# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes MNR, MNDC, FF; AAT, CNC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for unpaid rent, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order to the landlord to provide access to tenant to the rental unit pursuant to section 30; and
- an "other" remedy.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant was accompanied by her agent.

The tenant acknowledged receipt of the landlord's application including all evidence. On the basis of this admission, I find that the tenant was served with the landlord's dispute resolution package pursuant to section 89 of the Act.

The landlord acknowledged receipt of the tenant's application including all evidence. On the basis of this admission, I find that the landlord was served with the tenant's dispute resolution package pursuant to section 89 of the Act.

*Preliminary Issue – Tenant's Amendments*

At the hearing I asked the tenant to what her claim for an "other" remedy related. The tenant informed me that she was seeking compensation from the landlord in respect of several allegations of landlord misconduct. The tenant's application gives no indication to the landlord that the tenant seeks a monetary order or an indication of the amount of any such order. I informed the tenant at the hearing that I would be unable to award the tenant a monetary order because she has not properly applied for the remedy and thus the issue was not before me. The tenant informed me that she wished to withdraw this portion of her application and reapply at a later date. I allowed the tenant to withdraw this portion of her claim.

At the hearing, I asked the tenant and landlord if there was ever a 1 Month Notice issued in respect of this tenancy. Both the landlord and tenant agreed that there was not. The tenant expressed confusion about the meaning of a tenant's application to cancel a notice for cause. The tenant understood that this application meant that the tenant had cause to cancel the order of possession. I informed the tenant that this was not the case and that this type of application is to cancel a 1 Month Notice. I asked the tenant if she wished to withdraw this portion of her application. The tenant withdrew this portion of her application. I allowed the tenant to withdraw this portion of her claim.

*Preliminary Issue – Evidence*

The tenant sought to rely in this hearing on an email in evidence before another arbitrator regarding this same tenancy. The landlord did not consent to the tenant relying on this evidence. Rule 3.19 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) provides that I may direct that evidence be submitted after the commencement of a hearing. Had the landlord known that the tenant sought to rely on this evidence, the landlord may have elected to examine the email for authenticity or make inquiries of the email's author. I decline to exercise my discretion to admit this evidence as it would be unduly prejudicial to the landlord and the tenant had ample opportunity to submit her evidence prior to this hearing.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant? Is the tenant entitled to an order that the landlord to provide access to tenant to the rental unit through the landlord's dwelling?

Background and Evidence

This tenancy began in October 2013. Monthly rent of $1,000.00 was due on the first. The landlord no longer holds any security deposit as the security deposit was already applied against a monetary order awarded by the Residential Tenancy Branch. This tenancy ended 31 December 2014, by order of the Residential Tenancy Branch. The tenant is still residing in the rental unit.

This tenancy was the subject of an earlier cross application before a different arbitrator of the Residential Tenancy Branch. The arbitrator found that monthly rent was $1,000.00 per month and ordered that the tenancy end. That arbitrator set out in her decisions, among other findings, that:

> *Introduction*
> *…*
> *At the beginning of the hearing the parties agreed that the tenancy would end at 1:00 pm, December 31, 2014, and that an order of possession would be granted to the landlord for that date and time.…*
>
> *Background and Evidence*
> *…*
> *The walking from the front of the house to the suite entrance is a series of stepping stones cut into the sloped lawn. There is not a ninety degree riser between each step. Instead there is a grassy slope. The tenant says it is about twelve inches from one step to another. The tenant says there are nine steps in total.*
>
> *The tenant says that when she looked at the unit she went in and left through the landlord's unit. She looked at the patio but did not think about or look for the walkway to the unit. When the movers brought her furniture, including appliances, they did not use the walkway. Instead they used the slope beside the walkway.*

*…*
*In the spring of 2014 the tenant applied to be a homestay provider for foreign students. On June 16 the program administrator advised her that after inspecting the home and thing about it "I am concerned about the small stepping stones down the grass at the side of the yard. They could be dangerous in rain and snow and it is not a proper entranceway to a home. If your landlord agreed to put proper stairs down to your entrance I would consider your home for a student. With them unfortunately I cannot."*

*The tenant advised the landlord of this response.*

*That summer, after some delays, the tenant's father did some renovations to the steps. He doubled the width of each step by adding a second paving stone to each step. The landlord said the tenant directed the work. The tenant said this measure did not rectify the situation because the issue was the slope between the stairs and the slope was still there….*

*<u>Conclusion</u>*

a. *An order of possession effective 1:00 pm, December 31, 2014, has been granted to the landlord with the consent of both parties. If necessary this order may be filed in the Supreme Court and enforced as an order of that court.*
b. *For the reasons set out above I find that the tenant must pay the landlord the sum of $2175.00. Pursuant to section 72, I order that the landlord retain the security deposit of $500.00 and the pet damage deposit of $200.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of $1475.00. If necessary, this order may be filed in Small Claims Court and enforced as an order of that court.*

The landlord testified that the tenant continues to occupy the rental unit. The landlord testified that she attempted to enforce the order of possession in the Supreme Court, but was unable to at that time because her paperwork was not in order. The landlord testified that she intends to enforce the order of possession with the Court if necessary.

