



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding BENTALL KENNEDY  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      MNDCT FFT OLC

### **Introduction**

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

- a monetary order for compensation for loss, emergency repairs, or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

The landlord was represented by their agents KS and RF. Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord confirmed receipt of the tenants' dispute resolution application ('Application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the Application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were received in accordance with section 88 of the *Act*.

### **Issues**

Are the tenants entitled to a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement?

Are the tenants entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Are the tenants entitled to recover the cost of the filing fee from the landlords for this application?

### **Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began in May of 2015. Monthly rent was set at \$1,569.00. The tenants' rent increased as of July 2017, and is currently set at \$1,637.00. Commencing March 2018, the tenants were given a temporary monthly abatement by the landlord of approximately 5% of their monthly rent.

The tenants are making a monetary claim in the amount of \$24,598.00 as set out in the table below, as well as a request for a rent reduction of 50% retroactive from 2018 to when the construction is complete.

<b>Item</b>	<b>Amount</b>
Loss of Use of Balcony	\$1,598.00
Loss of Quiet Enjoyment	23,000.00
<b>Total Monetary Order Requested</b>	<b>\$24,598.00</b>

The tenants are making a monetary claim for the loss of use of their balcony from February 2017 to November 2017 in the amount of 10% of the monthly rent. The tenants feel that the calculation is fair as the balcony amounts to approximately 10% of their living space, which is one of the units in a 13 storey, 136 unit building.

The tenants are also making a monetary claim for loss of quiet enjoyment due to the ongoing construction. The tenants testified that the construction has taken place Monday to Friday, from 7:30 a.m. to 8:00 p.m., and from 10:00 a.m. to 8:00 p.m. on Saturdays. The tenants testified that because of the construction they have been forced to stay out of their home for the majority of the day. During the hearing, an audible noise was heard in the background which the tenants attributed to the construction noise. The landlord testified that the noise could not be confirmed, and therefore should not be considered as evidence in support of the tenants' claims.

The tenants testified that despite the landlord's compliance with bylaws, the rent that they pay is not reasonable considering the loss that they have suffered, and continue to suffer. The tenants testified that they were not the only tenants impacted, as indicated by the chats that they have had with their neighbours and other tenants. In addition to the claim for loss of quiet enjoyment, the tenants also requested a rent reduction equivalent to 50 percent of the rent retroactive from 2018, and continuing until the construction is complete.

The landlord testified that they are not only in compliance with bylaws, but that they have taken care and attention to address the possible implications of the construction on tenants. The landlord gave examples of how they have addressed the matter such as holding community open houses, providing quiet rooms on the opposite side of the building, as well as offsite facilities. The landlord included in their evidence documentation to show that they have taken in consideration the noise requirements as set out by the city bylaw office, and testified that they have not received any complaints.

The landlord testified that the rent abatement given for the landscaping further supports their attention to how the construction has impacted the tenants. The landlords testified that they waived the rent increase for 2018, and have offered to visit the tenants in their home to assess the situation, which included evenings, days, or weekends in order to accommodate the tenants. It was undisputed by both parties that the tenants have not accepted this offer, as the tenants feel that the assessment would not be beneficial in addressing their concerns.

The landlord did acknowledge that they were behind schedule due to the weather this winter, but anticipate that the construction would be complete in 2020. The landlords testified that they had obtained noise exceedance permits that had allowed them to go over the prescribed decibel limits. Despite the permission to do so, the landlord testified that these incidents were infrequent when the noise would exceed the normal decibel limits.

In order to ensure compliance, the landlord testified that they had hired a company to monitor the sounds, which included baseline testing, and ongoing recording of the noise. The landlord called their witness JF to testify about the monitoring, which included movement, vibration, and sound. The witness JF testified that the decibels only exceeded 85 2.7% of the time. The landlord feels that the tenants are not entitled to their monetary claim as they have not mitigated the losses claimed by accommodating the landlord's proposal to address the problem. The landlord testified that they had

made several attempts to address the issue, but the tenants have not accepted. The landlord further testified that the tenants have not proven their losses.

### **Analysis**

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenant must satisfy each component of the following test for loss established by **Section 7** of the *Act*, which states;

#### ***Liability for not complying with this Act or a tenancy agreement***

**7** (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss*.

Therefore, in this matter, the tenants bear the burden of establishing their claim on the balance of probabilities. The tenants must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the tenants must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenants must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Furthermore, section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been “a reduction in the value of a tenancy agreement.”

I find that it was undisputed by both parties that the tenants lost the use of their balcony for the period stated in their application. Although I recognize that the tenants lost the use of this portion of the rental unit, in considering their monetary claim for this loss the tenants must still establish how this loss has impacted them, and how this has resulted in a reduction in the value of their tenancy agreement. While the balconies do form part of the tenants’ useable space, I am not satisfied that the tenants have demonstrated that they are entitled to a retroactive reduction in their rent in the amount of 10%. The onus falls on the applicants to demonstrate the impact this loss has had on the value of the tenancy agreement, and in this case I find that the tenants have failed to sufficiently do so. Accordingly, I dismiss the tenants’ monetary claim for the loss of use of their balcony without leave to reapply.

### **Protection of tenant's right to quiet enjoyment**

**28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following...

(b) freedom from unreasonable disturbance;...

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

I have considered the testimony of both parties, and while it was undisputed that the tenants have been subjected to the disturbance of the ongoing construction, the onus still falls on the applicants to support their claim. I find that the landlord has provided several detailed examples of how they had mitigated the tenants’ exposure to the noise and disruption as much as possible in compliance with the *Act* and municipal bylaws, including offers to assess the situation from the tenants’ rental unit, obtaining exceedance permits, and ensuring proper monitoring of the noise which included baseline testing.

Although I am sympathetic to the tenants’ concerns, I find that the landlord has fulfilled their obligations as required by the *Act*. I am not satisfied that the tenants have established that they had mitigated the landlord’s exposure to the losses claimed, as is

required by section 7(2) of the *Act*. It was undisputed that the tenants declined the landlord's requests to visit their rental unit in order to assess the noise and disturbance. Whether these offers would have resulted in a resolution of the matter or not, I find that the fact that the tenants declined the offer without allowing the landlord the opportunity to attempt to address the matter shows their lack of interest towards mitigating the losses claimed, which is a requirement of the *Act*. I have also considered the fact that this is a large, multi-unit complex consisting of 136 homes, and although the tenants referenced complaints and concerns from other tenants and occupants, the tenants did not call any witnesses who provided sworn testimony to support this, nor have the tenants provided any evidence of similar claims filed by other tenants.

Although I do find that the tenants have been affected by the ongoing construction and continue to do so, I find there is insufficient evidence for me to make a finding that the landlord had failed to meet their obligations regarding this matter. I find that the tenants have not met the burden of proof to support their claims as set out above. Accordingly, I dismiss the remainder of the tenants' claims without leave to reapply.

As the filing fee is normally awarded to the successful party after a hearing, I dismiss the tenants' application for recovery of the filing fee.

### **Conclusion**

I dismiss the tenant's entire application 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: April 30, 2019

---

Residential Tenancy Branch