the communications between their lawyer and the Landlords’ Counsel regarding the City’s February 2014 inspection. However, as noted above, the Tenants submitted documentary evidence at page 148 of their evidence which included their lawyer’s statement of account which clearly indicated that they had continued communication with their lawyer until February 19, 2014. There was additional evidence which confirmed their lawyer received and communicated information with the Landlords’ former Counsel as late as March 19, 2014.

Based on the foregoing contradictions, I favored the Landlords’ submissions over the Tenants’ as the Landlords’ submissions were forthright, consistent, and credible. The Landlords readily admitted that they did not complete condition inspection report forms and that they gave the Tenants’ permission to establish a garden, albeit one that they thought would be of a regular size.

It was undisputed that the Tenants removed some of the compost mulch product; however, the Tenants’ own evidence supports that their excavator continued to work on the property after the last load was taken away on January 14, 2014. The excavator’s invoice shows an additional 10.25 hours of work on January 15 and 16, 2014, prior to the move charge [*which would be a charge to move the equipment on or off the property*] on January 16, 2014.

Based on the above, I find the Landlords’ explanation that the Tenants removed some of the compost mulch material leaving a large amount spread out over the property and some piled at the north end of the property to be reasonable given the circumstances presented to me during the hearing.

It was undisputed that the Tenants entered into an agreement with the Landlords where they agreed as follows:

> *As repeated numerous times, we take full responsibility for the **garden and materials** we brought to the property and have every intention of removing it at the end of our tenancy. [my bolding added]*

It was further undisputed that on December 26, 2013 the Tenants sent an email which included the following:

> *As repeated numerous times, we take full responsibility for the garden and materials we brought to the property and have every intention of removing it at the end of our tenancy…*
>
> *… PS. Since our lawyer and the lawyer we were planning to hire for you are both on holiday maybe our only option to reply to the court within the deadline this Saturday, December 28th, 2013 is to take your suggestion for the moment and have your lawyer complete the affidavit and response package. We are open to covering the cost but need to speak to the lawyer first to know what we are agreeing to…*

I do not accept the disputed verbal testimony that the above agreement was contingent on the Landlord agreeing to a 5 year tenancy as there was no evidence before me that the Landlords agreed to such a stipulation.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear; and must return all keys to the Landlord.

Section 67 of the Residential Tenancy Act states:

> Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

As per the above, I find the Landlords submitted sufficient evidence to prove that the Tenants breached sections 32(3) and 37(2) of the Act by leaving the property with a large amount of compost mulch product, which caused the Landlords to suffer a loss of $745.50 for a geo-engineer report, $10,397.10 for removal fees of the product. I further find that the Tenants are responsible to pay the $1,568.00 in legal fees that were incurred to defend the Landlords against the Supreme Court petition filed by the City, as per their prior agreement. Accordingly, I award the Landlords a total of **$12,710.60,** pursuant to section 67 of the Act.

Monetary Order – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit plus interest as follows:

Section 24(2) of the RTA provides that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

Section 36(2) of the RTA stipulates that a landlord's right to claim against a security and pet deposit for damages is extinguished if they do not schedule a move out condition inspection with the tenant.

Section 20 of the Regulations stipulates the standard information that must be included in a condition inspection report form which includes items specific to the rental unit in which the tenant(s) would reside. The Regulations do not provide that the inspection report form has to include the condition, grade, and material content of the exterior land on which the rental unit sits.

Section 38 of the Act provides a landlord with two options on how to deal with the disbursement of security deposits: (1) the landlord must file an application for Dispute Resolution to make a claim against the deposit or (2) the landlord must return the deposit to the tenant.

The undisputed evidence was that the Landlords did not complete a condition inspection report form at move in or move out and as such their right to claim damages against the security deposit had been extinguished, pursuant to sections 24 and 36 of the RTA; if their application for Dispute Resolution was filed only to seek compensation for damages to the rental property. In addition to a claim for compensation for damages the Landlords' application was filed to recover the costs for loss due to the Tenants' breach of an agreement. Therefore, I find the extinguishment provision does not apply here. Accordingly, I do not accept the Tenants' submission that the Landlords' claim should be dismissed due to a failure to complete the condition inspection report form.

The evidence before me supports that the tenancy ended February 28, 2014, the Landlords were provided the Tenants' forwarding address via email from the Tenants' lawyer to the Landlords' Counsel on March 19, 2014. The Landlords filed their application for dispute resolution on March 14, 2014.

Based on the above, I find that the Landlords complied with Section 38(1) of the RTA, filing their application within the required 15 day period. Accordingly, the Landlords are **not** subject to Section 38(6) of the RTA that stipulates the landlord must pay the tenant double the security deposit.

Geo-engineer report, clean up, legal costs	$12,710.60
Filing Fee	100.00
SUBTOTAL	$12,810.60
LESS: Security Deposit $1,000.00 + Interest 0.00	-1,000.00
Offset amount due to the Landlords	**$11,810.60**

Conclusion

The Landlords have been awarded a Monetary Order for **$11,810.60**. This Order is legally binding and must be served upon the Tenants. In the event that the Tenants do not comply with this Order it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court

I HEREBY DISMISS the Tenants' application, with 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: February 6, 2015

Residential Tenancy Branch