# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## FINAL DECISION

**Dispute Codes** RR, PSF, FFT

**Introduction**

This hearing was reconvened from an adjourned hearing originally scheduled for December 19, 2022 in response to the Tenants' application to the *Residential Tenancy Act* (the "*Act*") for:

- an order to allow the Tenants to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an order that the Landlords provide services or facilities required by law pursuant to section 65;
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72. All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. TS and BM attended as the Tenants and HDM appeared for the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of *Rule 6.11* of the *Rules of Procedure*, (the "*Rules*")which prohibits participants from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch. I have amended the Landlord's name from HDM to HD.

At the December 19, 2022 hearing, Tenants TS and BM acknowledged service of the Landlord's evidence, but testified that they had not received a "complete evidence package" and objected to proceeding with the hearing. The Landlord testified that every document she uploaded to the Residential Tenancy Branch (the "RTB") was provided to the Tenants by the Property Manager. She could see no reason why the Property Manager would withhold some of the evidence. The Landlord then stated that some of the files the Tenants provided on a USB stick were corrupted.

As I was unable to confirm what evidence was received by the Tenants, Pursuant to the *Rule 7.9* of the *Rules,* I adjourned the hearing. In the Interim Decision rendered on December 19, 2022 I set out the reasons for the adjournment and ordered both parties to resubmit their original evidence, in one package, to the other party and to the RTB within a specific time. The parties were told not to submit new evidence. If new evidence was submitted that evidence would not be considered.

The Interim Decision and notices of reconvened hearing (containing the call-in numbers for this hearing) were sent to each of the parties using the contact information provided to the Residential Tenancy Branch. The Interim decision should be read in concert with this Final Decision.
The Tenant testified in compliance with the Interim Decision, she made a paper copy of their evidence, put the videos on vsb and mailed the package by Priority Mail to the Landlord on December 22, 2022. The Tenant provided a tracking number confirming this mailing which is reproduced on the cover of this

decision. She stated that she forgot to include a bylaw notice in the evidence package and sent it to the Landlord by email. The Landlord confirmed receipt of the information.

The Landlord testified that her evidence, including an itemized list of all documents included, was sent to the Property Manager who confirmed each document against the list with the onsite maintenance person before placing the package in the Tenants mailbox on December 21, 2022.

The Tenant stated that the Property Manager did not deliver the package, rather, the package was placed in the Tenants' locked mailbox by the onsite maintenance person. The Tenant called the police reporting that the onsite maintenance person illegally accessed the mailbox,

The Landlord confirms that the onsite maintenance person placed the mail in the mailbox after the Property Manager handed him the key, so the Property Manager could video delivery. The Landlord confirms that the police contacted her after speaking with the Tenants. The Officer stated that he told the Tenants it is common for onsite maintenance personnel to have mailbox keys, it is not unlawful, and that he would not testify at this hearing on their behalf.

The Tenant testified that they did not receive the July 10, 2022 notice advising of the parking changes in the recent evidence package delivered December 21, 2022. The Landlord disputes the Tenant's testimony stating that each item in the package was double checked – first by the Landlord and then by the Property Manager with the onsite maintenance person to confirm the evidence was included. The Landlord read through the list of items included in the package.

Service of documents is a rebuttable presumption and in making my finding I have considered the following:

- The Tenants were aware of the July 10, 2022 Notice as the Landlord introduced this Notice into evidence in the original hearing on December 19, 2022.
- If the Tenants did not receive the July 10, 2022 notice, when they opened the package and checked the documents, they had the option to contact the Landlord or the Property Manager and requested the document be sent. The Tenants did not do so.
- Although the Tenants allege the Landlord has a prior history of intentionally withholding documents, I fail to see what the benefit of withholding this document is to the Landlord given the Tenants were aware of the contents of the document based on the Landlord's testimony at the original hearing.
- The Landlord testified that the package she sent to the Property Manager contained an itemized list of the documents in the package which were then checked by the Property Manager and the maintenance person prior to placing the package in the mailbox; thus making the package contents double checked for accuracy.

On a balance of probabilities, I find that the July 10, 2022 document was more likely than not included in the package. Further, if in fact the document was not included the Tenants could have reached out to the Landlord or her Agent to obtain a copy. I find that the Tenants and Landlord were served with each other's evidence in accordance with sections 88 and 90 of the *Act*.
I also restated that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

**Issues to be Decided**

Are the Tenants entitled to:

1) an order to the Landlord to provide services or facilities;
2) a rent reduction; and
3) recover the filing fee?

