



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNETC, FFT

Introduction

This matter dealt with an Application for Dispute Resolution filed by the Tenants March 04, 2022, for the following:

- Compensation for monetary loss or other money owed
- Compensation because the Landlord ended the tenancy and has not complied with the Act or used the rental unit for the stated purpose
- To recover the filing fee

This matter came before me October 27, 2022, and an Interim Decision was issued the same date. This Decision should be read with the Interim Decision.

At the second hearing, the Tenant appeared. The Landlord appeared at the hearing with their son, to assist with any necessary translation, and with Legal Counsel. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing package and evidence, and no issues arose.

The request for compensation because the Landlord ended the tenancy and has not complied with the Act or used the rental unit for the stated purpose is a request for compensation pursuant to section 51 of the *Residential Tenancy Act* (the “Act”). This tenancy did not end pursuant to a notice issued under section 49 of the *Act* nor did the

Tenant seek compensation pursuant to section 51 of the Act in their Monetary Order Worksheet. This claim is dismissed without leave to re-apply.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all evidence provided. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Tenants entitled to compensation for monetary loss or other money owed?
2. Are the Tenants entitled to recover the filing fee?

Background and Evidence

The Tenants sought \$25,476.21 in compensation all arising from pigeon feces on a ledge outside a bedroom window of the rental unit. The specific amounts sought are as follows:

Item	Description	Amount
1	Hazard team access to ledge (first stage)	\$656.25
2	Hazard team access to ledge (second stage)	\$1,884.75
3	Sampling of air samples	\$418.95
4	Analysis of air samples	Above
5	Cleaning of surface areas	\$393.75
6	Air purifier	\$120.91
7	Alternate emergency accommodation for daughter	\$9,273.04
8	Lab analysis of collected samples	\$335.22
9	Disinfectant supplies	\$24.59
10	Disinfectant work crew	\$393.75
11	Loss of quiet enjoyment (8 months, \$500.00 per month)	\$4,000.00
12	Partial loss of use of rental unit (8 months, \$250.00 per month)	\$2,000.00
13	Loss of value of tenancy (8 months, \$150.00 per month)	\$1,200.00
14	Damages for disregard for Tenants' wellbeing	\$4,500.00
15	Estimated additional hydro costs for running air purifier	\$175.00
16	Filing fee	\$100.00
	TOTAL	\$25,476.21

A written tenancy agreement was submitted, and the parties agreed it is accurate. The Tenancy started February 01, 2019, and was for a fixed term. Rent was \$2,650.00 per month. The parties agreed the Tenants moved out of the rental unit January 31, 2022.

Tenants' position

The Tenants submit that the Landlord was responsible pursuant to section 32 of the *Act* and term 10 of the tenancy agreement to have pigeon feces removed from a ledge outside their daughter's bedroom window. The Tenants submit that the Landlord refused to remove the pigeon feces and so they hired a company to do so. The Tenants submit that the pigeon feces resulted in airborne spores coming through the bedroom window into the rental unit causing health issues for their daughter and adversely affecting their use of the rental unit.

The Tenants provided the following testimony, evidence and submissions.

The ledge where the pigeon feces was located was not accessible to the Tenants from the rental unit which the Landlord acknowledged in an email. The Tenants were not responsible for cleaning the feces pursuant to section 32 of the *Act* or term 10 of the tenancy agreement, and the Landlord was.

The Tenant complained about the pigeon feces issue to the Landlord in April. The Tenant sought a rent reduction and the Landlord agreed to a \$50.00 rent reduction until the pigeon feces were removed. The \$50.00 rent reduction was for the extra costs of hydro for cleaning up the pigeon feces.

In July 2021, the Tenant took it upon themselves to have the pigeon feces removed due to their daughter's health issues. The pigeon feces released airborne spores which were a serious health hazard and had to be reported to BC Health.

In relation to item #1 and #2, these costs are for the team that accessed the ledge and removed the pigeon feces, which was done in July 2021. The team hired to remove the feces had to do so in two stages on two separate dates.

In relation to item #3 and #4, the Landlord refused to address the pigeon feces which were a health hazard. The Tenants' daughter fell ill, and it was discovered that they had antibodies in their blood caused by airborne infected spores from pigeon feces. The Tenants' daughter had to vacate the rental unit to mitigate damage and due to concern

for their health. The Tenant called an environmental consultant about the issue and air samples were obtained and analyzed. The Tenant obtained a report from Clearco Environmental Consulting to get an idea of the nature of the infectious spores that had come into the rental unit. The airborne spores in the rental unit were from air coming through the bedroom window from the ledge. The Tenant put cardboard up to seal the bedroom window at one point.

