# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD ( GLEN VALLEY GROVE) and [tenant name suppressed to protect privacy]

## DECISION

**Dispute Codes** FFT, RR, and PSF

**Introduction**

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

- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act.*

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. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

As the parties were in attendance I confirmed that there were no issues with service of the tenant's application for dispute resolution ('application').. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenants' application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

**Issues**

Are the tenants entitled to an order to the landlord to provide services or facilities required by law?

Are the tenants entitled to an order to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided?

Are the tenants entitled to recover the filing fee for this application from the landlord?

**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 fixed-term tenancy began on July 1, 2021, with monthly rent originally set at $3,000.00, payable on the first of the month. The tenants were provided with a promotional discount of $992.00 per month, which lowers the rent to $2,008.00 per month. As part of the promotional discount, the tenants were also provided free rent for the month of July 2021, as well as a waiver of the security deposit.

The tenants filed this application as they feel that the landlord has not provided all the amenities and services that were included as part of the tenancy agreement. The tenants provided a monetary order worksheet as well as a cost breakdown in their evidentiary materials. The tenants are requesting a total of $420.28 per month in a rent reduction for the services and amenities not provided by the landlord.

| **Item** | **Amount per month** |
|---|---|
| Coffee bar not provided | $198.00 |
| Concierge services not provided | 106.80 |
| Sauna opened late (December 16, 2021), and then closed from December 22, 2021-January 18, 2022) | 115.48 |
| **Total Rent Reduction Requested per Month** | **$420.28** |

The tenants noted that the tenancy agreement clearly included the following amenities as part of their tenancy agreement: sauna, concierge, and coffee station.

The tenants testified that the landlord has never provide the coffee station, and does not intend to. The tenants provided a cost breakdown of the losses due to this amenity being withheld. The tenant used a calculation of $3.83 per cup of a “Grande Cappuccino” that would be purchased at a nearby coffeeshop, which would be $7.66 for

both tenants with tax. The tenants also added $2.24 per trip for the cost of mileage using a calculator found on the federal website for reasonable mileage allowances. The tenants estimated 20 coffee trips per month for a total loss of $198.00 per month.

The tenants is also seeking compensation for the lack of a twenty-four hour concierge desk. The tenants testified that the concierge desk was removed by the new landlord, and no alternate services or arrangements were communicated to them. The tenants dispute that the landlord had provided or communicated to them other means of accessing similar or equivalent services the twenty-four hour concierge would provided. The tenants note that the new tenancy agreements do not even list a concierge service, and disputes that the current service is equivalent to the original service promised. The tenants testified that since they were unaware of a parcel holding service they had to send their packages to the post office instead. The tenants submitted a monetary claim of $235.20 per year for a mailbox rental, plus $2.48 per trip for mileage. The tenants calculated that they would make an average of 15 trips per month for a total loss of $56.80 per month related to the parcel service not provided. The tenants also argued that they should receive a further $50.00 per month for the loss of other services a concierge would provide. The tenants are seeking a total claim of $106.80 per month for the lack of a twenty-four concierge.

Lastly, the tenants testified that a sauna was advertised and included as part of the amenities. The tenants note that the landlord does not dispute that this amenity was not made available until December 16, 2021, and was then withheld from December 22, 2021 through to January 18, 2022. The tenants acknowledge that there was a public health order for the period of December 22, 2021 to January 18, 2022, but argued that residential buildings were exempt, and that the fitness center was open during this time. The tenants argued that the landlord provided multiple reasons for the closures, which the tenants do not feel were justified. The tenants provided a cost calculation of $57.12 per month for a monthly membership to a public facility to use the sauna, as well as $1.24 per trip for mileage. The total monetary loss sought for the sauna is $115.48 per month.

The landlord responded that the building was a new build, and the landlord had already taken into account the reduced services and amenities by provided the tenants with a substantial ongoing discount in rent of $992.00 per month which was accepted and acknowledged by both parties. The landlord notes that the tenants were also provided the equivalent of one month’s free rent for July 2021 upon move-in, and the security deposit was waived. The landlord feels that the tenants were already provided a substantial and ongoing reduction in rent to compensate for the reduced services and

amenities, and that the losses claimed by the tenants were not sufficiently proven nor supported. The landlord also provided detailed responses and explanations for the specific amenities referenced in the tenants' application.

The landlord confirmed that the three amenities were listed on the tenancy agreement. The landlord argued that the coffee bar never included the services of a full-time barista making handcrafted drinks with freshly ground expresso, nor were the beverages free of charge. The landlord argued that the tenants' request for compensation was a substantial upgrade from what the original amenity was supposed to offer, which was a coffee station that would vend coffee beverages from a machine. The landlord argued that the tenants never provided receipts to support losses of equivalent value, and that the tenants' claims for a premium take-out coffee does is not reasonable nor justified.