**Background and Evidence**

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

The parties entered into a written fixed term tenancy agreement starting September 1, 2016 and ending August 31, 2017 continuing thereafter as a month-to-month periodic tenancy. According to the tenancy agreement uploaded, monthly rent at the time was $775.00, payable on the first of each month.

At the reconvened hearing of January 3, 2023, the Tenant stated that initially the Tenants agreed to be maintenance personnel for reduced rent in the amount of $100.00 per month. The arrangement did not last long, perhaps November and December 2016 and the rent was then increased by $100.00 to $875.00 per month. Rent is currently $923.00 per month. The Tenant stated that the tenancy agreement is in her storage locker.

The Tenant paid the Landlord a security deposit of $387.00. The Landlord still retains this deposit. The tenancy agreement under Clause 3(b) "What is included in the rent" identifies the following inclusions with rent paid:

| | | | |
|---|---|---|---|
| Water | Heat | Stove and oven | Refrigerator |
| Window coverings | Storage | Garbage collection | Parking for 1 vehicle |

The Clause also states:

> The Landlord must not terminate or restrict a service or facility that is essential to the Tenant's use of the rental unit as living accommodation or that is a material term of the tenancy agreement.

Under Clause 17 "Additional Terms" in the tenancy agreement, and Addendum with eight (8) additional terms form part of the Agreement. Item 7 of the Addendum reads:

> 7) Each unit is only entitled to one parking spot. Vehicles must be legally registered and insured in British Columbia in order to park at the building.

The Landlord testified that this clause was included for property insurance purposes but has never been enforced.

There are ten (10) rental units on this residential property, currently with eleven (11) parking spots. Photographs of the parking spaces, some of which are covered and others which are outside were submitted as evidence .

The Residential Tenancy Branch Dispute Management System files tenancy agreements in "Dispute View" in proximity to Applicant information – in this case the Applicants were the Tenants. At the hearing, I mistakenly stated that the Tenants uploaded the tenancy agreement when, in fact, the Landlord uploaded the tenancy agreement.

**Tenant**
**December 19, 2022 hearing**

The Tenant, TS, stated that for six (6) years, the Tenants parked in parking stall #6 that was "given" to them by the Landlord six (6) years ago because of the size of their vehicle. All residents have been parking in the same spots for six (6) years.

On August 16,2022, the Landlord enacted new parking assignments. The Tenants' new parking assignment moved the Tenants underground. The current parking spot measures 95.5" from wall to pole and the truck measures 112" making the new assigned parking spot unusable for the truck.

The Tenant states that their previous spot remains empty. When she questioned the Landlord about the empty parking spot, the next day maintenance assigned the spot to "owner", but the Tenant pointed out that spot is empty because the owner/landlord lives in Ontario.

The Tenant states that when she asked the Landlord why she reassigned parking, the Landlord told her that it resulted from a number of complaints received from residents. The Tenant states that as long as she has lived in the rental unit, there were no parking issues and rarely had anyone been towed. Occasionally delivery drivers would use the residents' parking and "so people were parking all over". The Tenant states that the only Tenants who benefited from the parking assignments were the new Tenants. The Tenant states that in February 2020, they were given permission to store a Tonneau cover in the garage for two (2) months and used two (2) parking spots.

The Tenant states because of the new parking arrangements, they have to pay $125.00 per month to park on the neighbor's lawn. The Tenant submitted receipts for the alleged charge.

The Tenant states that street parking is "not permitted" under the bylaw. The truck belongs to BM and TS owns a car, that she parks on the street. BM works out of town and is away for several weeks at a time; thus, the truck remaining in situ would be in violation of the bylaw and subject to fines and towing.

The Landlord did tell the Tenants they could use another Tenant's parking spot but TS states that this leaves BM open to towing for parking in someone else's spot. Also, if that Tenant moves, it would leave BM and TS in the same situation, without a usable parking spot.

**January 3, 2023 Hearing**

In the reconvened hearing the Tenant testified that the parking spot assigned to them does not comply with bylaw requirements. The Tenant states they measured the parking spot and it measures 2.3 meters in width and the bylaw requires a minimum width of 2.4 meters. Further, to make a 60-90 degree turn there must be 7 meters clearance to pull into a parking spot and the configuration does not

allow for that. The Tenant argues they have not been given a legal spot and the spot is unusable even for the other car they own. The Tenant read the applicable bylaw into evidence. Bylaw violations are outside the scope of my jurisdiction.