In relation to item #5 and #10, which are duplicates, the Tenants had a cleaning service come into the rental unit and clean every surface with an emphasis on their daughter's bedroom due to the airborne spores from the pigeon feces. The cleaning was done at the start of August 2021, because everything was in disarray due to the pigeon feces issue and the Tenants wanted to ensure the airborne spores had settled before the rental unit was cleaned.

In relation to item #6, this is for the cost of purchasing an air purifier to remove airborne spores from the rental unit. The receipt shows the appliance as a dehumidifier. The Tenants purchased a dehumidifier because spores cling to moisture and become airborne so the best way to remove spores is to remove humidity. The Tenants have not submitted documentary evidence to support their position about a dehumidifier versus an air purifier being necessary.

In relation to item #7, the Tenants' daughter had to move out of the rental unit and stay in a hotel due to the pigeon feces which were on the ledge outside their bedroom window. The Tenants have not provided documentary evidence showing that the pigeon feces caused the antibodies found in their daughter's blood.

In relation to item #8, the Tenant obtained a sample of the pigeon feces and sent it to a government lab for analysis to try to further determine their daughter's health issue.

In relation to item #11, this calculation for loss of quiet enjoyment was arbitrary; however, it is for the Tenants' daughter having to move out of the rental unit as well as the Tenants' and their son's enjoyment of the rental unit being disrupted due to knowing they were living in a rental unit infected with fecal matter spores.

In relation to item #13, this is an arbitrary but reasonable amount for the inconvenience and loss of quiet enjoyment caused by the pigeon feces issue.

In relation to item #14, this is for the wanton disregard by the Landlord for the Tenants' well being. The amount claimed is for the callous treatment by the Landlord endured by the Tenants.

The Tenant acknowledged they may have received a quote to remove the pigeon feces for \$625.00. The Tenant testified that they did not even consider this proposal because the company was going to put the pigeon feces into bags and remove the bags through the rental unit. The Tenant found it "out of the question" to remove the bagged pigeon feces through the bedroom window and through the rental unit. The team that removed the pigeon feces did not bring the bagged feces through the rental unit.

The Tenant acknowledged the Landlord offered to remove the pigeon feces. The Tenant testified that they allowed the Landlord into the rental unit to assess the pigeon feces issue. I note that the Tenants, as shown in the emails submitted, took the position that the pigeon feces had to be addressed from outside the rental unit given the pandemic.

I have read the Tenants' documentary evidence which includes details relating to the team cleaning up the pigeon feces from the ledge, correspondence about whether the ledge was easily accessible, alleged breaches of section 32 of the *Act* and term 10 of the tenancy agreement, correspondence about who is responsible for cleaning the ledge, invoices, correspondence about the Tenants' daughter using the guest suite in the building, correspondence about a rent reduction, records about the Tenants' daughter's illness, reports and analyses. The Tenants also provided written submissions.

Landlord's position

Legal Counsel submitted that the Application is an abuse of process because the Tenants made an identical claim in Small Claims Court which was settled by the parties as reflected in a BC Supreme Court Order submitted. Legal Counsel submitted that the Tenants cannot again make the claims in the Application given the settlement agreement and resulting Order.

Legal Counsel and the Landlord provided the following testimony, evidence and submissions.

The Tenants first complained to the Landlord about the pigeon feces December 07, 2019. No prior tenants of the rental unit had complained about the pigeon feces. The Landlord offered to clean the pigeon feces; however, the Tenants would not let the Landlord into the rental unit. The Landlord and their wife previously cleaned the pigeon feces from the ledge themselves. After the Tenants moved out of the rental unit, the Landlord and their wife again cleaned the ledge themselves. The Landlord and their wife accessed the ledge from inside the rental unit and went out onto the ledge. The Landlord and their wife used a broom through the window and climbed through the window out onto the ledge to clean.

The Landlord offered to help the Tenants with clean up of the pigeon feces, but the Tenants rejected the offer. A professional was not needed to clean up the feces. The Landlord would have cleaned the feces in the way they previously had by using a broom and going out onto the ledge. The Landlord would have double bagged the feces and disposed of it by taking it through the rental unit.