The landlord also confirmed that the sauna was not available until December 16, 2021 as there was a delay in the handover of keys from the previous owner, and issues with ensuring that they were able to operate and provide the amenity safely. The landlord testified that they also had supply chain issues. The landlord argued that the December 22, 2021 to January 18, 2022 was a closure for health and safety reasons in response to the provincial health order, as the landlord had the discretion to do. The landlord argued that even though they were not required by the order to comply as the facility was not commercial, the landlord had decided to close the sauna as they had a duty to ensure the health and safety of the users and comply with health and safety standards as required by the *Act.* The landlord argued that the gym was not open during this period for the same reasons. The landlord provided a copy of the notice to all tenants dated December 23, 2021. The Notice is addressed "TO ALL RESIDENTS… RE: Closure of Gyms & Amenities December 22, 201 to January 18, 2022" and stated that the sauna and all gyms on the properties managed by the landlord will be closed this period to minimize the spread of COVID-19. The landlord also argued that the tenants did not support their losses with any receipts for the losses claimed, and that the tenants would not have been able to access a public sauna facility during the period of December 22, 2021 to January 18, 2022 because of the Public Health Order.

The landlord testified that all tenants were sent an email in December 2021 informing them of the concierge services available. The landlord included a copy of this communication in their evidentiary materials, and argued that despite the removal of the desk, the tenants were still provided equivalent services such as a parcel holding services upon request, as well as access to building managers during regular business hours. The landlord testified that the building managers on site have never refused the tenants access to the parcel holding service, nor have the tenants provided receipts to

support the losses claimed as a result of not being able to access these services. The landlord argued that the landlord did not have the obligation to provide twenty-four hour concierge services, or maintain a desk that is maintained twenty-four hours.

**Analysis**

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenants 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 claims 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.

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

In this matter the tenants bear the burden to prove that it is likely, on balance of probabilities, that facilities listed in the tenants’ application were to be provided as part of the payable rent from which its value is to be reduced. I have reviewed and considered all relevant evidence presented by the parties. On preponderance of all evidence and balance of probabilities I find as follows.

**Section 27 Terminating or restricting services or facilities**, states as follows,

> **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.

I find that for the purposes of this matter the sauna, coffee bar, and concierge are not considered material terms of the tenancy agreement, nor are they essential to the tenant’s use of the rental unit as accommodation.

To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement. It falls to the person relying on the term, in this case the tenants, to present evidence and argument supporting the proposition that the term was a material term. As noted in RTB Policy Guideline #8, 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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be

material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material. In terms of all three amenities, I find that the tenants have failed to establish that they are material to the tenancy agreement, specifically that the failure of the landlord to provide or withhold any of three amenities would give the tenants the right to end the Agreement. For this reason, I do not find that the landlord is required to provide these amenities as part of the tenancy agreement unless the tenants were provided with proper notice of their termination and a reduction in rent equivalent to the reduction in the value of the tenancy agreement as stated in section 27(2) of the Act below. The tenants' application for an order requiring the landlord to provide these amenities or facilities is dismissed without leave to reapply.

Under section 27(2) of the Act, the landlord may withdraw a facility if 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.

I will now consider whether the landlord had fulfilled their obligations for each amenity in the tenants' claims.

1) **<u>The Coffee Bar</u>**

   It is undisputed that the coffee bar was an amenity that was listed as included in the tenancy agreement, but was never provided by the landlord. I note that despite the later notice provided by the landlord, the tenants were led to believe that some sort of amenity would eventually be provided. In this case, there was none. Although there was eventually notice given, the tenants were not given any indication until this notice that this amenity would never be provided. I am satisfied that the tenants were misled by the inclusion of this amenity on the tenancy agreement.

   As stated in section 7 of the Act, "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." Furthermore, the tenants may be entitled to compensation to a rent reduction equivalent to the

reduction in the value of the tenancy agreement resulting from this termination or restriction.

I have considered the evidence and testimony before me, and I am not satisfied that the tenants' claims for compensation and a rent reduction reasonably reflect the value of the amenity withheld, which in this case is an amenity called a "coffee bar". Other than the convenience of on-site access to beverages, I do not find the tenants had established these beverages would have been equivalent to a handcrafted beverage made by a barista, nor would these beverages have been free of charge and included as part of the monthly rent. I find the landlord meant to include this amenity as a service for the convenience of the tenants, but not as an amenity that would have provided the equivalent of 20 Grande Cappuccinos as claimed by the tenants.

Furthermore, as noted above, the burden of proof is on the tenants to support their loss. In this case, although the tenants made a claim equivalent to 20 Grande Cappuccinos, the tenants failed to support the value of the losses suffered in relation to the absence of this amenity, either with receipts to support financial losses suffered, or sufficient evidence to support that there was a reduction in the value of their tenancy due to the lack of this amenity. In this case, I find that the tenants' claims fall short, and I therefore dismiss the tenants' claims in relation to the coffee bar without leave to reapply.

**2) <u>The Sauna</u>**

The landlord does not deny that the tenants did not have access to the sauna during the specified times in the tenants' application.

