# Dispute Resolution Services



Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1173247 BC LTD
and [tenant name suppressed to protect privacy]

## DECISION

**Dispute Codes** **MNDCT MNSD**

**Introduction**

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

- a monetary order for $2,600 representing two times the amount of security deposit, pursuant to sections 38 and 62 of the Act; and
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $4,600 pursuant to section 67.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 11:13 am in order to enable the landlord to call into this teleconference hearing scheduled for 11:00 am. Tenant PA attended the hearing on behalf of all tenants. She was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that tenant PA and I were the only ones who had called into this teleconference.

Tenant PA testified that the landlord was served the notice of dispute resolution form and supporting evidence package via registered mail on October 27, 2019. She testified it was sent to the mailing address provided by the landlord to the tenants at the start of the tenancy. She provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision. I find that the landlord is deemed served with this package on November 1, 2019, five days after the tenants mailed it, in accordance with sections 88, 89, and 90 of the Act.

## Issues to be Decided

Are the tenants entitled to a monetary order of $7,200?

## Background and Evidence

While I have considered the documentary evidence and the testimony of the tenants, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below.

The parties entered into a tenancy agreement starting March 1, 2019. Acopy of the tenancy agreement was not entered into evidence. The tenants submitted copies of "Shelter Information" forms signed by the parties, and a letter signed by the parties setting out the monthly rent and deposit information. Monthly rent was $2,600 and was payable on the first of each month. The tenants paid the landlord a security deposit of $1,300. The landlord still retains this deposit.

PA testified that the landlord hired work crews to do work on the residential property during "June or July" 2019. She testified that in the course of their work an excavator damaged the septic tank in the rental unit's yard, which caused a "putrid smell" to settle around the rental unit. She testified that this smell lingered for "two or three months", and that the tenants had to shut all the windows in the rental unit in an effort to keep the smell out. She testified that they could not use the backyard during this time, and that sometimes they could not even sit in front of the rental unit due to the smell.

PA testified that the tenants notified the landlord's agent of this issue, but that the landlord's agent refused to fix the problem. She testified that he told tenant JA that he would put a sheet of plywood of the damage portion of the septic tank, but that he never even took this small step to fix the problem.

PA testified that the washing machine in the rental unit broke in August 2019, and spilled water on the ground. She testified that the tenants advised the landlord of this, but that the landlord refused to fix the washing machine.

PA testified that, on August 22, 2019, the landlord's agent sent a text message to tenant JA stating that the tenants must vacate the rental unit by September 30, 2019. The tenants submitted a copy of this text message into evidence.

In these text messages, JA responds to the landlord's agent's demand that the tenants vacate:

> You did not give us any written notice verbal is not good enough. Talked to the landlord tenancy branch the last month when moving out of a teardown is free. And you need to give 4 months notice.
>
> That you need to get the papers from the tenancy branch to serve us which you failed to do.
>
> You are 100% in the wrong.

The landlord's agent responded:

> As per yesterday's discussion I'm writing to inform you to vacant [sic] the [rental unit] on or before September 30. As per our contract I am supposed to give you 30 days notice but I am just letting you know in advance.

PA testified that the landlord's agent told her that the reason for ending the tenancy was so that the landlord could tear down the rental unit. She testified that the landlord never served the tenants with any written form of notice to end the tenancy.

PA testified that she provided the landlord with the tenants forwarding address on September 26, 2019, via a letter sent to the landlord. She submitted a copy of this letter into evidence. She testified that the tenants vacated the rental unit on September 30, 2019.

PA testified that, to date, the landlord has not returned the tenants' security deposit, or made an application against the security deposit.

Additionally, in the September 26, 2019 letter, PA advised the landlord that, pursuant to the Act, the tenants were entitled to four months' notice to end the tenancy in the event that the landlord was ending the tenancy to do major construction, and that, if this happened, they were entitled to one month's free rent. Additionally, in the letter, PA alleged the landlord that the failure to fix the septic tank and the washing machine constituted a deprivation of the tenants' right to quiet enjoyment of the rental unit as guaranteed by the Act.

PA testified that the landlord's reaction to this letter, when she spoke to him about it, was to laugh at her.

The tenants vacated the rental unit on September 30, 2019. JA testified that the tenants did not pay any of the rent due for September 2019, as they did not believe they were required to, and were $600 in arrears for the month of August 2019.

PA argued that the tenants are entitled to two times the amount of the security deposit as the landlord has failed to return the deposit or make a claim against it within 15 days of the end of the tenancy, or at all.

PA argued that the tenants are entitled to the equivalent of two month's rent for loss of quiet enjoyment due the smell caused by the ruptured septic tank. PA stated that the tenants are willing to have $600 deducted from any monetary order made under this portion of their claim in satisfaction of the August rental arrears.

## Analysis

Based on the uncontroverted evidence of PA, and the documentary evidence submitted by the tenants, I find that the tenants were obligated to pay monthly rent of $2,600 and paid a security deposit to the landlord of $1,300. I find that they have not paid any rent for September 2019, and that they are in arrears of $600 for the month of August 2019.