Pursuant to term 10 of the tenancy agreement, the Tenants were responsible for cleaning and maintaining areas they had access to. There was easy access to the ledge from the rental unit. The Landlord and their wife were able to access and clean the ledge from the rental unit. There is no reason to distinguish the ledge from any other balcony. When the Landlord wrote the email submitted about the ledge not being accessible, the Landlord meant they offered to clean the ledge, but the Tenant refused to let the Landlord into the rental unit.

Even if it was the Landlord's responsibility to clean the ledge, the Landlord was not obligated to clean it on any particular schedule.

The \$50.00 rent reduction agreed upon by the parties in the April emails submitted was in place until the end of the tenancy. The Tenant gave up their right to insist on the feces being cleaned up on their schedule when they came to the agreement about the \$50.00 rent reduction.

The Tenants have not submitted invoices or receipts for items #3, #4 or #9. The costs claimed in items #3 and #4 were unnecessary because the Tenants were going to have the feces removed anyway.

Legal Counsel questioned why the Tenants had to hire a cleaning service to clean the rental unit weeks after the pigeon feces were removed. Legal Counsel noted the

cleaning was done three weeks after the pigeon feces were removed. Legal Counsel submitted that it was the Tenants' responsibility to clean the rental unit.

The Tenants have not submitted evidence of any actual illness in their daughter caused by the pigeon feces. The amount claimed for the Tenants' daughter to stay in a hotel is excessive and remote. There is no evidence showing the Tenants' daughter had to move out of the rental unit. The Tenants' daughter was not a tenant of the rental unit per the tenancy agreement and therefore had no rights under the tenancy agreement.

In relation to item #8, this was done after removal of the pigeon feces which was proceeding anyway, the Landlord is not responsible for this cost.

Items #11 to #14 are all "made up" amounts.

The Tenants lived in the rental unit the entire time the pigeon feces issue persisted. The removal of the pigeon feces was not an emergency repair. The Tenants should have applied for an order from the RTB to have the feces cleaned up. Instead, the Tenants voluntarily had the feces removed themselves. Further, there were less expensive ways to have the feces removed including the estimate for \$625.00.

The Landlord submitted Court records and correspondence between the parties. The Landlord also provided written submissions.

Analysis

Whether Tenants were permitted to bring the Application

The Order made by Justice Morellato February 16, 2022, relates to claims and actions of the Tenants in the BC Supreme Court and BC Small Claims Court. The Order does not relate to RTB claims or files. The Order does not state that the Tenants cannot file further claims in other venues. Legal Counsel did not provide legal authority for their position that the Tenants could not file a claim with the RTB due to the Order. I am not satisfied based on what is before me that the Tenants were prohibited from filing the Application due to the Order. I have therefore decided the Application.

Compensation sought

Section 7 of the *Act* states:

7 (1) If a landlord...does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord...must compensate the [tenant] for damage or loss that results.

(2) A...tenant who claims compensation for damage or loss that results from the [landlord's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

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

Section 65(1)(f) of the *Act* states:

65 (1) Without limiting the general authority in section 62 (3)...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...

Section 32 of the *Act* states:

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.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access...

Section 28 of the *Act* states:

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

(b) freedom from unreasonable disturbance;

(c) 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]...

Pursuant to rule 6.6 of the Rules, it is the Tenants as applicants who have the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

Based on the photos submitted by the Tenants, I accept there was a large amount of pigeon feces on the ledge outside the window of a bedroom in the rental unit. I find the pigeon feces became an issue for the Tenants around April 01, 2020, because this is the first written correspondence between the parties about this issue before me.

Based on the emails submitted, I find the parties agreed in April that the Tenants could deduct \$50.00 from rent for "increased costs of electricity/inability to open second level windows" until the pigeon feces were removed.

I find the Landlord's agents were talking about having the pigeon feces cleaned up by a company in April of 2020, based on the emails in evidence. Based on the emails in evidence, I find the Tenant rejected the opportunity to have a company attend and provide a quote for removal of the feces because of their unwillingness to have strangers in the rental unit given the pandemic. Based on the emails, I find the Tenant suggested a solution to the issue being the \$50.00 rent reduction which was then agreed to by the parties.

Based on the Landlord's property manager's email dated April 20, 2020, I find the Landlord offered to arrange to clean up the feces once "the government" allowed them to do so, which I assume is a reference to pandemic restrictions. I find the Landlord made further efforts to have the Tenant contact a company to do the cleaning June 22, 2020, based on the email in evidence. Based on the June 24, 2020, email in evidence, I find the Tenant again rejected the opportunity to have the Landlord address the feces issue due to the pandemic and the Tenants not wanting strangers in the rental unit, which the Tenant seemed to believe was necessary to assess the situation.

