Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC, RP, LRE, AAT, LAT, FF, O, MNR, MND

Introduction

This hearing dealt with applications from the landlord and the tenants pursuant to the *Residential Tenancy Act* (the *Act*). The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33;
- an order to suspend or set conditions on the landlord's right to enter the rental unit and to authorize the tenants to change the locks to the rental unit pursuant to section 70;
- an order to allow access to or from the rental unit or site for the tenants or the tenants' guests pursuant to section 70;
- authorization to recover their filing fee for their application from the landlord pursuant to section 72; and
- other remedies as set out with their application.

The landlord applied for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover his filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

Preliminary Matters

The landlord testified that he sent the tenants a 10 Day Notice to End Tenancy for Unpaid Rent and Utilities (the 10 Day Notice) by posting it on their door and by sending it by registered mail on November 18, 2011. Female Tenant MAL (the tenant) confirmed receiving this Notice. The tenant testified that on November 20, 2011, she

sent by registered mail and posted on the landlord's door a written notice to end this tenancy by December 1, 2011, by which time the tenants had vacated the premises. The landlord confirmed that he received the tenants' notice to end their tenancy by registered mail. I am satisfied that both of these notices were served to the parties in accordance with the *Act*.

The tenant testified that she sent the landlord a copy of the tenants' dispute resolution hearing package by registered mail on November 22, 2011. She provided the Canada Post Tracking Number to confirm this mailing. The landlord said that he received this package. I am satisfied that the tenants served their hearing package to the landlord in accordance with the *Act*.

The landlord testified that he sent the tenants a copy of his dispute resolution hearing package to the address identified by the tenants on their application for dispute resolution by registered mail on December 6, 2011. The landlord provided a copy of the Canada Post Tracking Number to confirm this mailing. The tenant said that she had never received this hearing package nor had she received the landlord's written evidence that the landlord said he included in that package. She said that she tried to collect the registered mail package but Canada Post refused to release this package to her. She said that she could not obtain this package because she had never actually lived at the mailing address she identified as hers on the tenants' dispute resolution hearing package. She described this address as a "secondary address" because the tenants were reluctant to provide their actual mailing address to the landlord as a result of the acrimony that arose during this tenancy. She said that the tenant had not received the landlord's application for dispute resolution or his evidence.

Section 89(1)(c) of the *Act* allows a landlord to serve an application for dispute resolution to a tenant by sending it by registered mail to the address where the tenant resides. I find that in their November 16, 2011 application for dispute resolution the tenants clearly provided the address where they agreed they could be served documents or notices by the landlord. As such, I find that the landlord served his application for dispute resolution to the tenants in accordance with the *Act*. According to section 90(a) of the *Act*, the landlord's application was deemed served to the tenants on December 11, 2011, the fifth day after the dispute resolution hearing package was mailed to the tenants.

During the early stages of this hearing, I considered adjourning this matter to enable the tenants to receive a copy of the landlord's dispute resolution hearing package and written evidence. However, the tenant provided another mailing address that she admitted was not her own but which she believed would enable her to obtain a new

dispute resolution hearing package if the landlord were to mail one to her. There was no certainty that this new mailing address provided by the tenant would lead to her receipt of the landlord's hearing package and written and photographic evidence if the hearing were adjourned.

At this stage there was discussion regarding whether either side wished to have the hearing adjourned. The tenant said that her daughter, the other tenant in this matter, was planning to move and would not be available as a witness at an adjourned hearing. The landlord also asked to proceed with the hearing as he had hurried to submit his application and evidence. He did not believe that he should be required to wait further and incur further costs in submitting his dispute resolution and hearing packages if the tenant could not provide her actual mailing address for the purposes of this hearing.

With the agreement of the parties, and in particular the two tenants who had not received either the landlord's hearing or evidence packages, I agreed to proceed to hear both applications without adjourning this matter. The landlord's application was read into oral evidence to ensure that the tenant knew the items sought in the landlord's application for a monetary award.

Since the tenants vacated the rental unit by December 1, 2011, the tenants agreed that there was no need to consider the non-monetary aspects of their application for dispute resolution. I agreed to their request to withdraw their applications for the following items included in their original application for dispute resolution:

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33;
- an order to suspend or set conditions on the landlord's right to enter the rental unit and to authorize the tenant to change the locks to the rental unit pursuant to section 70; and
- an order to allow access to or from the rental unit or site for the tenants or the tenants' guests pursuant to section 70.