1. Return of the Security Deposit

Section 38 of the states:

> **Return of security deposit and pet damage deposit**
>
> 38(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
>
> […]

> (6) If a landlord does not comply with subsection (1), the landlord
> (a) may not make a claim against the security deposit or any pet damage deposit, and
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Based on the undisputed evidence of PA, and the documentary evidence submitted by the tenants, I find that the tenants vacated the rental unit on September 30, 2019 and that they provided their forwarding address to the landlord in writing on September 26, 2019.

I find that that the landlord has neither returned the security deposit, not made an application for dispute resolution claiming against the security deposit within 15 days of the end of the tenancy, or at all.

As such, I find that, pursuant to section 38(6), the landlord must pay the tenants $2,600.

2. Loss of Quiet Enjoyment

Section 28 of the Act states:

> **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;

I find that the prolonged presence of the “putrid smell” on the rental property constituted an “unreasonable disturbance” for the tenants. I accept PA’s testimony that the tenants advised the landlord of this smell, and the landlord took no steps to remove it. I find that the presence of this smell deprived the tenants of the use of the backyard of the rental unit for at least two months during the summer and caused them to have the windows in the rental unit closed during this time as well. This is not a small inconvenience.

Policy Guideline 6 states:

> **Compensation for Damage or Loss**

> A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA […]. In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

I find that the tenants' loss of quiet enjoyment was serious, prolonged, and deprived them of substantial (although not total) use of the rental property. Accordingly, I find that the tenants are entitled to an amount equal to one month's rent ($2,600) in compensation for this loss.

3. Anticipatory Breach

I accept PA's undisputed evidence that the landlord attempted to end the tenancy so that the rental unit could be demolished by giving one month's notice (the "**Landlord's Notice**"). I find that this is not permitted under the Act, as sections 49(2)(b) and (6)(a) require that a landlord provide a tenant four months' notice when a tenancy is ended for the purposes of demolishing the rental unit.

The "standard terms" of all tenancy agreements require that the methods of ending a tenancy set out in the Act be complied with:

> The landlord may end the tenancy only for the reasons and only in the manner set out in the Residential Tenancy Act and the landlord must use the approved notice to end a tenancy form available from the Residential Tenancy Branch.

Section 12 of the Act states that the standard terms are terms of every tenancy agreement whether or not the tenancy agreement is in writing. Section 5 of the Act states that landlords and tenancy may not avoid or contract out of this Act. As such, despite the fact that I do not have a complete copy of the tenancy agreement in evidence, I find that the tenancy agreement contained the above-mentioned standard

term. Therefore ending the tenancy with the Landlord's Notice is not permitted under the tenancy agreement either.

I find that by issuing the Landlord's Notice, the landlord clearly indicated its intention to breach the tenancy agreement (that is, to end the tenancy without having given sufficient notice). I find that this is an "anticipatory breach" of the tenancy agreement, which is also known in law as a repudiation of the contract.

In the legal textbook *The Law of Contract* (3rd Ed, (1994) at p 600) Professor Fridman writes:

> Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due.
>
> […]
>
> The authorities reveal that, for this type of breach to occur the following must be established: (1) conduct which amounts to a total rejection of the obligations of the contract; (2) lack of justification for such conduct. If, to these, is added the acceptance by the innocent party of the repudiation, then the effect will be to terminate the contract.

I find that, by issuing the Landlord's Notice, the landlord rejected its obligation to provide the rental unit to the tenants in accordance with the tenancy agreement. This rejection was totally unjustified. The Act is clear as to how a tenancy may be ended in such circumstances.

I find that, by vacating the rental unit on September 30, 2019, in accordance with the Landlord's Notice, the tenants accepted the landlord's repudiation, and terminated the tenancy agreement.

Professor Fridman, at pages 615 and 616, writes of the effect of an acceptance of repudiation:

> Since the contract is discharged by breach, not agreement, the innocent, injured party has the right to sue. He may sue for damages immediately, without waiting for the time when the contact should have been performed to arrive.

Applied to this case, as a result of the landlord's breach of the tenancy agreement, the tenants may make a monetary claim for damages suffered as a result of this breach.

I find that the tenants have suffered damages as the result of the landlord's breach in the amount of $2,600, representing one month's rent. Section 51(1) of the Act states:

> **Tenant's compensation: section 49 notice**
>
> 51(1) A tenant who receives a notice to end a tenancy under section 49 *[landlord's use of property]* is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

Had the landlord ended the tenancy in accordance with the Act (that is, pursuant to section 49(6)), the tenants' would have been entitled to an amount equal to one month's rent ($2,600). The tenants lost this entitlement due to the landlord's action. As such, I order that the landlord compensate them this amount.

4. <u>August Arrears</u>

The tenants acknowledge they owe $600 in rental arrears for the month of August, and they have agreed that this amount should be deducted from any amount they are awarded in this decision. As such I order that $600 be deducted from the above-made monetary orders.

I note that nothing in this decision prevents the landlord from making a claim for rental arrears for the month of September 2019.

## Conclusion

I order the landlord to pay the tenants $7,200, representing the following:

| | |
|---|---|
| Double the balance of the deposit ($1,300) | $2,600 |
| Loss of Quiet Enjoyment | $2,600 |
| Damages for Landlord's Breach | $2,600 |
| Credit for rental arrears (August) | -$600 |
| **Total** | **$7,200** |

Upon its receipt, I order that the tenants serve a copy of this decision and attached monetary order on the landlord as soon as possible.

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: December 17, 2019

Residential Tenancy Branch