Based on the emails in evidence, I find the Tenant then had Humane Solutions attend the rental unit in July 2021, to remove the pigeon feces.

It is not clear to me what occurred between the parties from June of 2020 to July of 2021. I do note that there is no documentary evidence before me showing the Tenants again asked the Landlord to deal with the pigeon feces between these dates.

I find it was the responsibility of the Landlord to have the pigeon feces removed from the ledge. I find the Landlord understood it was their responsibility to clean up the feces based on the emails from April of 2020, in evidence. Further, the ledge is clearly just that – a ledge – not a balcony for use by the Tenants. From the photos, the ledge appears to be just wide enough for a person to stand on. There is no door going out to the ledge which clearly shows it is not a balcony for use by the Tenants, but a ledge. I also find the Landlord knew the ledge was just that – a ledge – and not a balcony and not accessible given their email April 03, 2020. To suggest this email meant something different is disingenuous. Further, I do not accept the testimony of the Landlord that they easily accessed the ledge because there is no documentary evidence before me to support this and it is contrary to the Landlord's position in their April 03, 2020, email. I find it absurd to suggest that the Tenants should have climbed out one of the windows onto the ledge to clean it.

I accept that the Landlord should have had the pigeon feces removed based on the Tenants' complaints about it and given the statements in the Clearco Environmental Consulting report dated June 04, 2021, under the heading "bird feces".

I find the Landlord breached section 32 of the *Act* by not having the pigeon feces removed.

I find the real issues in this matter are whether the Tenants have met their onus to prove that the loss claimed resulted from the pigeon feces, the amounts claimed and that they adequately mitigated their loss.

It does not follow from my finding that the Tenants should not have been expected to climb out their window onto the ledge to clean it that I am satisfied someone qualified to do so could not have cleaned the pigeon feces from inside the rental unit. There are many types of repairs or cleaning that are not expected of a tenant but that qualified professionals can reasonably do.

I am satisfied the Tenant received a quote for removal of the pigeon feces for \$625.00. Although the Tenant attempted to be noncommittal about this in their testimony, I find their testimony clearly showed they did in fact receive such a quote. The Tenant disregarded this quote because the company was going to bring bagged feces through the bedroom window and through the rental unit. I am not satisfied based on the evidence provided that this was an unreasonable way of dealing with the pigeon feces. The Tenant's own testimony that this was not reasonable is not sufficient because I am not satisfied the Tenant is qualified to provide this opinion. The email from Humane Solutions in evidence shows that it was the Tenant who asked that they not bring the bagged feces through the rental unit. Further, Humane Solutions noted that this request of the Tenant "adds an additional variable regarding logistics." I find the Tenants failed to mitigate their loss by not using the company that provided the \$625.00 quote in the absence of some compelling evidence that their proposed method was unreasonable.

I also find the Tenants failed to mitigate their loss by failing to accept the Landlord's offers to be responsible for cleaning up the pigeon feces in 2020. Although the Landlord should have arranged for the cleaning on their own, and I do find they instead asked the Tenant to assist them with this, I find the Tenant failed to take them up on their offer. I acknowledge that the Tenants did so due to the pandemic and not wanting strangers in the rental unit; however, the Tenants could have left the rental unit for the time required and could have disinfected, or had someone disinfect, the rental unit

afterwards. I do not accept that the Tenants can prohibit people from coming into the rental unit and then take the position that the Landlord did nothing to address the pigeon feces. Further, there is no correspondence before me showing that the Tenants re-connected with the Landlord about the pigeon feces issue before July of 2021. I note that the pigeon feces obviously would have gotten worse between 2020 and 2021.

I also agree with Legal Counsel that the Tenants should have sought an order from the RTB requiring the Landlord to have the feces removed. I am not satisfied based on the evidence provided that feces removal was an urgent issue because there is no compelling evidence that this is the case before me.

In relation to items #1 and #2, I find the Tenants are entitled to some compensation for this because I find it was the Landlord's responsibility to have the pigeon feces removed. However, due to the failures of the Tenants to mitigate their loss, I award the Tenants \$468.75 being three-quarters of the cost of the \$625.00 quote for removal. I split the cost in this way to account for the Landlord's responsibility to have the work done and the Tenants' failure to mitigate loss.