The tenant testified that she had not provided a copy of the most recent written evidence from a former tenant in this building to the landlord in advance of the hearing. As such, she testified that she understood that I would not be considering this evidence. I confirm that I have not considered the evidence from this former tenant in reaching my decision.

Issues(s) to be Decided

Are either of the parties entitled to monetary awards resulting from this tenancy? Are either of the parties entitled to recover their filing fees from the other party?

Background and Evidence

This fixed term tenancy commencing on November 1, 2011 was scheduled to remain in effect until March 30, 2012. The standard monthly rent was set at $820.00, payable in advance on the first of each month. According to the terms of this tenancy agreement, the tenants were also responsible for the higher of 1/3 of the monthly utility costs or $100.00 for each of the two tenants for utilities per month. The signed tenancy agreement emphasized that these utility payments did not include any provision for heat. This is emphasized in the final statement in the "Lights and Heat" section of the tenancy agreement which read as follows:

> *...Heat is not included in basic utilities of $100. Each heat source or electric heater is $75 each...*

The tenancy agreement identified a number of options whereby the tenants could obtain heat from different sources. The tenancy agreement described these options in the following terms:

> *...This accommodation offers Dual Heating at Extra Cost...*
> *Electric oil radiant heater for each heater $75*
> *based on max. 8 hours per day*
> *Dual heating...gas fired boiler with hot water radiant heat with thermostat $275 per month (2 month min. Payment in advance to activate)*
> *Over and above minimum monthly utilities of $100*
> (*as in original*)

The signed tenancy agreement read as follows with respect to a $425.00 charge identified by the landlord and in the tenancy agreement as a House Keeping Services & Utilities or Extra Guest Services Charge applied by the landlord at the commencement of this tenancy:

> *...I have not paid a security deposit. I have paid towards house keeping services & utilities or extra guest services. I have paid for cleaning and house keeping services, for items. If there is not enough money paid I will clean myself costs of house keeping listed below...*

The charges identified in these costs were pre-determined charges for such items as steam cleaning of the carpets, cleaning shelves, the oven, the toilet and the bathtub. The purpose of the charge was described in the agreement as follows:

...to ensure upon me vacating I will remove all odours and leave the place clean and I am paying the owner of home to ensure this. Further I will not use the excuse even if the oven, walls, fridge, toilet, bathtub was dirty or not clean by use of other person, guest, visitor or lodger. I take responsibility to clean or keep it clean. I have received the accommodation in clean condition...

The tenants applied for a monetary award of $1,133.35. This included the tenants' claim for the following items:

Item	**Amount**
Return of Security Deposit	$425.00
Tenant's Cleaning Costs at Move-In (4 hours and Hot Plate Inserts)	205.00
Purchase of an Extra Space Heater	78.35
Reduction in November 2011 Rent because Rental Unit not in Full Use from November 15- November 30, 2011)	425.00
Total Monetary Award Requested	**$1,133.35**

The landlord applied for a monetary award of $1,724.35 for the following items:

Item	**Amount**
Unpaid November 2011 Rent	$170.00
Use of 3 Radiant Heaters at $75.00 each	225.00
Damaged Radiant Heater	78.35
Oven Use ($12.00 in written evidence- amended by Landlord at Hearing to $120.00)	12.00
Use of Outside Light, Day and Night	25.00
Oven Element	42.00
Two Hot Plates ($18.00 each)	36.00
Removal of Cigarette Smoke ...Interior Doors and Walls	120.00
Cost of New Lock	87.00
Loss of Rent for December 2011	820.00
Filing Fee	50.00
Steam Clean Carpet to Remove Smoke Odour	59.00
Total Monetary Award Requested	**$1,724.35**

