



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## **DECISION**

Dispute Codes      MNDC, MNR, MNSD, FF

### Introduction

This hearing dealt with the landlord's request for a Monetary Order for unpaid rent, damage or loss under the Act, regulations or tenancy agreement, retention of the security deposit and recovery of the filing fee. Both parties appeared at the hearing and were provided the opportunity to be heard and respond to the other party's submissions.

### Issues(s) to be Decided

1. Has the landlord established an entitlement to recover unpaid rent from the tenant?
2. Has the landlord established an entitlement to compensation for damages or loss under the Act, regulations or tenancy agreement?
3. Retention of the security deposit.
4. Award of the filing fee.

### Background and Evidence

Upon hearing undisputed testimony of the parties, I make the following findings concerning the tenancy. The parties entered into a one-year fixed term tenancy that commenced on September 1, 2007 (the first agreement). The parties entered into a second one-year fixed term tenancy commencing September 1, 2008 (the second agreement). The tenant was required to pay rent of \$1,450.00 on the 1<sup>st</sup> day of every month. The tenant paid a security deposit of \$725.00 on or about September 1, 2007. The tenant gave the landlord written notice by way of a letter dated December 31, 2008 that he would be terminating the tenancy as of January 31, 2009. The tenant testified that he placed his letter under the door of the office, as he does with rent cheques, on the afternoon of December 31, 2008. The landlord testified that the office was open until

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at least 4:00 p.m. on that date and that the landlord did not receive the tenant's notice until January 2, 2009 when the landlord's office re-opened after the statutory holiday. The tenant vacated the rental unit by January 31, 2009. The landlord re-rented the unit for March 1, 2009 at a reduced rent of \$1,350.00 per month.

The landlord amended the application to claim the following damages or loss:

Loss of rent – February 2009	\$ 1,450.00
Termination fee	1,450.00
Loss of rent for remainder of term	600.00
Carpet cleaning	52.50
BC Hydro for February 2009	<u>14.49</u>
Total damages and loss	\$ 3,566.99

In addition, the landlord was seeking to recover \$100.00 paid for the filing fee and authorization to retain the tenant's security deposit in partial satisfaction of the amounts owed to the landlord. A \$100.00 filing fee was paid instead of the \$50.00 filing fee as the landlord's application initially indicated that the landlord was seeking monetary compensation over \$5,000.00.

Except for the carpet cleaning costs, the tenant did not agree with paying any of the other amounts claimed by the landlord. The tenant was of the position that prior to the expiration of the first agreement, the tenant tried to negotiate a renewal with a term less than one year; however, the landlord did not agree to the tenant's requests. The tenant felt he had no choice but to agree to the landlord's one year fixed term in the second agreement, and to accommodate his son's accommodation needs, the tenant had to end the tenancy early to find a larger unit. The tenant also explained that after he gave his written notice, the landlord provided a document under his door, asking him to

indicate whether the tenant would be finding an assignee for the tenancy agreement or whether he would be terminating the tenancy (the termination agreement). The tenant returned the termination agreement to the landlord and indicated on it that that he would be assigning the lease; however, the tenant did not know what the ramifications would be if he was not successful in finding an assignee. The tenant asserted that the landlord misguided him in providing information about his options to assign or terminate the lease.

A copy of the termination agreement was provided as evidence. The termination agreement page 7 of the tenancy agreement and was initialled by the tenant when the tenant signed the tenancy agreement. The termination agreement provides that where a tenant chooses to assign his lease the landlord will qualify the assignee as a tenant upon receiving an application and the current tenant must pay for his own advertising and pay a \$50.00 move out fee. Whereas, a tenant that chooses to terminate the lease must give at least one full month's notice and pay a fee equivalent to one month's rent and that in doing so the tenant is "released of contractual liabilities upon ending this tenancy and physically moving out..."

The landlord refuted the tenant's statements that the landlord did not adequately inform the tenant of the termination process and claims to have had conversations with the tenant where she explained the process to him. The landlord provided a copy of the second tenancy agreement signed by the tenant and the first page of the first tenancy agreement with the assurance that the remainder of the first tenancy agreement contains the same terms as the second tenancy agreement except the dates have been changed to reflect the new term. The tenancy agreement is seven pages long with the last page being the termination agreement. Clause 28 of the tenancy agreement, located on page 4 of the tenancy agreement, provides in bold type that "Further renewals of this lease must be negotiated 3 months prior to its expiration, or vacate

upon its expiration.” Clause 15 also stipulates that the tenant must vacate by the end of the term unless a renewal is negotiated.

