



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

### **Dispute Codes**

Tenant: **CNL, RR, AAT, LRE, LAT, OLC, FFT  
CNC, FFT**

Landlord: **OPC, FFL**

### **Introduction**

The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act*, (the "Act") and the singular of these words includes the plural.

This hearing dealt with applications filed by both the landlord and the tenant pursuant to the Residential Tenancy Act.

The tenant filed two applications seeking:

- An order to cancel a 2 Month Notice to End Tenancy for Landlord's Use pursuant to sections 49 and 55;
- An order for a reduction of rent for repairs, services or facilities agreed upon but not provided pursuant to sections 27 and 65;
- An order allowing the tenant access to the rental unit pursuant to section 30;
- An order suspending the landlord's right to enter the rental unit pursuant to section 70;
- Authorization to change the locks to the rental unit pursuant to section 31;
- An order for the landlord to comply with the Act, regulations or tenancy agreement pursuant to section 62;
- Authorization to recover the filing fee from the other party pursuant to section 72.

And

- An order to cancel a 1 Month Notice to End Tenancy for Cause, pursuant to sections 47 and 55; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The landlord sought:

- An order for the landlord to comply with the Act, regulations or tenancy agreement pursuant to section 62; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The landlord D.B. and both tenants attended the hearing. As both parties were present, service was confirmed. The parties each confirmed receipt of the applications, amendments and evidence. Based on the testimonies I find that each party was served with these materials as required under RTA sections 88 and 89.

#### Partial Settlement Reached

Pursuant to section 63 of the Act, the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. At the commencement of the hearing, the parties discussed the issues between them, turned their minds to compromise and achieved the following resolution of an aspect of their disputes with the following terms:

1. The tenants agree to vacate the rental unit in accordance with the Notice to End Tenancy for Landlord's Use on December 31, 2023.
2. The landlord will not collect rent for the month of December 2023, pursuant to section 51 of the Act.

Both parties testified that they understood and agreed that the above terms are legal, final, binding and enforceable, which settle this aspect of their disputes.

As this tenancy is ending, I dismissed without leave to reapply, the remainder of the tenants' original applications and the landlord's application seeking an order of possession. On October 4, 2023, the tenants filed an amendment to their original application, seeking a monetary order for damages or compensation pursuant section 67 and the landlord acknowledges receiving it. The remainder of the hearing was dedicated to hearing the merits of this issue.

#### Issue(s) to be Decided

Are the tenants entitled to a monetary order for damages or compensation?

Can either party recover their filing fee?

#### Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree on the following facts:

- The rental unit is a newer home located close to the beach, described as a custom built home on an ocean front peninsula
- The tenants occupied the upper two floors of the house, which has a lower patio off the back yard and an upper patio.
- There is a below grade space, not legal for occupation as a living space, that was not part of the rental agreement

The tenant A.M. gave the following testimony. When he accepted the tenancy, he understood that the landlord C.B. may occasionally occupy the lower unit since C.B. has a moving company, his home is located a distance away, and driving home could be a problem. As a result of C.B.'s only occasionally using the illegal space, the hydro was split with the tenants paying  $\frac{3}{4}$  and the landlord paying  $\frac{1}{4}$ .

The tenants allege that C.B. and the other landlord, D.B. moved into the illegal space and lived there as a residence. When the landlords purchased a house in town, the landlords moved out of the illegal space but moved landlord D.B.'s parents into the space instead. The tenant seeks to have the utilities evenly split as 50% for both parties, as the landlords or their parents were using it as much as the tenants were. According to the tenant, there has been a full time occupant of the space throughout the duration of his tenancy.

The tenants also seek to have half of the rent they paid during the tenancy returned to them, alleging a loss of use of the property. The tenants understood under the terms of the tenancy agreement that they had full access of the property, which includes the back yard, but only excludes the lower space being occasionally used as a "crash pad" by C.B. Once the tenancy began, the landlords brought over a boat to store; patio furniture for their own use; and a pickup truck in the driveway. Not only did this impeded the tenants' use of the backyard, the use of either of the decks was compromised as the lower deck led directly to the back yard being used by the landlords and the using the upper deck made the tenants uncomfortable, since the landlords would be watching them from below.

The landlord gave the following testimony. The advertisement for the rental unit clearly indicates that only 2/3 of the house was for rent. The tenants knew the space below the house was illegal but the landlords thought they could convert the space to become legal later on. The landlord D.B. has never moved into the illegal space under the rental unit and the co-landlord C.B. has always used it as his living space. D.B. had a house in Summerland where she and her son lived. During the move from Summerland to the town where the rental unit is, she stayed for a short time with C.B. in the space under the rental unit.

The backyard was never intended for the tenants' use. There is no mention of access to the backyard in the tenancy agreement. The condition inspection report form notes that there is one parking spot reserved for the landlord. The boat in the back yard is a dinghy and doesn't affect the tenants' space. Also, the landlord's child comes to visit his grandparents who are in the lower space and they do not do anything malicious to the tenants. The landlord testified that her parents rarely occupy the space as they are retirees who are travelling.