The landlord testified that he started advertising the availability of this rental unit shortly after he learned that the tenants were planning to end their tenancy by December 1, 2011. He identified two local newspapers where he has been advertising this rental unit. He said that he was unable to access the rental unit until December 1, 2011 due to the tenants' lack of co-operation with his requests to show the rental unit to prospective tenants. He said that the rental premises remain vacant although he continues to try to rent it.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Although I attempted during this hearing to focus the parties on the issues that remained before me following the tenants' withdrawal of the non-monetary aspects of their application, the parties, and in particular the landlord, had a difficult time limiting themselves to these issues. In his written submission and in his oral testimony, the landlord submitted that the tenants' application and their dispute of his application should be considered in the context of what he claimed were untruthful statements they made with respect to this tenancy. Much of this dispute and the ending of this fixed term tenancy after one month revolved around the landlord's claim that the tenants were in fact smokers and rented a non-smoking rental unit. The tenants maintained that the landlord was not providing them with adequate heat in this small rental unit. The landlord testified that they had two electric oil radiant heaters in this rental unit and added a third during their tenancy. The landlord also prolonged this hearing by refusing to accept my observations that many of the provisions he had included in this very non-standard residential tenancy agreement were not in accordance with the *Act* and, as such, were unenforceable.

The tenant did not dispute the landlord's claim that she misrepresented herself as a non-smoker in her application for tenancy for this non-smoking rental unit. She testified that she always smoked outside; the landlord said that there was a strong smoke odour in the rental unit and that the carpets will need to be professionally steam cleaned and the walls will need to be cleaned to remove the thick smoke odour from the rental unit. The landlord also testified that the tenants' smoking of cigarettes and marijuana led to

them leaving the doors open frequently which led to frequent drops in heat in the rental unit.

Analysis – Tenants' Application

The first issue before me in the tenants' application is whether the tenants did in fact pay a security deposit. I find that the $425.00 charge paid at the beginning of this tenancy described in the tenancy agreement as a house keeping services & utilities or extra guest service charge was a security deposit and not as described in the tenancy agreement. The *Act* does not allow landlords to avoid the provisions of the *Act* with respect to security or pet damage deposits by labelling these deposits as something other than a security or pet damage deposit. The *Act* is clear in that landlords cannot charge tenants in advance for services that have not yet been provided or may not be required even at the end of a tenancy. Recourse for claiming on such deposits is established by way of security and pet damage deposits and cannot be circumvented by a landlord's inclusion of unconscionable and unenforceable terms such as this one in a residential tenancy agreement. Whether or not the tenants signed such a provision attesting that they were not paying the charges levied by the landlord at the beginning of this tenancy as a security deposit, the *Act* states that the only such charges that can be applied by a landlord at the commencement of a tenancy is by way of a security or pet damage deposit. I also find that the stated purpose of the charges identified in the tenancy agreement is very similar to and may even be identical to the purpose for requring a security deposit.

Under these circumstances, I find that the purported house keeping services & utilities or extra guest service charge set out in the tenancy agreement is actually a security deposit. As such, I find that the tenants are to be credited for a $425.00 security deposit paid at the commencement of this tenancy. Although the tenants did not specifically apply for a return of their security deposit, they did request this return in their application for a monetary award. In accordance with the offsetting provisions of the *Act* and as a result of the tenants' inclusion of reference to the return of their security deposit in the material they submitted with their request for a monetary award, I allow the landlord to retain the $425.00 payment provided by the tenants which I find was in actuality a security deposit and not house keeping services and utilities or extra guest service charges. I allow the landlord to apply this payment towards the landlord's successful application for a monetary award for unpaid rent, set out below.

I dismiss the tenants' claim for four hours of cleaning and for hot plate inserts. Although they signed no joint move-in condition inspection report, they provided no evidence that they raised this issue of cleaning when they moved into this rental unit. Included in their signed tenancy agreement was a statement that they "received the accommodation in

clean condition." In the absence of any receipts for the hot plate inserts or any other evidence other than the tenant's sworn testimony, I find that the tenants have not established sufficient grounds to allow their claim for cleaning that occurred when they moved into this rental unit.

I dismiss the tenants' application for reimbursement for their $78.35 purchase of an extra oil space heater on November 7, 2011. While I have no doubt that the tenants purchased this heater to use in the rental unit, the tenants took this heater with them when they ended this tenancy, a few weeks after they purchased this heater. Under these circumstances and without adequate evidence that the tenants had the landlord's authorization to purchase another oil heater at the landlord's expense, I dismiss this claim.