In relation to items #3 and #4, the Tenants have failed to provide invoices or receipts for these and have failed to prove the amount or value of the loss claimed.

In relation to items #5, #9 and #10, there is no compelling evidence before me that the pigeon feces on the ledge had any effect on the interior of the rental unit. The only documentation that purports to show this is the Clearco Environmental Consulting and Sarcova reports. I have read these reports and cannot conclude that they show any issue with the interior of the rental unit or air due to the pigeon feces on the ledge. I am not satisfied cleaning the inside of the rental unit was required due to the pigeon feces on the ledge.

In relation to item #6, I have the same comments as above. There is insufficient evidence before me to show there was an issue with the air in the rental unit due to the pigeon feces. Further, there is no compelling evidence before me to support that a dehumidifier was required to address any alleged air issue in the rental unit due to the pigeon feces.

In relation to items #7 and #12, I am not satisfied based on the evidence provided that the Tenants' daughter became ill due to the pigeon feces on the ledge because there is no compelling evidence of this before me. The Tenants' daughter's medical record

does not show what caused the results. There is no documentary evidence before me from a qualified individual linking the pigeon feces on the ledge to the Tenants' daughter's illness.

In relation to items #8, the Landlord is not responsible for this cost. The Landlord was responsible for cleaning up the pigeon feces, not for having analyses of it done. If the Tenants chose to have the analyses done to further determine the cause of their daughter's illness, that is outside the scope of the Landlord's responsibility. If the Tenants were attempting to show a link between the pigeon feces and daughter's illness for evidence purposes, parties are not entitled to reimbursement for the cost of obtaining evidence for these hearings. Further, the Tenants have not provided compelling evidence linking the pigeon feces and their daughter's illness.

In relation to item #11 and #13, I do not accept that the Tenants' daughter had to move out of the rental unit due to the pigeon feces because the Tenants have not submitted compelling evidence of this. Further, there is no compelling evidence before me that the pigeon feces affected the inside of the rental unit in any way and therefore, I do not accept that it impacted the Tenants' right to quiet enjoyment. At most, I accept that the pigeon feces impacted the Tenants' ability to open the window in the bedroom which the Tenants were compensated for through the \$50.00 rent reduction.

In relation to item #14, I do not accept that the Landlord acted in an egregious manner in this matter because none of the documentary evidence supports this. In fact, I find the Landlord offered to be responsible for cleaning the pigeon feces in 2020 and that the Tenants chose not to allow people into the rental unit to assess the situation in order to address it. Further, there is no documentary evidence before me showing that the Tenants re-connected with the Landlord about this issue before hiring a company themselves to remove the pigeon feces.

In relation to item #16, I do not accept based on the evidence provided that the Tenants needed to run an air purifier due to the pigeon feces on the ledge. Further, the Tenants did not run an air purifier, they ran a dehumidifier. As explained above, I am not satisfied based on the evidence provided that running a dehumidifier in the rental unit was necessary due to the pigeon feces.

In relation to the filing fee, the Tenants have been partially successful in the Application and therefore are awarded \$100.00 for the filing fee pursuant to section 72(1) of the *Act*.

In summary, the Tenants are entitled to the following:

Item	Description	Amount
1	Hazard team access to ledge (first stage)	\$468.75
2	Hazard team access to ledge (second stage)	-
3	Sampling of air samples	-
4	Analysis of air samples	-
5	Cleaning of surface areas	-
6	Air purifier	-
7	Alternate emergency accommodation for daughter	-
8	Lab analysis of collected samples	-
9	Disinfectant supplies	-
10	Disinfectant work crew	-
11	Loss of quiet enjoyment (8 months, \$500.00 per month)	-
12	Partial loss of use of rental unit (8 months, \$250.00 per month)	-
13	Loss of value of tenancy (8 months, \$150.00 per month)	-
14	Damages for disregard for Tenants' wellbeing	-
15	Estimated additional hydro costs for running air purifier	-
16	Filing fee	\$100.00
	TOTAL	\$568.75

The request for compensation for items #2 to #15 is dismissed without leave to re-apply. In relation to item #1 and the filing fee, the Tenants are issued a Monetary Order for \$568.75 pursuant to section 67 of the *Act*.

Conclusion

The Tenants are issued a Monetary Order for \$568.75. This Order must be served on the Landlord. If the Landlord fails to comply with this Order, it may be filed in the Small Claims division of the Provincial Court and enforced as an order of that court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: December 08, 2022

Residential Tenancy Branch