



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, FFL**
 MNDCT, MNSDS-DR, FFT

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- An order requiring the tenant to reimburse the landlord for the filing fee pursuant to section 72.

This hearing dealt also with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;

- An order for the landlord to return the security deposit pursuant to section 38;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The tenants attended (“the tenant”). VE attended as agent for the landlord (“the landlord”).

Both parties were given the opportunity to make submissions as well as present affirmed testimony and written evidence. The hearing process was explained, and an opportunity was given to ask questions about the hearing process. The parties provided their email address for delivery of the Decision.

Settlement Discussions

Neither party made any adjournment or accommodation requests.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. Both parties had an opportunity to ask questions, which I answered.

I informed the parties I make my Decision after the hearing and not during the hearing and that I would not provide legal advice to them.

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute and if the parties do so during the dispute resolution proceedings, the settlement may be recorded in the form of a Decision or an Order.

The Arbitrator assisted the parties in efforts to settle the matter. Settlement discussions were unsuccessful, and the hearing continued.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for damages and for authorization to apply the security deposit to any award?

Is the tenant entitled to a monetary award for damages and for return of the security deposit?

Is a party entitled to reimbursement of the filing fee?

Background and Evidence

Overview of Applications

This cross-application involved a fixed term tenancy. The landlord explained they are a property management company with several employees, and they manage the unit on behalf of the owner, the other named landlord.

The landlord's main claims are for two months rent for the period after the tenant moved out and before a replacement occupant moved in, as well as a fee for re-rental.

The tenant moved out before the end of the tenancy. Their new home was ready for occupancy, and they were uncomfortable in the unit because of the presence of insects. The tenant's main claims are for a doubling of the security deposit and a monetary award for loss of quiet enjoyment.

Evidence

Both parties submitted documentary evidence and verbal testimony at the hearing.

The tenant submitted a substantial documentary package consisting of many copies of correspondence (texts and emails), documents, pictures and videos.

Not all evidence, asserted facts and arguments referenced in the 2-hour hearing are reproduced in this Decision. I refer to only selected, key, admissible evidence upon which my findings are based.

The Tenancy

A copy of the tenancy agreement was submitted. The parties agreed on the following background.

INFORMATION	DETAILS
Type of Tenancy	Fixed term
Beginning Date	July 9, 2021
Fixed Term End Date	July 31, 2022
Vacancy Date	May 31, 2022
Rent payable on first of month	\$2,800.00
Security deposit	\$1,400.00
Pet deposit	0
Condition Inspection Report on Move-In signed by both and submitted	yes
Condition Inspection Report on Move-out signed by both and submitted	no
Arrears of Rent	none
Forwarding address Provided	May 31, 2022 (tenant) June 15, 2023 (landlord)

Condition Inspection Report

A Condition Inspection Report on moving in was conducted and a copy of the report was submitted signed by both parties. The Condition Inspection Report indicated the unit was in good condition in all material aspects.

A Condition Inspection Report on moving out was submitted. Although completed, the report is not signed. The tenant testified the attending agent for the landlord said she did not have authority to sign. The tenant was not provided with a copy. The incomplete report does not reference the following issues relevant to the tenant's claims: presence of insects, condition of the yard, workshop and one of the (non-functioning) toilets.

Landlord's Claims

The landlord's claim, confirmed at the hearing, is:

	ITEM	AMOUNT
1.	Re-rental administrative charge	\$700.00
2.	Outstanding utilities (final 2 months)	\$176.96
3.	Rent June 2022	\$2,800.00
4.	Rent July 2022	\$2,800.00
	TOTAL	\$6,476.96

The landlord requested reimbursement of the filing fee and authorization to apply the security deposit of \$1,400.00 to the award.

Tenant's Claim

The tenant's claim, confirmed at the hearing, is:

	ITEM	AMOUNT
1.	Security deposit return	\$1,400.00
2.	Security deposit doubling	\$1,400.00
3.	Loss of Quiet Enjoyment (flying ants) - 30% of monthly rental for 4 months	\$3,360.00
4.	Loss of Services/Facilities (yard from debris) - 10% of rent for 5 months	\$1,400.00
5.	Loss of Services/Facilities (workshop without power) \$100.00 x 10 months	\$1,000.00
6.	Loss of toilet one month	\$70.00
	TOTAL	\$8,630.00

Agreement

The tenant agreed to pay the re-rental administrative fee claimed by the landlord of \$700.00.