The landlord testified that the monetary order against the tenant in the amount of $1,475.00 remains unsatisfied.

In these proceedings, the landlord seeks a second monetary order of $3,550.00:

| **Item** | **Amount** |
|---|---|
| Compensation for December's Use and Occupancy | $1,000.00 |
| Compensation for January's Use and Occupancy | 1,000.00 |
| Compensation for February's Use and Occupancy | 1,000.00 |
| Rental of Carpet Cleaner | 150.00 |
| Gas for January and December | 100.00 |
| Hydro for January and December | 100.00 |
| Water for January and December | 100.00 |
| Gas / Hydro / Water for February | 50.00 |
| Recovery of Filing Fee for this Application | 50.00 |
| **Total Monetary Order Sought** | **$3,550.00** |

The tenant testified that utilities were part of her rent. On cross-examination, the landlord confirmed that utilities were part of the tenant's rent but submitted that as the tenant was still residing in the rental unit beyond the date of the order of possession "things had changed". The landlord also alleged that the tenant was making excessive use of the utilities. The landlord testified that the tenant had her heat set to 78$^{o}$F.

The tenant testified that she requires access through the landlord's dwelling in order to remove her furniture from the rental unit. The tenant testified that she was unable to move from the rental unit as she was unable to find movers that would access the rental unit by way of the pathway. The tenant did not provide me with any documentary or photographic evidence of the pathway. The tenant testified that two moving companies she consulted told her that they were unable to move the tenant's furniture using the pathway. The tenant did not call the movers as witnesses or provide any documentary evidence of these statements. The tenant testified that she arranged for movers to attend at the rental unit multiple times and had to cancel each time. The tenant testified that each time she was denied access to her rental unit through the landlord's home. The tenant testified that the landlord agreed in the earlier arbitration to allow access to the rental unit.

The landlord testified that she never has provided access through her dwelling to the tenant. The landlord submitted that access was never part of the arbitrator's decision and thus she is not required to provide this access. The landlord testified that her three previous tenants all moved in and out of the rental unit by way of the pathway. The landlord testified that the tenant moved in to the rental unit by this method. The landlord testified that the tenant never contacted her to arrange for movers to access the rental unit through the landlord's home on 29 December 2014. Further to this, the landlord testified that, in any event, she was out of the city on 29 December 2014 and would have not been able to let movers in. The landlord testified that she does not trust the tenant and does not want the tenant to have access to the landlord's home. The landlord alleges that the tenant is making an issue about the steps because she does not want to move.

The tenant alleges that employee(s) of the Residential Tenancy Branch told her to not pay compensation to the landlord for the tenant's use and occupancy of the rental unit, and that she should send a text to the landlord that said that the tenant would withhold rent, asked the landlord to unlock the door, and to ask how the landlord expected the tenant to move out.

The landlord testified that she asked an employee of the Residential Tenancy Branch about the tenant's allegations and was told that the Residential Tenancy Branch does not tell people not to pay, does not tell people to text, and does not tell people what to say.

The tenant made various allegations as to the landlord's conduct that are not relevant for the purpose of these applications.

Analysis

*Tenant's Application*

The tenant seeks the unusual remedy of an order to allow her access through the landlord's dwelling. For the following reasons, I dismiss the tenant's application without leave to reapply.

Although this tenancy has ended, I have jurisdiction to hear this matter as, the definition of "landlord" in section 1 of the Act includes a former landlord where the context requires. In this matter the tenant is alleging that the landlord's conduct has frustrated her attempts to move her belongings and thus return full possession to the landlord. Section 57(2) of the Act sets out that a landlord cannot take actual possession of a

rental unit unless the landlord has a writ of possession from the Supreme Court of British Columbia. The landlord does not have this writ. Accordingly, any interference with the tenant's rights to access the rental unit would amount to interference with the tenant's actual possession.

There are two key sections in the Act that deal with the tenant's right to enter and exit his or her rental unit.

Section 31 of the Act, purports to deal with lock or other access to residential property or the rental unit:

> **31** (1) A landlord must not change locks or other means that give access to residential property unless the landlord provides each tenant with new keys or other means that give access to the residential property.
>
> (1.1) A landlord must not change locks or other means of access to a rental unit unless
>
> (a) the tenant agrees to the change, and
>
> (b) the landlord provides the tenant with new keys or other means of access to the rental unit.…

"Residential property" is defined in section 1 of the Act:

> **"residential property"** means
>
> (a) a building, a part of a building or a related group of buildings, in which one or more rental units or common areas are located,
>
> (b) the parcel or parcels on which the building, related group of buildings or common areas are located,
>
> (c) the rental unit and common areas, and
>
> (d) any other structure located on the parcel or parcels;

A plain language reading of these provisions indicates that section 31 protects the right of a tenant to enter through locked doors into the building in which the rental unit and common areas are situate. Additionally this section protects the right of a tenant to enter through locked doors into his or her rental unit. However, I do not understand this section to provide any right to the tenant to have access through other rental units or the landlord's unit within the same building.

