



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, OLC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenants applied for:

- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation (the Regulation) or tenancy agreement, under section 67;
- an order for the landlord to comply with the Act, the Regulation and/or tenancy agreement, pursuant to section 62; and
- an authorization to recover the filing fee for this application, under section 72.

This hearing was originally convened on February 18, 2021 and adjourned to May 17, 2021 due to time constraints. This decision should be read in conjunction with the interim decision dated February 19, 2021. Tenants LB and DF (the tenant), the landlord's director JT (the landlord) and witness KC attended both hearings. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of both hearings the parties affirmed they understand it is prohibited to record the hearings.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the Act.

Preliminary Issue – Partial Settlement

At the hearing both parties agreed to the following binding settlement for the application for an order requiring the landlord to comply with the Act.

- The landlord will install the railing on the deck's stairs by July 15, 2021.

The application for a monetary order for compensation for damage or loss will be adjudicated.

Issues to be Decided

Are the tenants entitled to:

1. a monetary order for compensation for damage or loss?
2. an authorization to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the tenants' obligation to present the evidence to substantiate the application.

Both parties agreed the rental unit's keys were provided on March 16, 2018. Monthly rent is \$1,800.00, due on the first day of the month. At the outset of the tenancy a security deposit of \$950.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It states:

53) Tenant is aware that Upper suite entrance is from deck on south. There is no railing and stairs/ramp for deck, so that it is not easy to access the entrance door. Caution is needed to be taken. **Tenant offered Landlord to renovate the deck before official possession date 2018 April 1st, and Landlord accepted this offer and would like to pay the material cost if it is around market value.** The deck renovation should be completed before 2018 April 1st. The key of the garage can be given to Tenant when the half month rental and security deposit are paid. So tenant can start renovating deck immediately.

[...]

55) **Tenant is welcomed to submit quote to Landlord for material cost of deck renovation and material/labor cost** of repairing gutter/face board/downspout etc. **Tenant can start to do the renovation and repairs when Agent of the Landlord**

approves it in writing. The money for material and/or labor will be paid after the job is completed. In the future, the material fee will be paid before the job if tenant is approved in writing for the other improvements. Original receipt will be provided by the tenant and reimbursed by Landlord.

Signed on 2018, March 08.

(emphasis added)

The tenants are claiming for compensation in the amount of \$4,144.00 for their labour to renovate the rental unit's deck.

Tenant DF is a contractor specialized in building decks and offered the landlord to renovate the rental unit's deck. The tenant stated he provided the landlord's agent IR a verbal quotation in the amount of \$4,144.00 for the cost of his labour to demolish the original deck and build a new one. The tenant does not usually sign contracts for his labour. Agent IR explained to the tenant that the offer would be analyzed by the landlord's board of directors and one week later the parties signed the tenancy agreement.

The landlord affirmed that per clause 53 of the tenancy agreement the tenants had to submit a quote in writing for their labour and the quote had to be approved by the landlord's board of directors. The landlord stated the tenants did not submit a quote in writing and the landlord did not approve any compensation for the tenants' labour. The landlord submitted an email dated January 19, 2021 sent by the landlord's agent that showed the tenants the rental unit before the tenancy agreement was signed:

[Tenant] never mentioned he would charge \$5,50 per square feet. Instead, [tenant] mentioned he actually earned much more than he filed to CRA, because he always takes cash from customers, so he only filled up \$5000 per month in my application form. [Tenant] also never showed me any documents to prove how much dollar per SqFt he could earn.

The landlord affirmed the rental unit's keys were given to the tenants on March 16, 2018 so that the tenants could start working on the deck renovation and have it completed by the tenancy start date, April 01, 2018. The tenant stated he started the renovation on March 17, 2018 and he could only move in on April 01, 2018. The tenant said most of the renovation labour was completed by April 07, 2018, three weeks after he received the keys. On April 04, 2018 the tenant emailed the landlord:

[...] I talked to the RTB and the contract we signed with you does not state the deck [tenant] is building was free labour. This needs to be paid upon completion when [landlord] receives the bill no exceptions or we will have to take to small claims court.

The landlord replied on the same day: "Just a kind reminder that, the labor fee of deck and other fees stated in our agreement will not be paid by the [landlord]."

On May 05, 2018 the landlord emailed the tenant:

If we were given the complete quote in March and aware of the total price could be \$2300 and potentially more, we might considering re-enforcing the previous deck instead of redoing the whole new one with all brand new material, plus the deck was not completed before 2018 April 1st. If I aware of this before signing up the agreement with you, I might consider other applicants who was offering me even more...

