



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDCT, OLC, RP, RR

### Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") for a monetary claim of \$1,648.30 for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, for an order directing the landlord to comply with the Act, regulation or tenancy agreement, for regular repairs, and for a rent reduction.

The Tenant appeared at the teleconference hearing and gave affirmed testimony, but no one attended on behalf of the Landlord. The teleconference phone line remained open for over 17 minutes and was monitored throughout this time. The only person to call into the hearing was the Tenant, who indicated that she was ready to proceed. I confirmed that the teleconference codes provided to the Parties were correct and that the only person on the call, besides me, was the Tenant.

I explained the hearing process to the Tenant and gave her an opportunity to ask questions about the hearing process. During the hearing the Tenant was given the opportunity to provide her evidence orally and to respond to my questions. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Preliminary and Procedural Matters

The Tenant said that she served her Application and documentary evidence on the Landlord in person on August 7, 2019. The Tenant said that she served the Landlord with a copy of the Amendment she made to her Application by putting it in an envelope, which she slipped under his door. The Tenant said she confirmed that the Landlord had received this package via text messages. I find that the Landlord was deemed served with the Tenant's Application, documentary evidence and Amendment pursuant to the Act.

The Tenant provided her email address at the outset of the hearing and confirmed her understanding that the Decision would be emailed to her and mailed to the Landlord at the address set out in the Application, and that any orders would be sent to the appropriate Party.

The Tenant advised in the hearing that the Landlord completed repairs to the bathroom ceiling and reimbursed her for the cost of carpet cleaning after she served the Landlord with her Application; therefore, the Tenant said she withdraws these claims for dispute resolution. I dismiss the Tenant's claims for regular repairs and recovery of carpet cleaning costs without leave to reapply.

#### Issue(s) to be Decided

- Is the Tenant entitled to a rent reduction, and if so, in what amount?

#### Background and Evidence

The Tenant said that the periodic tenancy began on July 1, 2019, with a monthly rent of \$1,300.00, due on the first day of each month. The Tenant said she paid the Landlord a security deposit of \$650.00, and no pet damage deposit.

#### Balcony Access

The Tenant said that when she viewed the apartment on June 7, 2019, she saw scaffolding and construction around the rental unit balcony. She said the Landlord told her it would be finished before she moved in. The Tenant said: "When I moved in, the scaffolding was still there. There was also a large board blocking the balcony door, which affected the air, light, and my ability to use the space. The Tenant submitted photographs of the outside of the balcony, which show a large board covering the bottom two-thirds of the glass doors to the balcony. It also shows no railing on the balcony.

The Tenant said: "I texted and asked [the Landlord] in person when it would be resolved, and he would say, 'Any day now'. Other tenants said it had gone on for over six months already." The Tenant said that the Landlord was unclear as to when it is going to be finished.

The Tenant has applied for the rent to be reduced, because she does not have access to the balcony, which consists of approximately one-fifth of the rental unit in terms of

square footage. She said she has to keep all of her plants inside, she is unable to use the balcony to do yoga, and that it affects her space working from home. The Tenant said that a big problem is the board on the balcony that is blocking the door, since the door takes up a large amount of space on the wall. The Tenant said this limits the sun and air flow coming in. She also said she cannot go onto the balcony, because it does not have railings, which is a safety issue. The Tenant said that if not for the ongoing construction, "I would be on the balcony every day. I would not have moved in if I had known that I wouldn't have access to it."

### Window Coverings

The Tenant said her final claim is for reimbursement for window coverings. She said the tenancy agreement states that these are included, but she had to buy them from the previous tenant. The Tenant said she paid the previous tenant \$88.30 for the window coverings.

### Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

During the hearing, I advised the Tenant that I would be analyzing the evidence before me, as follows. I told her that the party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Tenant must prove:

1. That the Landlord violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Tenant to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Tenant did what was reasonable to minimize the damage or loss.

### Balcony Access

The Tenant's undisputed testimony is that the Landlord said the construction on the rental unit balcony would be completed by the time she moved in; however, it is ongoing as of the date of the hearing on September 30, 2019.

### **Terminating or restricting services or facilities**

- 27** (1) A landlord must not terminate or restrict a service or facility if
- (a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
  - (b) providing the service or facility is a material term of the tenancy agreement.
- (2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord
- (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and
  - (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Policy Guideline #22 ("PG #22") deals with termination or restriction of a service or facility that is provided by the landlord under a tenancy agreement. PG #22 sets out the following:

In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, an arbitrator will consider whether the tenant can obtain a reasonable substitute for that service or facility. For example, if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service.

Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.