The tenant agreed to pay the utility fees if an award for rent were made against them.

Each claim is addressed.

Landlord's Claim for Two Months' Rent

The parties agreed the tenant provided written notice on April 12, 2022, that they were moving out on May 31, 2022.

The landlord testified as follows. They started advertising May 5, 2022. They claimed considerable experience with advertising for tenants as a long-established property management company. As far as the attending agent was aware, the landlord followed their usual corporate protocol which included advising a potential client/renter list of the availability and advertising adequately. No copies of any correspondence to such a list was submitted and it was not

clear when such a mailing occurred. The landlord submitted some copies of ads on websites and claimed they were refreshed regularly.

The tenant asserted the landlord's efforts were inadequate for the following reasons:

1. The landlord knew when the tenant moved in, they would be vacating early as they were building a house.
2. The parties had agreed on 2 months notice by the tenant. The tenant agreed before they moved out to pay the \$700.00 administration fee for re-rental.
3. The tenant wrote to the landlord on March 9, 2022, a copy of the text exchange being submitted, and saying they were moving out June 1, 2022 and offering to move out earlier:

We take possession of our home on May 20th [2022]; so we were hoping to exit the lease around June 1. We are flexible, however, if there are renters found that may need the property on an earlier date. As discussed, I understand there is an early cancellation fee. We have no issues paying that.

4. The landlord replied:

[...] Like I said before, once you give your official notice we are required to start advertising and showing immediately. It just depends if you're willing to accommodate viewings for that long prior to move out. I believe 2 months notice would be plenty of time to find a tenant to move in by June 1st if that's the date you would prefer to be out by. I have passed along this information to the landlords as well.

5. The tenant sent an email on April 12, 2022 confirming they were moving out June 1, 2022.

6. On April 18, 2022, the landlord acknowledged receipt of the tenant's written notice to vacate May 31, 2022 and stated:

I will let the owners know and we will start to advertise.

7. The landlord starting advertising on websites about 3 weeks after notice was given and not right away. The delay meant it was not likely a replacement occupant could be found for a move-in date of May 31, 2022.
8. Efforts to advertise were inadequate:

- a. The landlord did not post on enough websites. On June 16, 2022, the tenant wrote to the landlord, a copy of the correspondence being submitted:

You had two months to advertise, and only brought in two viewings during that time.

- b. The landlord did not put a "for rent" sign outside.
 - c. The landlord did not let other client renters know that a unit was available or did so inadequately.
 - d. The tenant proactively sourced potential occupants but the landlord claimed they were all unqualified. The tenant submitted a copy of correspondence with the landlord dated June 16, 2022:

I listed the property on Facebook and have redirected six people that are extremely interested in the house to you via email. One of them has reached out and said that nobody got back to her today. I truly hope you get these people viewings asap and get this house rented.

- e. The landlord initially advertised the unit for more rent than the tenant was paying. They raised the rent from \$2,800.00 to \$2,900.00,

before dropping it to the amount paid by the tenant. It was not clear when the landlord reduced the rent.

- f. The landlord initially advertised the unit as “no pets” although the tenant was permitted a small dog. This was a material change in the terms of the tenancy and reduced the pool of eligible applicants.
- g. The landlord made insufficient efforts to find replacement tenants as they assumed they were entitled to rent from the tenant for the final two months of the tenancy.
- h. The correspondence from the tenant to the landlord of June 16, 2022, a copy of which was submitted, states:

[T]he fact you are turning down so many potential renters is disappointing to me. The rule does not seem to be in place in order for you to take advantage of the tenants; you are required to put in an effort to rent it. Something I am not confident you are doing.

I also noticed that the rental says no pets, when we were told small pets were allowed when we moved in.

Tenant's Claim – Doubling of Security Deposit

The tenant submitted a copy of the notice providing their forwarding address. The notice is dated May 31, 2022, signed by the tenant and is in the standard RTB form.

Both tenants testified they handed this notice on May 31, 2022 to a representative of the landlord who attended the condition inspection on moving out although she refused to sign the report. This representative did not attend the hearing or submit a statement.

The landlord denied the tenant provided the forwarding address to one of their agents on May 31, 2022.

The landlord testified the forwarding address was provided on June 15, 2022 and they filed this application within 15 days of that date. The landlord claimed they had complied with the Act.

The tenant claimed entitlement to double the security deposit as the landlord did not return it within 15 days of the end of the tenancy and provision of the forwarding address.