The Tenant states they have owned the same vehicle a GM 2500 since 2016 and they were "given the #6 spot" because of the size of their vehicle. A notice in March 2017 was posted to the doors of every Tenant in the residential property, allocating parking stall #6 to the Tenants. The Tenant stated that she has a copy of the notice in her storage locker. She did not upload it because my Interim Decision stated no additional evidence could be submitted.

Although my Interim Decision did, in fact, state no new evidence will be considered; I remind the Tenants this was their application and the onus to prove the claim falls to the applicants. If the Tenants felt this document was sufficiently relevant to prove their case, they had ample time and fair opportunity to prepare for this hearing, including retrieving relevant documents such as the tenancy agreement and the memo out of storage.

Notwithstanding, the Landlord confirmed that she issued a memo to all the Tenants stating that TC and BM could "use" parking stall #6.

The Tenant argues that the Landlord never sent out the July 10, 2022 notice about implementing the new parking structure. The Tenant alleges this was not the first time the Landlord failed to provide notices as required under the *Act*. The Tenant thus argues that she did not receive the required 30-day notice. BM concurred with TS that no notice re: parking was received The Tenant stated she canvassed other tenants who stated they did not receive the July 10, 2022 notice either. Other than their oral testimony, the Tenants provided no supporting evidence to prove this allegation.

The Tenants are adamant they want their old parking stall, which was "taken away", back. The Tenant once again argued that the "swap" was not a viable solution and pointed out that at the time of the hearing parking stall #9 was being used by the maintenance person. BM stated he is not interested in compensation but wants his parking spot returned.

The Tenants consider that the Landlord is determined not to accommodate their requests for stall re-assignment in retaliation over grievances and another dispute resolution application before the RTB. The Tenants also wanted to note for the record they believe their tenancy is in jeopardy.

**Landlord**

The Landlord states that the tenancy agreement allows for one parking spot and prior to August 18, 2022 Tenants were not assigned specific stalls. Parking was on a first come, first served basis.
The Landlord stated that parking was becoming increasingly contentious. For example, on February 18, 2021, the Tenant sent the Landlord a text message complaining about hospital workers parking in the resident's parking spots. The Hospital is across the street from the rental property. The Landlord submitted the text message into evidence. On December 1, 2021, the Tenant sent the Landlord a text message stating that more Tenants had cars and were parking wherever there was a free spot. In part to resolve the problems of random parking and non-residents parking in tenant parking spaces, the Landlord decided to assign parking stalls to each unit. The Landlord testified:

- complaints from Tenants determined random parking was creating problems and parking needed to be defined;
- she was getting the building "sell ready" and was working with the municipal planning department to ensure parking compiled with municipal bylaws and regulations.

The Landlord testified she was told by City Planning that the two (2) middle spots were too small and were not in compliance with regulations. The Landlord submitted before and after photos of the two (2) middle spots, showing the reconfiguration based on municipal requirements. The Landlord provided no municipal documentation.

The Landlord testified that City Planning told her that parking spots must be a minimum of 2.4 metres *acr*oss. The Landlord stated that six (6) parking spots measure 2.41 metres wall to post; 2 larger parking spots measure 4.7 metres (each) post to post; one parking spot measure 2.35 metres and was not a legal spot. Parking had to be reconfigured. City Planning recommended eight (8) covered parking spots and two (2) outside parking spots. After bringing the parking into compliance, the Landlord proceeded with numbering the parking spots sequentially one through ten, making it organized and fair, and to resolve parking complaints. The Landlord testified that favoritism did not factor into the decision. The decision was purely utilitarian.

The Landlord testified a notice was issued to all Tenants on July 10, 2022 advising that parking will be assigned:

> Due to a growing concern over open parking spots, parking spots will need to be assigned. The entitlement will remain the same. I spot per unit. T and R will be painting lines with spot numbers. into the near future. They will be doing this in chronological order and parking will be assigned vice open by mid next month. A reminder will come out once this is completed. [reproduced as written]

On August 3, 2022, the Landlord notified all Tenants that maintenance will begin painting the numbers on the parking stalls.