### Analysis

Section 7 of the Act states that 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.

Section 67 of the Act establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim and that the standard of proof is on a balance of probabilities.

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] states at Part C:

In order to determine whether compensation is due, the arbitrator may determine whether:

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

[the 4-point test]

First, the tenants seek a re-assessment of the proportion of utilities they paid, from three quarters to one half. While the tenancy agreement clearly indicates the tenants are to pay three quarters of the utilities, the evidence leads me to conclude that the tenants were misled with respect to the landlord's use of the space below the rental unit at the beginning of the tenancy.

I find that it is more likely that not that the landlord C.B. was occupying the space as his full time residence. I find the co-landlord D.B. spent time occupying the space between her move from Summerland and her occupancy of her newly purchased home. D.B. also acknowledges that her parents are the current occupants of the space as their residence.

As the landlords are using the space below the rental unit as a living space, I find the hydro utilities are unevenly split. While it is impossible to accurately determine how much electricity was consumed by the landlord's occupancy of the lower space as a living unit, I am satisfied that it was greater than a quarter. I accept that a half of utilities more accurately reflects the amount of hydro being used by the occupants of the space below the rental unit. I have reviewed the bills provided by the tenants and I find that the tenants are entitled to recover the **\$476.31** they seek as a reassessment of the hydro utilities between December 16, 2022 and September 26, 2023. Going forward, the parties are to split the hydro utilities as 50/50 until the tenancy ends on December 31, 2023.

Section 28 states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (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];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference

The tenants seek to have half their rent recovered from the commencement of their tenancy, due to the loss of the use of the back yard, loss of driveway space and the inability to use their decks. I have reviewed the tenancy agreement and note that section 3(b) requires the tenants to maintain the lands and premises in good repair. Section 3(c) prohibits the tenant from storing rv's boats and trailers on the land and 3(f)

requires the tenant to keep up fences, and not cut down trees. Notably, section 7 states that tenants are to maintain the lawns and gardens.

The landlord argues that the usage of the back yard was not included as part of the tenancy agreement. I find this argument does not reflect the terms in the tenancy agreement that, in my opinion, infer that the tenants were to have full use of the yard, free from unreasonable disturbance from the landlord. It would be patently unreasonable to expect that the landlord's retention of the storage space under the rental property would exclude the tenants from being able to use the back yard for their own use.

I find that the tenants have been restricted from being able to use the back yard due to its limited space and it being filled with the landlord's furnishings. I also find that the landlords and their parents were using the back yard for their own personal enjoyment, despite the requirement that the yard be provided for the tenant's use. While I note that there is no exclusivity for the yard's usage in the tenancy agreement for the tenants or the landlord, the placement of the landlord's furnishings prevented the tenants from being able to enjoy it. Further, due to the landlords' exclusive usage of the back yard space, I find the tenants were prevented from being able to use the decks that overlook or lead onto the back yard due to the discomfort arising from the proximity of the landlord or their parents there.

Section 65 allows the director to reduce past or future rent by an amount that is equivalent to a reduction in the value of the tenancy agreement. The tenants seek half the rent returned to them as compensation, however I do not find the value of the lost decks and back yard to be worth \$2,400.00 for every month of the tenancy. I find the value of the loss to be more in line at \$800.00 per month, based on the fact that the yard is not used in the winter. For the period from January 1, 2022 to October 31, 2023, the tenants are awarded the sum of **\$8,000.00**. I further order that rent for the month of November, 2023 be reduced to \$3,800.00. The landlord will not be collecting rent for the month of December in accordance with section 51 of the Act, as she has served the tenants with a notice to end tenancy under section 49 for landlord's use.

Regarding the parking in the driveway, I find the tenancy agreement does not grant exclusive use of the driveway to the tenants. On a balance of probabilities, I find that the parties agreed that the landlord could retain a spot in the driveway for C.B.'s use. I do not find the tenants entitled to any rent reduction for a loss of the use of the full driveway.

As the tenant's application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee for the cost of this application. The landlord's filing fee will not be recovered.

Item	Amount
Reassessed hydro at 50% from December 16, 2022 to September 26, 2023	\$476.31
Reduction in rent from January 1, 2022 to October 31, 2023	\$8,000.00
Filing fee	\$100.00
<b>TOTAL</b>	<b>\$8,576.31</b>

### Conclusion

To give effect to the settlement reached between the parties and as discussed at the hearing, I issue an Order of Possession to the landlord. The landlord is required to serve this Order of Possession upon the tenants and may enforce it as early as 1:00 p.m. on December 31, 2023 should the landlord be required to do so.

I order a monetary order in the tenants' favour in the amount of \$8,576.31 pursuant to sections 65 and 67 of the Act.

I order the parties are to split the hydro utilities as 50/50 from September 27, 2023, until the date the tenancy ends on December 31, 2023.

I further order that rent for the month of November, 2023 be reduced to \$3,800.00.

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: October 26, 2023

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Residential Tenancy Branch