Tenant's Claim – Loss of Quiet Enjoyment

The tenant testified as follows. In early February 2022, the tenant reported to the landlord that flying ants suddenly appeared in the unit's living room. While the landlord made some effort to eliminate the ants, the efforts were only partially and temporarily successful. The ants persisted until the end of the tenancy, seriously disturbing the tenant and forcing them to move out as quickly as possible.

The landlord replied as follows. They acknowledged there were ants in the unit for the last 4 months of the tenancy. However, they asserted everything possible was done to correct the situation. In any event, the number of ants were not significant and the presence of the insects was not the compelling reason why the tenant moved out.

The parties exchanged many texts and emails about the ants in the remaining 4 months of the tenancy, some of which are reproduced:

a. (Feb 3, 2022, from landlord to tenant)

I spoke with the landlords and they suggested to start with some ant traps for now and see how that goes. Please send us a photo of there receipt and we will reimburse you. They also asked if there is any moisture in the area that you've

seen them?

If you could keep us updated on the situation that would be great.

b. (Feb 6, 2022 from tenant to landlord)

So. Just an update. We have vacuumed up about 30 of these ants in the last 2 days.

Also, we are out of town Monday- Thursday.

We will leave out any traps while we safe gone... but these ants (from my research) are not gathering food to bring back. They are queens exploring to start new nests... in the wood.

So... curious what the threshold is for this to go to the next step? Let me just say, my wife is not super excited with flying ants in the living room.

c. (Feb 7, 2022 from tenant to landlord)

Vacuumed up about 15 more today. Also, one landed on my wife while in the living room today and fell down her shirt when she freaked out. Just putting the disgustingness out there. I think that they are entering the living room through holes in the roof near the main windows. That is near where I find the majority of them, and the holes seem to go into the attic.

d. (February 10, 2022 from tenant to landlord, picture of bowl containing dead ants enclosed)

We caught a few less than I expected, but our living room still had flying ants everywhere. On our couch, our chair, in our kids toys on the curtains. Just wanted this video for the record. These are the ones we saw and I vacuumed.



e. (Feb 15, 2022 from tenant to landlord)

Somebody [pest control] came by today. He said it is going to be a bugger to try and treat as it is in the attic. But, for now, he says the bugs should stop bothering us. I appreciate you getting this taken care of for us.

f. (Mar 8, 2022 from tenant to landlord)

The barrier seems to be doing its job. The ants all die in the one part of the living room now. Occasionally one makes it through, but it is rare now. The other day I vacuumed up over 60. ● Other days are around 20. It makes me wonder how many ants got through before that we never even saw. [...]

g. (February 20, 2022, written statement by NK, mother of tenant)

I was visiting my son and daughter in law between April 20 until May 4th, 2022. I went to in the living room to watch TV. I sat down in a chair closer to the window. I went to open the curtain a little to let some light in. Huge black flying ants fell all over me and on the ground and furniture around me. It was so disgusting. We were cleaning them up and when we came back to the room, they were everywhere again.

The whole visit was affected by these disgusting ants. If I wanted to sit on any furniture, I would have to first make sure there were no ants on the furniture. It made relaxing in the living room an impossibility. So with this issue it was also impossible for me to sit with my family. and enjoy my visit with them.

Even going to bed at night was creepy because I kept feeling like there were ants in or on my bed. That is how bad they were. At one point I had fallen asleep on the sofa on the farthest part away from the windows while watching tv. When I woke up there were ants crawling on me. It was really disgusting

While I was there, I witnessed my son speaking to one of the landlords about it, and he did not seem overly concerned about it. Nothing was

done about it during my time at my sons to vis

Tenant's Claim – Loss of Services or Facilities

The tenant testified as follows. The unit included an exterior workshop. At the beginning of the tenancy, the landlord told the tenant the workshop had functioning electricity. The tenant learned it did not. The tenant claimed compensation as they were denied the use of the workshop.

The tenant also claimed the back yard was not available to them from early January 2022, when weather caused branches and debris to land in the backyard, to the end of the tenancy. The tenant notified the landlord of the situation, and the landlord did not respond adequately or clean up the yard. The debris remained in the backyard until the tenant moved out. The tenant's child was unable to play in the backyard as a result.

Finally, the tenant claimed that one of the toilets in the unit required replacing and they were without the extra toilet for one month. The parties cooperated on the replacement and disposal.