The landlord also provided copies of various communications between the landlord and tenant with respect to renewing the tenancy and the termination of the tenancy as evidence for the hearing.

### Analysis

Section 13 of the Act requires that if a tenancy is a fixed term tenancy, the tenancy agreement must specify when the tenancy ends and whether the tenancy continues on a periodic basis or another fixed term or whether the tenant must vacate the rental unit on that date. Although I was not provided with the tenancy agreement initially agreed upon by the parties in 2007, based on the landlord’s undisputed testimony that the terms of the first tenancy agreement were the same as the terms that appear in the second tenancy agreement signed in 2008, I find that, based on the balance of probabilities, the first tenancy agreement stipulated that the tenant would have to vacate the rental unit at the end of the term unless a renewal was negotiated.

Upon review of the correspondence between the parties in the summer of 2007 it is apparent that the tenant wanted to enter into another tenancy agreement but for a fixed term of less than one year or a month to month basis, but that was not agreeable to the landlord. The parties eventually signed the second tenancy agreement in August 2008 whereby the tenant agreed to enter a one-year fixed term tenancy. Although the tenant may have wanted a shorter term, he signed a contract whereby he agreed to a term of one year in duration. From the tenant’s email to the landlord, dated February 9, 2009, the tenant states that he had the option to either vacate the rental unit or sign another one year fixed term tenancy at the end of his first tenancy. Clearly this shows me that the tenant was aware that he was required to vacate or negotiate a new tenancy

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agreement at the end of his first tenancy agreement. Even though the tenant claims that he had no choice but to sign the second tenancy agreement because he was travelling extensively, I do not find that the landlord forced or coerced the tenant into signing the second tenancy and there is not basis to find the second tenancy agreement unenforceable. Therefore, it is my finding that the tenant's position that he wanted a shorter term when he negotiated the second tenancy agreement is of no effect since he actually agreed upon a one-year fixed term with an expiry date August 31, 2009.

In awarding claims for loss of rent to a landlord, the landlord may recover loss of rent up until the time the tenant could have legally ended the tenancy agreement. The issue is when was the tenant legally could have legally ended the tenancy agreement. Usually, a tenant is not permitted to legally end a fixed term tenancy before the expiration date. In this case, the landlord provides two options for tenants who wish to end their tenancy and those options are provided in the tenancy agreement by way of the termination agreement. Although the tenant claimed that the landlord gave him the termination agreement under his door with no explanation, I find that in fact the termination agreement was provided to the tenant with the tenancy agreement and, for the tenant's convenience, the termination agreement was provided under the tenant's door after he gave his notice dated December 31, 2009.

In completing the termination agreement, the tenant indicated that he would be finding an assignee for the remainder of the term. In doing so, the tenant did not enclose the termination fee, as required with the "Terminate Lease" option, and the landlord did not commence activities to re-rent the unit until the tenant vacated and there was no application received for an assignee. The tenant submitted that the termination agreement and the landlord did not make it clear to him what would happen if he did not find an assignee. However, upon my review of the termination agreement, I find that the termination agreement states that "an exact date of vacating is only confirmed when

you have provided acceptable tenants.” I find a reasonable person would interpret that clause to mean that the tenant retains possession of the rental unit until such time the assignee is approved and that the tenant is not relieved of his contractual obligations until the assignee is in place. Therefore, under the “Assign Lease” option, the earliest the tenant could have legally ended the tenancy is when the tenant had new tenants approved by the landlord and in place to take over the rental payments. Since the tenant did not find an assignee, the earliest termination date defaults to the expiration date of the fixed term tenancy.

The “Terminate Lease” option of the termination agreement provides that a tenant may chose an exact month to end the tenancy, provided the tenant gives the landlord at least one full month of notice before the month the tenant intends to vacate and pay a termination fee of one month’s rent. The notice provided by the tenant was dated December 31, 2009 and was given to the landlord by sliding it under the office door. The landlord date stamped the notice as received on January 2, 2009. Section 88 of the Act provides for ways a party may give documents to another party. Section 90 of the Act provides for when documents are deemed received, depending on the method used to give the document to the other party. I find that by leaving the notice under the office door, the notice is deemed to be received three days later. Since the landlord acknowledges receipt only two days later on January 2, 2009 I accept the landlord’s position that the tenant gave notice on January 2, 2009.