The tenant sent the landlord an invoice for his labour on March 25, 2020. The invoice indicates the total amount owing for the labour completed until March 20, 2020 is \$4,144.00, more labour is required to complete the renovation and that the labour includes the construction of a 240 square feet deck at \$5.50 per square feet. The tenant submitted into evidence eight photographs of the deck before and after the renovation.

The tenant said he does not know how he calculated the cost of his labour. Later the tenant affirmed he worked for around two weeks in the renovation, maybe for 80 hours. The renovated deck is about 200 square feet. The tenant affirmed the \$4,144.00 is half the market value of his labour.

The parties further discussed the labour compensation by email on October 07, 2020:

L: As for the agent allowed you to move in earlier, that was a good gesture at her ends, and it was nothing to do with the deck.

T: Agreed, nothing to do with the deck nor was it half a month's rent free. Keys were given to the garage to store my tools and gate key for access as I was building the deck. We never moved in, and keys to house were never given, half month in advance as you are suggesting.

[...]

L: Addendum #53 states that "Tenant offered Landlord to renovate the deck before official possession date 2018 April 1st, and Landlord accepted this offer and would like to pay the material cost if it is around market value" The addendum did not mention paying for the labour cost. If you intended to get pay for the job, then why you didn't give your written labour quotation to the property manager before you started the job?

According to the agent, [redacted], you agreed to do it to secure the place and you needed the landlord to pay for the materials.

Emergency repair kicks in when the owner refuses to repair when there is a tenancy agreement in place. The Landlord expects you to give a written quotation of your rate before starting the work any work to get pay for.

The tenants are claiming for compensation in the amount of \$295.81. The tenants paid credit card interest because the landlord delayed the payment for the materials used in the deck renovation. The tenant affirmed he asked the landlord to submit the payment for the materials on March 17, 2018 and he only received the payment on September 25, 2021. The tenant submitted a picture of the credit card statement showing 'daily interest rate 0.07109%'.

The landlord stated that on April 21, 2018 he received the first invoice in the amount of \$1,733.27. Later the landlord affirmed he received the first invoice on March 19, 2018. The landlord said on May 15, 2018 he received the second invoice in the amount of \$609.18 and both invoices were paid on September 24, 2018. The landlord does not know why he only paid the tenants four months and two weeks after the second invoice was received.

The tenants are claiming for compensation in the amount of \$953.00 because the deck renovation is not completed until today and the tenants can only partially use the deck. The tenants did not apply earlier for dispute resolution because they were dealing with other issues. The landlord affirmed the tenants were supposed to complete the renovation before the tenancy started.

The tenants are claiming for compensation in the amount of \$3,200.00 for undue hardship because of the incomplete renovation and for the time they spent preparing for this application. The tenant testified he spent 80 hours at the hourly rate of \$40.00 dealing with the landlord regarding the renovation and preparing for this hearing. The tenant said the landlord suggested he moves out because of this dispute.

A monetary order worksheet dated November 22, 2020 was submitted into evidence. The total amount the tenants are claiming is \$8,692.81.

Analysis

Section 7 of the Act 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.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove the case is on the person making the claim.

Deck renovation labour

I accept the tenant's uncontested testimony that he did not submit a written estimate for his labour compensation before the start of the renovation, the tenant received the rental unit's keys on March 17, 2018 to start the renovation on that date and completed most of the labour within two or three weeks.

Clauses 53 and 55 of the tenancy agreement are ambiguous. The first one states the parties agreed to renovate the deck and does not mention compensation for the renovation labour. The second one states the tenants are 'welcome to submit quote to Landlord for material cost of deck renovation and material/labor cost'. Clause 55 also provides the labour for the renovation will be paid after the renovation is completed.

Based on the April 04, 2018 emails, I find the tenants were aware on April 04, 2018 that the landlord did not intend to pay for the deck renovation labour.

Based on the May 05, 2018 and January 19, 2021 emails, I find the landlord was expecting the tenants to renovate the deck, the landlord considered the tenants' professional skills when the tenancy agreement was signed and did not explain to the tenants that the deck renovation labour would not be paid until April 04, 2018, after most of the renovation was completed.

Based on the October 07, 2020 email, I find the tenants did not receive free rent as compensation for their labour.

Based on both parties' testimony and the photographs submitted by the tenants, I find the renovated deck was an improvement to the rental unit.

In the March 12, 2014 decision from the British Columbia Court of Appeal, *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, Justice Lowry writes:

[54] Generally a court must endeavour to resolve ambiguity in order to determine the mutual intention of the parties to a contract by interpreting the wording of any given clause in the context of the whole of the agreement as well as the factual matrix that gave rise to the agreement and against which it is intended to operate: *Jacobsen v. Bergman*, 2002 BCCA 102, paras. 3-6.