The landlord denied the tenant is entitled to any monetary award for either of these claims. The landlord acknowledged correspondence between the parties about the debris in the back yard and the toilet. However, the landlord asserted none of the above assertions are sufficient to amount to a loss of services or facilities and the tenant made no claim for compensation during the tenancy.

Filing fee

Each party claimed reimbursement of the filing fee.

Analysis

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the submissions and arguments are reproduced

here. The principal aspects of the claim and my findings around each are set out below.

Credibility

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth.

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

I have carefully reviewed the evidence. I find as follows.

The tenant's testimony was straightforward and matter of fact. Their testimony was supported in most aspects by substantial documentary evidence. They clearly expressed what it was like to live in the unit during the flying ant infestation. The documented the landlord's efforts to re-rent the unit.

I find the landlord acknowledged the truth of the tenant's testimony in many key aspects. In matters over which they disagreed, I find the agent was not always informed of key aspects of the tenant's claims and was not a party to all communication. The agent who attended at the hearing acknowledged the management company had employees who also communicated with the tenant.

I do not place much weight on the landlord's general denial of all responsibility and minimization of the discomfort and inconvenience to which the tenant testified.

I have concluded the tenant's version of events is credible and reasonable in the circumstances. I find their recounting of what took place, and the personal consequences, rings true given the photographs and copies of correspondence. I find they documented the events in a believable manner.

I find their testimony to be most in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

For these reasons, I prefer the tenant's testimony. Where the parties' testimony conflicts, I give greater weight to the tenant's evidence and version of events.

Burden of Proof

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 their case is on the person making the claim.

The claimant (the tenant) bears the burden of proof to provide sufficient evidence to establish on a balance of probabilities all the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the Act, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the Act

Policy Guideline 1 - Landlord and Tenant – Responsibility for Residential Premises states in part as follows:

The Landlord is responsible for ensuring that rental units and property, or manufactured home sites and parks, meet “health, safety and housing standards” established by law, and are reasonably suitable for occupation given the nature and location of the property.

Sections 7, 65 and 67 address compensation as follows:

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.

Director's orders: breach of Act, regulations or tenancy agreement

65 (1) Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

(a) ...

(b) that a tenant must deduct an amount from rent to be expended on maintenance or a repair, or on a service or facility, as ordered by the director;

(c) that any money paid by a tenant to a landlord must be

(i) repaid to the tenant,

(ii) deducted from rent, or

(iii) treated as a payment of an obligation of the tenant to the landlord other than rent;

...

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I address the parties' claims in the following order.

1. Tenant's Claim – Doubling of Security Deposit
2. Tenant's Claim – Loss of Quiet Enjoyment
3. Remainder of Tenant's Claims
4. Landlord's Claim for Rent for June and July 2022
5. Filing fee
6. Summary of Award

1. Tenant's Claim – Doubling of Security Deposit

Section 38 of the Act requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value the deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit pursuant to section 38(4)(a).

Section 38(1) and (6) state:

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.

The parties agreed the tenant provided a security deposit of \$1,400.00 which the landlord holds.

I accept the tenant's credible testimony supported by a copy of the notice of forwarding address and find as follows. The tenant provided their forwarding address in writing to the landlord in compliance with the Act on May 31, 2022. The tenant has not waived their right to the return. The landlord submitted their application to retain the security deposit outside the 15-day period and did not comply with the Act.

Under these circumstances and in accordance with sections 38(6) and 72 of the Act, I find that the tenant is entitled to a monetary award of double the security deposit and I grant a Monetary Order in this amount.

2. Tenant's Claim – Loss of Quiet Enjoyment

The tenant's claim for damages is for compensation for loss of quiet enjoyment from an insect infestation, flying ants, for the last 4 months of the tenancy. The tenant has framed their loss of quiet enjoyment claim as a percentage reduction of rent paid in the past.

Section 28 of the Act deals with the tenant's right to quiet enjoyment. The section states (emphasis added):

28. A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

1. reasonable privacy;
2. **freedom from unreasonable disturbance;**
3. exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];
4. use of common areas for reasonable and lawful purposes, free from significant interference.

The *Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment* provides guidance in determination of claims for loss of quiet enjoyment.

The Guideline states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. The Guideline defines a breach of the entitlement to quiet enjoyment as *substantial interference with the ordinary and lawful enjoyment of the premises*.