There are six issues which must be addressed by the landlord and tenant:

- whether it is a service or facility as set out in Section 1 of the Legislation;
- whether the service or facility has been terminated or restricted;
- whether the provision of the service or facility is a material term of the tenancy agreement;

- whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
- whether the landlord gave notice in the approved form; and
- whether the rent reduction reflects the reduction in the value of the tenancy

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Where it is found there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an arbitrator may make an order that past or future rent be reduced to compensate the tenant.

The Tenant's undisputed testimony is that she had a variety of plans for her use of the balcony, particularly over the summer months. She said she would not have moved into the rental unit if she had known that she would not have access to this part of the unit. The Tenant still has shelter and use of the rental unit without the use of the balcony; however, I find from her testimony that the light, air and access to the balcony would have greatly increased the Tenant's enjoyment of her living space, but that this access was inhibited. There is no evidence before me of a comparable alternative to access to the balcony. I find that given the loss of this facility, an appropriate remedy pursuant to section 27(2)(b) of the Act is a rent reduction.

In terms of the six issues noted above in PG #22 to be addressed in considering an appropriate rent reduction in this situation, I note the following:

The use of the balcony is not listed in section 1 of the Act under the definition of "service or facility"; however, I find that for the Tenant, the balcony was similar in importance as the living room, given what it offers her in terms of airflow, light and access to the outdoors. As such, I find it is an integral part of the rental unit to this Tenant.

Given the board that blocks the door and the lack of railings, I find that the Tenant cannot use this part of the rental unit. As such, I find that access to the balcony has been restricted.

I find that access to the balcony is material to the Tenant, given her statement that she would not have moved in, if she had known of the ongoing access restriction.

According to the evidence before me, the Landlord did not give notice of the limitation of this part of the rental unit; however, the Tenant stated that she was led to believe that it would be resolved early in the tenancy or "any day now", according to the Landlord.

The Tenant seeks a rent reduction of \$2,753.00. She said that the floor space of the rental unit is 510 square feet and that the balcony consists of 90 square feet of the total. The Tenant calculated the cost per square foot to be \$2.55 by dividing the space by the \$1,300.00 monthly rent. The Tenant then calculated  $\$2.55 \times 90 = \$229.50$ , as the cost to rent the balcony  $\times 12$  months = \$2,753.00.

According to the Tenant's calculations, the floor space in the rental unit, including the balcony, is of equal importance. However, based section 1 of the Act and the six issues noted above from PG #22, I find that the balcony is not an essential service or facility. Further, I find it is unlikely that over the course of the tenancy that the Tenant would spend an equal time on the balcony as she would in other areas of the rental unit, such as the bedroom or work area, or that the balcony is as essential to the tenancy as, for example, the bathroom is. This is particularly true when the weather turns colder and rainier. I find it reasonable that the Tenant would have made more use of the balcony from July through September of the tenancy, and so I award her what she seeks for these months:  $\$229.50 \times 3 = \mathbf{\$688.50}$ . However, I award the Tenant with a rent reduction of \$100.00 per month for every month in which the balcony remains inaccessible to her, due to the ongoing construction and lack of a railing.

Pursuant to sections 65(1)(b) and 27(2)(b) of the Act, I authorize the Tenant to reduce one upcoming rent by \$688.50, representing the loss of use of the balcony from July 2019 through September 2019. I also authorize the Tenant to deduct \$100.00 for lack of use of the balcony in October 2019. Further, if the balcony remains inaccessible beyond that, the Tenant may deduct **\$100.00** from rent for each month that the construction is ongoing.

### Window Coverings

Policy Guideline #8 sets out what are material terms in a tenancy agreement. A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. I find the requirement to provide window coverings is not a material term of the tenancy agreement. Rather it is in the nature of a repair or an insufficiency that should have been identified when the Parties did a condition inspection at the start of the tenancy.

The Tenant said she purchased the curtains from the previous tenant of the rental unit; however, this means that the Tenant did not give the Landlord an opportunity to provide appropriate window coverings to the rental unit. I find that in this set of circumstances,

the Tenant chose to purchase the curtains from the previous tenant, rather than require the Landlord to provide them. As such I dismiss the Tenant's claim in this regard without leave to reapply.

### Conclusion

The Tenant's claim for compensation for damage or loss against the Landlord is successful. The Tenant established a monetary award of **\$688.50** for loss of use of a facility or service for July, August and September 2019.

Pursuant to section 65(1)(b) of the Act, I authorize the Tenant to reduce one upcoming rent payment by \$688.50, representing the loss of use of the balcony from July 2019 through September 2019. I also authorize the Tenant to deduct an additional **\$100.00** for lack of use of the balcony in October 2019. Further, if the balcony remains inaccessible beyond October 2019, I authorize the Tenant to deduct **\$100.00** from rent for each month that the construction is ongoing.

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

Dated: October 8, 2019

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Residential Tenancy Branch