The tenants did not have access to the sauna from the time they moved in on July 1, 2021 to December 16, 2021.The landlord provided an explanation for this delay as the building was new, and the current landlord had acquired ownership from the previous owner. The landlord argued that the tenants were provided fair compensation for this delay, and that the tenants were aware of the circumstances that lead to late opening of this amenity.

In consideration of the evidence and testimony before me, I find that the tenants were made aware that there would be inconveniences and delays that would impact the tenants when they moved in due to the fact that the building was just built. Furthermore, I find that some of the delays were due to circumstances

beyond the landlord's control, such as supply chain issues. I also find that the landlord had an obligation to provide and maintain the property in a manner that complies with health and safety standards. As explained by the landlord, they recently took ownership of the building, and had to ensure that the staff were fully trained and aware of the health and safety requirements of operating and maintaining this amenity.

Section 32 of the *Act* reads in part as follows:

> ***32*** *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*
>
> > *(a) complies with the health, safety and housing standards required by law, and*
> >
> > *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant...*
>
> *(4) A tenant is not required to make repairs for reasonable wear and tear.*
>
> *(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement...*

Although I am sympathetic towards the fact that the tenants were excited about using this amenity upon moving in, I find that the tenants failed to sufficiently support any losses associated with this claim. Not only do I find that the tenants failed to provide receipts to support the losses claimed in their cost analysis, I find that the tenants were provide with a substantial rent reduction totalling $992.00 in addition to the waiver of the July 2021 rent and the security deposit. I find that the landlord had already acknowledged and compensated the tenants fairly for this loss.

In regard to the closure from December 18, 2021 to January 22, 2022, I find that the landlord had provided a reasonable explanation for this closure, which was done in response to a Public Health Order. Although this Public Health Order applied to commercial facilities, I find that the landlord had determined that this facility was similar in nature, and held the same risks as one of a public facility. I find that the landlord had an obligation under section 32 of the *Act* as stated above to ensure the health and safety of all users. Lastly, I find that the tenants failed to support the losses claimed for this period, either with receipts to support

the losses referenced in the cost analysis or something of equivalent nature. As pointed out by the landlord, the tenants would not have been able to access a similar facility in most venues due to the Public Health Order. For these reasons, the tenants' application for compensation or a rent reduction in relation to the sauna is dismissed without leave to reapply.

**3) <u>The Concierge</u>**

The landlord does not dispute that they had removed the twenty-four concierge desk in the rental building. The tenants feel that the services that have been provided are not equivalent to the ones promised by the landlord. The landlord argued that the tenants still had and continue to have access to a variety of services such as security and a parcel holding service upon request.

In review of the evidence and testimony before me, I find that the tenancy agreement simply states that a concierge service was to be included. The agreement does not specific what specific service would be included. The tenants observed that the twenty-hour concierge desk was removed, and the tenants state that they were not informed of the parcel holding service.

In terms of the disputed testimony holding service, I am satisfied that the tenants appeared to be genuinely unaware and confused about how to access this service. Although the landlord may have attempted to communicate this service, I find that the tenants were under the understanding this service was provided as part of the twenty-four concierge desk, which was removed. I am satisfied the landlords have demonstrated that a parcel holding service is still being provided upon request, but only upon request of the tenants.

Similar to the other claims, the tenants filed a claim for financial losses for the failure of the landlord to provide this service. In this case, I am not satisfied that the tenants had provide receipts to support the losses claimed related to having to access parcels through an alternate means. Although the tenants described a scenario of having to open a mail box for parcels, and having to make 15 trips per month, I do not find this scenario to be supported in evidence. Accordingly, I dismiss the tenants' claims for the lack of access to a parcel holding service without leave to reapply.

The tenants also requested a rent reduction of $50.00 per month for other services that would have been provided by a concierge. In consideration of the evidence before me, as disappointing as it probably is to the tenants, the landlord

did not specific which specific services would be provided, and the specific hours would be kept as part of the concierge service that would be provided to the tenants. As noted in the *Act* and legislation, the burden of proof is on the tenant applicants to support their request for a rent reduction. Although I find that the landlord did indeed change the manner of delivery of the concierge services, I find that the original agreement did not specify what services would have been included. I find that some level of concierge service is still being provided by the building staff as a team, although not in the style or to the level as expected by the tenants. Although the expectations of the tenants have not been met, I am not satisfied that the reduction in rent has been supported. Although I can conceive the value and benefit of a twenty-hour desk and concierge service to the tenants, I do not find that this level of service was specified as part of the tenancy agreement, nor have the tenants sufficiently supported that they had access to this level of service before. For these reasons, I dismiss the tenants' claims for the rent reduction in relation to the concierge service without leave to reapply.

As the filing fee is normally awarded to the successful party after a hearing, the tenants' application to recover the filing fee is dismissed without leave to reapply.

**Conclusion**

The tenants' entire application is dismissed 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: June 06, 2022

Residential Tenancy Branch