The Policy Guideline states this includes situations in which the landlord has directly caused the interference, as well as situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.

The Guideline states in part as follows (emphasis added):

B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means **substantial interference with the ordinary and lawful enjoyment of the premises.**

This includes situations in which the landlord has directly caused the interference, and situations in which **the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.**

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. **Frequent and ongoing interference** or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

...

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 and section 60 of the MHPTA (see Policy Guideline 16).

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.

[emphasis added]

[...]

Director's orders: breach of Act, regulations or tenancy agreement

65 (1) Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

...

(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;

I have considered the tenant's credible testimony supported by substantial documentary evidence. I find the living room of the unit had flying ants beginning in early February 2022 which continued until they vacated at the end of May 2022, a period of 4 months. I find the presence of sometimes many of the insects during this period seriously undermined the tenant's right to quiet enjoyment of the unit. I accept the tenant's evidence supported by documents and a witness statement that the presence of the insects was a substantial interference with the ordinary and lawful enjoyment of the premises. Although the number insects varied from time to time, I find the insects were a frequent and ongoing interference.

I find the tenant notified the landlord in writing of the presence of the insects as soon as they discovered them, in early February 2022. I find the tenant cooperated with efforts to remedy the situation and did not expect the presence of the flying ants to continue for 4 months.

The landlord acknowledged the presence of the insects in the unit for the final 4 months of the tenancy but stated they were not in sufficient numbers to affect the tenant.

Having reviewed the timeline of events, the testimony of the parties, and the correspondence between them, I find the landlord had an obligation to deal with the ants and failed to do so in an effective and timely manner within a reasonable time. I find the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to deal effectively with the issue. I find the landlord did not remedy the breach during the tenancy.

I do not accept the landlord's assertion that the number of insects was not substantial. The tenant testified to the presence of dozens at a time which they vacuumed. While the number varied, I accept the tenant's claim as having lived in the unit that the situation was upsetting and disturbing. The use of the living room was not available to them. I find the tenant has established on a preponderance of evidence a scarcely tolerable situation.

I find the tenant has met the burden of proof that a loss of quiet enjoyment occurred, they quickly notified the landlord, and the landlord failed to respond effectively in a reasonable time.

I considered **Policy Guideline 16: Compensation for Damage or Loss** which states:

An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

- "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infringement of a legal right. While a precise valuation is not possible for the lack of quiet enjoyment described, I find the tenant has met the burden of proof for an award in the amount claimed.

In consideration of the evidence, the Act and the Policy Guideline, I find the tenant is entitled to an award as requested of 10% for the loss of rent for the 4-month period February, March, April and May 2022 which I find is \$1,120.00.

I grant the tenant an award in this amount.

5. Remainder of Tenant's Claims

I find the tenant has not met the burden of proof with respect to the remainder of their claims. While the workshop may indeed not have had electricity, I find the tenant acquiesced by their behaviour to its condition, did not request or insist on its repair, and has not established any loss or damages.

While there were clearly branches and debris in the back yard concerning which the tenant provided notice to the landlord, I find the situation did not amount to a breach of a condition of the tenancy agreement or Act. I find the tenant has not established any loss or damages.

While the tenant was without one of the toilets for a month, I find the parties' cooperated with the replacement in a timely manner and there was no breach of the tenancy agreement or Act. The tenant did not claim compensation in a timely manner and has not established any loss or damages.

I dismiss these claims without leave to reapply.

6. Landlord's Claim for Rent for June and July 2022

The parties agreed the tenant moved out of the unit two months before the end of the fixed term. The landlord claimed compensation for rent for the two final months of the fixed term. I accept the landlord's evidence they did not receive rental income from the unit in those two months.

The tenant claimed the landlord did not make adequate efforts to find a replacement occupant for the unit. They also claimed they could not continue to live in the unit because of the insect infestation.

I will first address the tenant's claim the landlord has not met its burden to mitigate loss of rent.

Section 7 of the *Act* provides that where a landlord claims against a tenant for loss of rent the landlord has a burden to prove the landlord took made every reasonable effort to minimize losses.

Section 7 of the *Act* imposes an obligation on the landlord to do whatever is reasonable to minimize the damage or loss, stating in part (emphasis added):

Liability for not complying with this Act or a tenancy agreement

7 (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 Policy Guideline 3: *Claims for Rent and Damages for Loss of Rent* provides information and policy statements with respect to claiming for loss of rent. The policy guideline states, in part, emphasis added:

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant.