By August 16, 2022 the stalls were numbered and parking assignments complete. A notice went out to all tenants advising of their parking stall number.

After receiving the notice, the Tenants sent the Landlord a text message asking if they could switch parking spaces. The Landlord contacted the Tenant in Unit 9 and the Tenant agreed to let TS and BM use parking stall #9, since that Tenant does not own a car. The Landlord stated that she offered this accommodation to the Tenants, which the Tenants declined.

The Landlord confirms that the Tenant is currently parking his truck on the neighbor's lawn. She states if the Tenant is in fact paying for parking, it is in contravention of Bylaw 14.04 ss (2.3) and (2.4) and if the neighbor was reported to the Bylaw department could be fined. The neighbor is not zoned to run a parking lot. The Landlord states that paid parking in this municipality "is hard to come by" since most parking is free throughout the municipality.

The Landlord states that the reason that BM does not want to park on the street is because his truck has

Alberta plates and is not registered in British Columbia. TS's vehicle, that is parked on the street, would definitely fit in that spot. The Landlord states she has not control over the size of vehicles owned by Tenants and the size is not her problem. The tenancy agreement provides for one parking space, she is providing one parking space. The Landlord states she spoke to the RTB who confirmed that

**January 3, 2023 Hearing**

The Landlord confirmed the Tenants' testimony that the Tenants were told they could "use" Stall 6 but reiterated there was no "assigned" parking. Parking was not an issue at that time since only 3-4 people in the complex had vehicles confirmed by the text conversation between the Landlord and the TS. Currently most of the Tenants living at the residential property have vehicles.

The Landlord stated that when her maintenance person started to paint the lines, she received a call in August from the municipal bylaw office telling her that some of the spaces were too small and she must reduce the number of parking stalls. There are eight (8) legal spots under cover and three (3) additional parking spots outside.

The Landlord testified after the parking spots were brought into compliance and the lines painted, a bylaw officer inspected the stalls and signed off on the changes.

Again, the Landlord testified that she made the changes based on complaints about non-residents parking in Tenant parking and she is in the process of selling the building. The decision to number the parking spots consecutively was based on aesthetics and practicality, with a one-to-one ratio of parking to unit with parking spots to match the unit number.

The Landlord tried to accommodate the Tenants by arranging a swap with the Tenant in #9 who does not own a vehicle but the Tenants refused the accommodation.

The Landlord concluded by stating that the Tenants' tenancy is not now nor ever has been jeopardized. She stated that they have been good Tenants and at one time she and the Tenants were friends.

**Analysis**

The Tenants made application to order the Landlord provide services or facilities; for a rent reduction; and for reimbursement of the filing fee. As the Applicants, the Tenants bear the burden of proof. The burden of proof is on the balance of probabilities.

**Parking Stall Assignment**

The *Act* s. 1 defines "rent" as money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of the Tenant to a Landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include a security deposit, a pet damage deposit, or a fee prescribed under s. 97(2)(k) of the *Act.* The definition of "services and facilities" in the *Act* includes parking.

The *Act* s. 13 sets out that a Landlord must prepare a written tenancy agreement and include certain

information and terms in the tenancy agreement including:

> (f) the agreed terms in respect of the following:
> (vi) which services and facilities are included in the rent.

The definition of "services and facilities" under the *Act* s. 1 includes:

> (d) parking spaces and related facilities.

The *Act* s. 13 and the definition of services and facilities provides that the tenancy agreement must reflect the parking spaces and related facilities to be provided to the Tenants as part of their rent payment. Whereas, Section 7(1)(g) of the *Residential Tenancy Regulations* provides that a landlord may charge a Tenant a fee for services or facilities requested by the Tenant if those services or facilities are not required to be provided under the tenancy agreement. This distinction is relevant in that different rules may apply depending on whether the service is part of the rent vs a distinct service requested by the Tenant and paid for outside the tenancy agreement.

It is undisputed that the tenancy agreement executed by the Tenants and Landlord reflect parking for one vehicle is included in the rent. I find the tenancy agreement is clearly written and the term is enforceable.

Unlike a strata property, governed by bylaws, rules, guidelines, and policies or procedures, the Landlord argued that prior to assigning parking there were no formal rules, guidelines, polices or procedures for dealing with assignment or reassignment of stalls because parking was random. The Landlord testified parking stall #6 wasn't formally "assigned" or "allocated" to the Tenants. They were given permission to "use" the parking stall and at that time parking space was not an issue as only 3-4 Tenants had vehicles.