The tenants have also claimed for a reduction in their rent for the last half of November 2011 because they were unable to live in the rental unit full-time due to the inadequacy of the heating in the rental unit. However, there is evidence that they did not pay their full rent, utilities or heat, as set out in their rental agreement which led to the landlord issuing them a 10 Day Notice on November 18, 2011. Since they refused to pay for the heat as set out in their tenancy agreement and issued their own notice to end this tenancy two days after the landlord issued his own 10 Day Notice, I do not find that the tenants are entitled to any reduction in rent for the last half of November 2011.

I do allow the tenants a limited reduction in rent due to the landlord's failure to follow the requirements of the *Act* in requesting and obtaining entry into their rental unit during their tenancy. The landlord admitted to entering the rental unit on one occasion when Tenant MV was alone in the rental unit and based on a balance of probabilities appears to have entered the rental unit at least once in the final half of November 2011. For these reasons, I reduce the tenants' rent by $100.00 for their loss of quiet enjoyment, including their privacy, during the course of their tenancy.

Analysis – Landlord's Application

I will first consider the landlord's claim for unpaid and lost rent arising out of this tenancy. I then turn to consideration of the landlord's claim for unpaid utilities including heat. I will then address the remainder of the landlord's claim.

The parties agreed that the base monthly rent was set at $820.00. The tenants entered undisputed oral testimony that they paid $850.00 in rent for the one month that they occupied the rental unit. I find that the terms of this tenancy agreement called for a base monthly rent of $820.00 plus a monthly payment of $200.00 for utilities as there

were two people occupying these premises. As such, I allow the landlord's claim for $170.00 in unpaid rent and base utilities.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. I find that the tenants were in breach of their fixed term tenancy agreement because they vacated the rental premises prior to the March 30, 2012 date specified in that agreement. As such, the landlord is entitled to compensation for losses he incurred as a result of the tenants' failure to comply with the terms of their tenancy agreement and the *Act*.

Section 45(2)(c) of the *Act* requires a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy the day before the day in the month when rent is due. As the tenants did not provide their notice to end their tenancy before November 1, 2011 and did not pay the remainder of their rent or utilities identified in the landlord's 10 Day Notice, I find that the tenants breached their tenancy agreement and as such the landlord is entitled to consideration of his loss of rent for December 2011. However, section 7(2) of the *Act* requires a landlord to demonstrate that he has made reasonable attempts to mitigate the tenants' losses in order to entitle him to a monetary award for loss of rent.

In this case, I am satisfied based on the landlord's undisputed evidence that he has tried to rent the premises to other tenants for December 2011. Once he was certain that this tenancy was ending, he gave undisputed oral evidence, although not supported with written confirmation, that he placed advertisements in two local newspapers seeking new tenants. Some of his efforts were frustrated by the tenant's apparent resistance to his attempts to show the rental unit to prospective renters.

I also find that the unusual and onerous demands that the landlord places in his residential tenancy agreements, would also serve to limit the range of tenants that he might be able to attract. By the landlord's instance on irregular and non-standard terms of tenancy that would limit the range of prospective tenants who might agree to such a tenancy, I question the extent to which the landlord has truly discharged his duty to mitigate the tenants' exposure to his rental losses. For any other month of the year, I may very well have declined to accept at least a portion of the landlord's loss of rent due to these unusual terms of tenancy and the landlord's failure to provide written evidence of his attempts to rent the premises to other tenants. However, the landlord also provided undisputed and convincing oral testimony that December is a particularly difficult time of year to find new tenants for this property as it is located near a college where he often finds tenants. Given that December is not an attractive month to try to

attract new tenants, particularly for a rental property that relies on students, I accept that the landlord has mitigated to the extent necessary his duty under section 7(2) of the *Act* to try to minimize the tenants' losses for his inability to rent the premises to another tenant for December 2011. For that reason, I find that the landlord is entitled to a monetary award in the amount of $820.00 for loss of rent for December 2011.

Based on the wording of the residential tenancy agreement, I find that the tenants agreed to pay a monthly fee of $75.00 for each electric oil radiant heater that the landlord supplied to them during November 2011. Since the tenants did not start using a third heater until part way through November and paid for this third heater themselves, I limit the landlord's claim for heating to $150.00. I make this finding as I accept to an extent the tenants' assertion that they were not staying in the rental unit for the entire month of November as they found the premises too cold to remain there. I issue a monetary award in the amount of $150.00 in the landlord's favour for heating.