I find the landlord acted indifferently to their obligation to mitigate, possibly on the assumption they were automatically entitled to two months' rent from the tenant.

In this case, it is noteworthy to me that the landlord initially advertised the unit at a higher rate and disallowed pets. They also did not begin to advertise until May 5, 2022, well after the March 9, 2022 correspondence from the tenant saying when they were moving out and three weeks after receiving the confirming letter of April 12, 2022.

I accept the tenant's credible and well documented evidence and find the landlord failed to make reasonable efforts to advertise the unit in a timely manner. I find the landlord failed to mitigate losses as required under the Act.

I now turn to the tenant's claim they could not continue to live in the unit because of the insect infestation. This is akin to a claim for breach of a material term.

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act:

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 [form and content of notice to end tenancy].

As noted in *RTB Policy Guideline #8 – Unconscionable and Material Terms*, 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.

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 tenant, to present evidence and argument supporting the proposition that the term was a material term.

The question of whether 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. The same term may be material in one agreement and not material in another. Applications are decided on a case-by-case basis. 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 the clause is material.

RTB Policy Guideline #8 reads in part as follows:

To end a tenancy agreement for breach of a material term the party alleging a breach...must inform the other party in writing:

- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*
- *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
- *that if the problem is not fixed by the deadline, the party will end the tenancy...*

As stated above, I find the tenant clearly told the landlord about the insect presence as soon as it started. They conveyed they found the winged ants alarming and upsetting. I have found the landlord's efforts were inadequate and the tenant entitled to an award for loss of quiet enjoyment.

I find the tenant made best efforts to cooperate with the landlord and to support all attempts at insect control. I find the tenant concluded they could not continue to continue to live in the unit as the flying ants persisted in unacceptable and disturbing numbers. I find this conclusion reasonable. As a matter of common sense, I believe most people in a similar building would insist on a unit free of insects as described by the tenant.

In considering the facts of this case, the testimony and the evidence, I find the tenant has met the burden of proof there was a material breach of the implied requirement that the landlord provide a unit free of insects and take reasonable, effective steps when an infestation is brought to their attention.

I find the tenant notified the landlord of the problem in early February 2022 and communicated with them multiple times about remediation. Although the tenant acknowledged they had planned to move into a new home, I find it reasonable and understandable that they could not continue to live in the unit after the planned move out day of May 31, 2022.

I find the tenant acted reasonably throughout. I find the landlord accepted the tenant's communication they were moving out and failed to meet their obligation to begin the search quickly and adequately for a new tenant.

In the circumstances, I find there was no need for the tenant to give a notice setting a date by which the insects must be eradicated in order to exercise their right to end the tenancy. I find the presence of the flying ants in the numbers to which the tenant credibly testified and the frequency of the communication with the landlord to constitute a breach of a material term which made it impossible for the tenancy to continue after May 31, 2022.

In summary, I find the landlord has failed to meet the burden of proof that they mitigated their losses. I find the flying ant infestation as described by the tenant and supported by the documentary evidence to amount to breach of a material term.

I find the landlord is not entitled to reimbursement of utilities.

As a result of my finding, I find the landlord has no claim for damages or compensation from the early ending of tenancy. I dismiss the landlord's application in this regard in its entirety without leave to reapply.

7. Filing fee

As the tenant has been substantially successful in their claim, I award the tenant reimbursement of the filing fee.

8. Summary of Award

Further to the above, I find the tenant is entitled to an award as follows.

	ITEM	AMOUNT
1.	Security deposit	\$1,400.00
2.	Security deposit doubling	\$1,400.00
3.	Loss of Quiet Enjoyment 10% of rent for 4 months	\$1,120.00
	Reimbursement filing fee	100.00
	TOTAL	\$4,020.00

The tenant agreed to compensate the landlord for the requested \$700 fee. Accordingly, the Monetary Order for the tenant is:

	ITEM	AMOUNT
1.	Award for Tenant (above	\$4,020.00
2.	(Less Administrative Fee – agreed)	(\$700.00)
	Monetary Order – Tenant	\$3,320.00

I grant the tenant a Monetary Order in the amount of \$3,320.00 against the landlord.

Conclusion

I grant the tenant a Monetary Order in the amount of **\$3,320.00. This Monetary Order must be served on the landlord and may be enforced in the Courts of the Province of BC.**

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: March 15, 2023

Residential Tenancy Branch