In light of the above remarks, I find it is not reasonable to conclude that the tenants would renovate the deck, improving the rental unit, and not be paid for this labour. Thus, interpreting clauses 53 and 55 of the tenancy agreement in the context of the situation presented, I find the landlord is expected to compensate the tenants for their deck renovation labour and the tenants suffered a loss because of the landlord's failure to comply with clauses 53 and 55 of the tenancy agreement.

Residential Tenancy Branch Policy Guideline 05 explains the duty of the party claiming compensation to mitigate their loss:

B. REASONABLE EFFORTS TO MINIMIZE LOSSES

A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided. In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For

example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:

- remove and dry the possessions as soon as possible;
- promptly report the damage and leak to the landlord and request repairs to avoid further damage;
- file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

Partial mitigation

Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

(emphasis added)

The tenants did not submit a written estimate for their labour cost before the renovation started. Furthermore, the tenant said he does not usually sign contracts for his services and the email sent by the landlord's agent on January 19, 2021 indicates the tenants did not explain how much money they would ask for the renovation labour before the tenancy agreement was signed. I find the tenants did not mitigate their losses and are not entitled to the full compensation claimed.

I note that the Residential Tenancy Branch Policy Guidelines are a guidance to interpret the Act. The landlord was expecting the tenants to renovate the deck and must compensate the tenants for their labour.

In the May 10, 2010 decision from the British Columbia Court of Appeal, *Wilson v. Fotsch*, 2010 BCCA 226, Justice Huddart writes:

[6] In a commercial case, unjust enrichment is usually the result of a one-way transfer of wealth from plaintiff to defendant. Their larger relationship will be bounded by contract and purely commercial considerations. While parties enter into a relationship from which both anticipate profit, they do so without any underlying expectation that the profits each creates in the conduct of their own affairs will be for the benefit of both. The limits of their relationship are tightly drawn.[...]

[10] Since *Pettikus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, Canadian authorities have treated unjust enrichment as an equitable cause of action for which constructive trust is one potential remedy. Restitution by way of a monetary award is another. The entitlement to either remedy arises on the date the duty to make

restitution arose: Clarkson v. McCrossen Estate (1995), 1995 CanLII 737 (BC CA), 3 B.C.L.R. (3d) 80 (C.A.) at paras. 75-76.[...]

[11] The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment
2. Detriment
3. Absence of a juristic reason for the enrichment

Considering the tenants' labour and the tenants' lack of mitigation of damages suffered, as well as the direct landlord's benefit from the tenants' labour and the landlord's enrichment without a juristic reason, I find it reasonable to award the tenants compensation in the amount of 33% of the amount claimed.

Thus, I award the tenants compensation in the amount of \$1,367.52.

Interest for late payment

Based on the tenant's uncontested testimony, I find the landlord breached section 55 of the tenancy agreement by paying the tenants the cost of the materials used in the deck renovation four months and two weeks after the second invoice was received and the tenants suffered a loss because of the landlord's failure to comply with the tenancy agreement.

The tenants did not explain why they did not apply for dispute resolution asking for an order for the landlord to pay the amount owed immediately after the landlord did not pay them. I find the tenants failed to act reasonably to minimize the damage they suffered and could have reasonably avoided this damage if they had applied for dispute resolution earlier. The landlord did not receive a benefit because of the delay in the payment.

As such, I dismiss the tenants' claim for compensation without leave to reapply.

Loss of use of the deck

Per section 53 of the tenancy agreement, the tenants offered to renovate the deck before April 01, 2018.

The tenants' testimony about only partially using the deck was vague.

Based on the tenant's uncontested testimony, I find the tenants failed to prove, on a balance of probabilities, that they suffered a loss because the landlord failed to comply with the Act or the tenancy agreement.

As such, I dismiss the tenants' claim for compensation without leave to reapply.

Hardship and time spent preparing for the hearing

The tenant's testimony about hardship was vague.

Based on the tenant's testimony, I find the tenants failed to prove, on a balance of probabilities, that they suffered hardship because the landlord failed to comply with the Act or the tenancy agreement.

Section 72(1) of the Act provides that an Arbitrator may award one party recovery of the filing fee from the other party; however, the Act does not provide for recovery of other costs associated with making an application for dispute resolution, gathering evidence, copying evidence or serving hearing documents.

Thus, I dismiss the tenants' claim without leave to reapply.

Filing fee and summary

As the tenants were partially successful in this application, the tenants are entitled to recover the \$100.00 filing fee.

In summary:

Item	Amount \$
Deck renovation labour	1,367.52
Filing fee	100.00
Total:	1,467.52

Conclusion

Pursuant to sections 7, 67 and 72(2)(a) of the Act, I authorize the tenants to reduce \$1,467.52 from a future rent payment.

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: June 09, 2021

Residential Tenancy Branch