The Tenants submit that in March of 2017 the Landlord circulated a memo to all Tenants at the residential property advising that parking stalls #2 and #6 were allocated to specific Tenants. Although the Tenants failed to submit the notice into evidence, the Landlord confirmed a notice was sent out stating that the Tenants could "use" parking stall #6.

In deciding this matter, I have considered whether the Landlord was estopped from assigning the Tenants a different parking stall and/or if by way of the parties actions there was an implied waiver to the parking clause in the tenancy agreement.

In *Cowper-Smith v. Morgan,* 2017 SCC 61, the Chief Justice wrote that:

> *[a]n equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.*

This doctrine protects the claimant's equity in a matter, and the following broad concept of estoppel is described by Lord Denning M.R. in *Amalgamated Investment & Property Co (In Liquidation) v. Texas Commerce International Bank LTD.,* [1982] 1 Q.B. 84 (C.A.). at [; 122

> When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. [emphasis added]

> [66]. The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. V. Pan* 1988 Canlll 174 (BC CA). [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in Desbiens v. Smith, 2010 BCCA 394:
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> > …It would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment…[emphasis added.]. That statement was affirmed by the English Court of Appeal in *Habib Bank* and, as we read the decision, accepted by the Court in *Peyman v. Lanjani,* [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.) p. 731 (May L.J.) and p. 735 (Slade L.J.).

In lay terms, estoppel is a rule of law that states when person A, by act or words, gives person B reason to believe that a certain set of facts upon which person B relies, person A cannot later, to his (or her) benefit, deny those facts or say that his (or her) earlier act was improper. In effect, estoppel is a form of waiver, when person A does not enforce their rights and person B relies on this waiver.

Guideline 11 discusses waiver, in part:

> Express waive happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will continue.
>
> Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent, Instead, the waiver is implied through the actions or behavior of the landlord or tenant.

It is important to note that *intent* may be established by evidence as to the *conduct of the parties*.

In deciding this matter I considered the following:

- The tenancy started on September 1, 2016.
- In March 2017, six (6) months after the tenancy started, the Landlord issued a notice to the Tenants in the residential property that the Tenants could "use" parking stall #6.

- The Tenants had continued and sole "use" of parking stall #6 since March 2017 through August 2022.

In the present case, I find the Tenants have met the evidentiary threshold necessary to establish a waiver and estoppel. Although parking stall #6 was not formally documented in the tenancy agreement as assigned to the Tenants, I find there is sufficient evidence, based on the conduct of the parties, to show it was an implied or unwritten agreed to term. Thus, I find that while the bulk of Tenant parking on the residential property was random, parking stalls #6 [and #2] were, in fact, "assigned" parking. The Landlord's argument, drawing a distinction between "use "of the parking stall and an "assigned" parking stall, is linguistic parsing. The Tenants had exclusive use of parking stall #6, which they relied upon for six (6) years by way of a circulated memo. I find on a balance of probabilities that the Landlord's conduct amounts to an implied waiver to the random parking used by other Tenants of the residential property. I find it unreasonable that the Landlord, some 6 years after, assigns the Tenants' different parking.

I order the Landlord to reinstate **former parking stall #6** to the Tenants.

**Reduced Rent**

The Tenants applied for an order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65. The Tenants allege they incurred a monthly cost of $125.00 from September through December for parking as a direct result of the Landlord's new parking assignment. The Landlord disputes the Tenants' claim.

Guideline 16 sets out the criteria which must 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 ay determine whether:
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> - 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 Tenants were offered and declined the free parking stall (#9). Guideline 16 requires the party alleging loss to act reasonably to minimize the alleged damage or loss. I find the Tenants , in refusing the parking offered, have not done so. Accordingly, I dismiss this part of the application without leave to reapply.

Pursuant to the *Act* s. 72(2)(a), as the Tenants were partially successful in their application, I authorize the Tenants to deduct $50.00 from rent payable to the Landlord for the month of February 2023.

**Conclusion**

I order the Landlord to reinstate former parking stall #6 to the Tenants.

I dismiss the Tenants' application to reduce rent pursuant to s, 65, without leave to reapply.

I authorize the Tenants to deduct $50.00 from rent payable to the Landlord for the month of February 2023.

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: January 24, 2023

Residential Tenancy Branch