Subsection 30(1) of the Act protects a tenant's right to access to the residential property:

> **30**(1) A landlord must not unreasonably restrict access to residential property by
>
> (a) the tenant of a rental unit that is part of the residential property, or
>
> (b) a person permitted on the residential property by that tenant.

Again, I do not interpret this section as creating a right to enter a dwelling exclusively occupied by another tenant or a landlord. This provision was enacted in order to protect the rights of tenants and guests to enter a building, proceed through common areas, and enter a tenant's rental unit. This is most certainly the case where, like in this application, a tenant has a method of entry and exit that does not require trespass on the landlord's dwelling. I find that the landlord has not unlawfully restricted the tenant's right of access to the residential property by refusing the tenant access to the rental unit by way of the landlord's dwelling.

In other circumstances there could be facts that would result in a right of access to another's private dwelling. These would be circumstances in which that area of the home has become, in fact, a "common area"; perhaps under circumstances similar to that under which an easement would be found. There are no such facts to support this argument in the applications before me.

*Landlord's Application*

Pursuant to subsection 57(3) a landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended. As, pursuant to an order of the Residential Tenancy Branch made 9 December 2014, the tenancy has ended, the landlord is not entitled to "rent" as such; however, the landlord is entitled to compensation from the tenant for her use and occupancy of the rental unit. Further, pursuant to section 67 a landlord is entitled to be compensated for his or her rental loss. A claim for loss is subject to a duty of mitigation pursuant to section 7(2).

The tenant testified that she was entitled to not pay any amount to the landlord because the landlord had denied the tenant (and the tenant's movers) access through the landlord's home. The tenant maintained that the landlord is responsible for her inability to vacate the premises.

The prior arbitrator did not make any findings of fact as to whether the pathway was compliant with the Act or tenancy agreement. The tenant provided me with testimony that two movers told her that the pathway was unusable for the move. The landlord testified that three past tenants have used the same pathway to move their belongings. I find that the tenant has failed to show on a balance of probabilities that the pathway is unfit for the purposes of moving from the rental unit.

I question the tenant's claim that her attempts to obey the order of possession have been thwarted by the landlord. The tenant is still residing in the rental unit. She has not attempted to move herself or any of her possessions that did not require the assistance of professional movers out of the rental unit in an attempt to obey the order to any extent. Not only has she failed to abide by the order of possession issued by this Branch, but she has failed to abide by the monetary order as well.

The landlord has faced great uncertainty as to when she will get possession of the rental unit back. It is highly unlikely that the landlord would be able to find a new tenant before the end of February.

The landlord has shown an entitlement to compensation for the tenant's continued occupation of the rental unit and her rental loss. I find that the landlord is entitled to a monetary order for $3,000.00 for the tenant's use and occupancy as well as the landlord's rental loss of the rental unit in December, January and February.

The tenant has not yet provided possession of the rental unit to the landlord. Accordingly, it is possible that the tenant will leave the rental unit in such a condition that the carpet cleaning will not be required. As such, I dismiss the landlord's application for the costs of carpet cleaning as her claim is premature. The landlord may reapply in the future should this claim become necessary.

The landlord has claimed for utilities' costs for December, January and February. The landlord acknowledges that utilities were included in rent. The landlord answered on cross-examination that she should be entitled to these amounts as the tenant was overholding and her utilities use was excessive. I disagree with the landlord's submissions. It would amount to double collection to receive compensation for both an amount intended to compensate the landlord for both "use and occupancy" as well as utilities and then to recover again for utilities. As I have ordered the tenant pay compensation to the landlord for the tenant's use of the rental unit in December, January, and February, I dismiss the landlord's claim for utilities without leave to reapply.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlord's claim in respect of carpet cleaning is dismissed with leave to reapply.

The landlord's claim in respect of utilities for December, January and February is dismissed without leave to reapply.

I issue a monetary order in the landlord's favour in the amount of $3,050.00 under the following terms:

| **Item** | **Amount** |
|---|---|
| December Use and Occupancy | $1,000.00 |
| January Use and Occupancy | 1,000.00 |
| February Use and Occupancy | 1,000.00 |
| Recovery of Filing Fee for this Application | 50.00 |
| **Total Monetary Order** | **$3,050.00** |

The landlord is provided with these orders in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with these orders, these orders may be filed in the Small Claims Division of the Provincial Court and enforced as orders of that Court.

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

Dated: February 06, 2015

Residential Tenancy Branch