Since the tenant gave notice on January 2, 2009 he did not give one full month’s notice to end the tenancy on January 31, 2009, as would be required under the “Terminate Lease” Option. Therefore, even if the tenant had wanted to utilize the “Terminate Lease” option, the earliest date he could have ended the tenancy under this option was February 28, 2009.

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Having found that the earliest date the tenant could have legally ended the tenancy agreement is February 28, 2009, the tenant is responsible for compensating the landlord for loss of rent for the month of February 2009. As with all monetary claims, the party making the claim must show that they did whatever was reasonable to minimize their loss. In this case, the landlord did not commence advertising efforts in January 2009 as the tenant had indicated on the termination agreement that he would be finding an assignee. Therefore, I find the landlord made reasonable efforts to re-rent the unit once the landlord was informed that the tenant did not have a replacement tenant and I grant the landlord's request for loss of rent for February 2009 in the amount of \$1,450.00.

Upon review of the tenancy agreement, I note that clause 13. *Re-Leasing Cost* provides that an early termination of the lease will cause one month extra rent to be charged to the tenant and that this charge is not to be construed as a penalty. This charge is consistent with a liquidated damages clause that parties agree upon at the time the tenancy is formed to offset the landlord's pre-estimated of costs to advertise the rental unit, show the unit to prospective tenants and other administrative costs incurred sooner and more frequently than had the tenancy continued. A liquidated damages clause is not enforceable if it constitutes a penalty, as indicated by an extravagant amount or based on a trivial breach. In this case, I do not find the liquidated damages amount extravagant and ending the fixed term tenancy early is not a trivial breach of the tenancy agreement. Accordingly, I find the liquidated damages clause is not a penalty and I find it to be valid and enforceable. Where a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum as it is a term agreed upon by the parties in entering the tenancy agreement, even where the actual costs have not been proven by the landlord. Therefore, I award the landlord the re-leasing costs of \$1,450.00 as claimed.

In order to re-rent the unit, the landlord had to reduce the rent \$100.00 per month. The landlord seeks to recover this loss from the tenant for the remaining six months of the second tenancy agreement term. Although landlords may be entitled to receive the amount of rent lost when a new tenant pays less than the tenant who ended the fixed term tenancy. However, in this case, the landlord makes several provisions in the tenancy agreement with respect to breaking a lease and the re-leasing costs. In particular, the two termination options provided to tenants when the tenancy agreement is signed. Where a tenant chooses to terminate and not find an assignee, the landlord requires one full month's written notice and the payment of the lease breaking fee. The "Terminate Lease" option further indicates that the tenant is released from contractual obligations of the tenancy provided the keys are returned. The landlord has been awarded the lease breaking fee and an award for February 2009 rent as the tenant gave notice on January 2, 2009. Therefore, in granting these awards to the landlord, the landlord has been placed in the same position had the tenant chosen the "Terminate Lease" option and I find the tenant is entitled to be released from contractual liabilities of the tenancy agreement as provided under that option.

As the tenant agreed to pay the carpet cleaning costs, I award \$52.50 to the landlord.

I grant the landlord's request to amend the landlord's application to include hydro costs for the month of February 2009 in the amount of \$14.49. As the landlord has shown that the tenant was responsible for paying for the rental unit until the end of February 2009, I also award the landlord the cost of the hydro.

As the landlord was substantially successful with this application, I award the landlord \$50.00 of the filing fee paid by the landlord for this application. Since I have found the landlord is entitled to an award in excess of the security deposit, I authorize the landlord





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to retain the tenant's security deposit and accrued interest in partial satisfaction of these amounts and I provide the landlord with a Monetary Order calculated as follows:

Loss of rent – February 2009	\$ 1,450.00
Liquidated damages	1,450.00
Carpet cleaning	52.50
Hydro	14.49
Filing fee	50.00
Less security deposit and interest	<u>(739.56)</u>
Monetary Order	<u>\$ 2,277.43</u>

The landlord must serve the Monetary Order upon the tenant and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.

## Conclusion

The landlord is authorized to retain the tenant's security deposit and accrued interest. The landlord is also provided a Monetary Order in the amount of \$2,277.43.

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: April 29, 2009.

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Dispute Resolution Officer