The landlord has not provided any bills, receipts or invoices to support his claim for expenses incurred to clean the rental unit or to demonstrate his other losses arising out of this tenancy. He said that the charges he identified were pre-determined and included in the tenancy agreement.

Without joint move-in and joint move-out condition inspections and reports, it is difficult to ascertain the damage and loss, if any, arising out of the tenants' actions in this very brief tenancy. As the landlord claimed that he did not apply a security deposit, his claim for these items relied on an assertion that he was not bound by the provisions of the *Act* that would extinguish his rights to claim against that deposit.

When disputes arise as to the changes in condition between the start and end of a tenancy, joint move-in condition inspections and inspection reports are very helpful. No joint move-in or move-out inspections were conducted and no reports were issued by the landlord.

Sections 23, 24, 35 and 36 of the *Act* establish the rules whereby joint move-in and joint move-out condition inspections are to be conducted and reports of inspections are to be issued and provided to the tenant. These requirements are designed to clarify disputes regarding the condition of rental units at the beginning and end of a tenancy. For example, section 36(1) of the *Act* reads in part as follows:

Consequences for tenant and landlord if report requirements not met

36 *(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord*

(a) does not comply with section 35 (2) [2 opportunities for inspection],

(b) having complied with section 35 (2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations...

Similar provisions apply to join move-in condition inspections and reports.

Since I find that the landlord did not follow the requirements of the *Act* regarding the joint move-in and move-out condition inspections and inspection reports, I find that the landlord's eligibility to claim for damage arising out of this tenancy is limited. Although the landlord did present photographs of the rental unit, these photographs were taken during the tenancy, and do not reveal the condition of the rental unit either before or after this short-term tenancy.

I find that the landlord failed to provide evidence to support his claim for reimbursement for damage other than his list of charges set out in the tenancy agreement in support of his claim to retain the $450.00 he charged at the commencement of this tenancy. His claim for a damaged heater relied on the tenants' own receipt for the purchase of their own new radiant heater. He provided no receipts to demonstrate that he actually incurred losses arising out of this tenancy other than his loss of rent for December 2011 and the tenants' failure to pay for rent and utilities for November 2011. He also sought compensation for items that would seem to rely on unconscionable and unclear terms he included in the tenancy agreement, which should be interpreted in favour of the party who did not prepare the agreement, in this case the tenants. For example, the landlord's inclusion of a separate charge for use of an outside light would seem to be one that a reasonable person would assume would be covered in the $200.00 monthly utility charge the landlord was charging to the tenants for utilities including hydro. As a landlord, he would bear the cost of rekeying the premises at the end of this tenancy and did not provide receipts for any such expenses.

I dismiss all of the landlord's claims against the tenants for damage, with the exception of a $75.00 monetary award I allow for general cleaning, and cleaning of carpets and walls. I make this $75.00 monetary award because on a balance of probabilities, I find

that the tenants did not comply with the requirement under section 37(2)(a) of the *Act* to leave the rental unit "reasonably clean." I find that some cleaning was likely required by the landlord after the tenant vacated the rental unit.

Since both parties were partially successful in their applications, I make no order regarding their applications to recover their filing fees.

Conclusion

I issue a monetary award in the landlord's favour in the following terms which allows the landlord to recover unpaid rent and utilities, to recover loss of rent and damage arising out of this tenancy, and to retain a portion of the $425.00 payment by the tenants which I consider to have been a security deposit.

Item	**Amount**
Unpaid Rent and Utilities November 2011 ($820.00 + (2 x $100.00) - $850.00 = $170.00)	$170.00
Heating Costs November 2011	150.00
Loss of Rent for December 2011	820.00
Landlord's Cleaning Cost	75.00
Less Security Deposit	-425.00
Reduction in November 2011 Rent	-100.00
Total Monetary Order	**$690.00**

The non-monetary items identified in the tenants' application for dispute resolution were withdrawn by the tenants. Both parties bear the cost of their filing fees.

The landlord is provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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 *Residential Tenancy Act*.

Dated: December 19, 2011

Residential Tenancy Branch