



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNSD, MNDC, FF

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant 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. The landlord confirmed that on September 22, 2011 the tenant handed him a written notice to end this tenancy effective November 1, 2011. The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by registered mail on October 27, 2011. I am satisfied that the parties served each other with these documents and with written evidence packages in accordance with the *Act*.

### Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

### Background and Evidence

This one-year fixed term tenancy commenced on February 1, 2011. Monthly rent was set at \$750.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$375.00 security deposit paid on January 28, 2011. The parties agreed that the tenant vacated the rental unit on October 17, 2011 at which time possession of the rental unit passed to the landlord.

The landlord testified that he was able to re-rent the rental unit to another tenant as of November 1, 2011 for a monthly rent of \$750.00, with no rental incentive agreement in place to reduce the amount of rent received by the landlord.

The landlord applied for a monetary award of \$558.00, plus recovery of the \$50.00 filing fee for this application. In making this claim, the landlord noted that the tenant had signed her agreement to the following when she entered into this one-year fixed term tenancy:

- a \$350.00 lease break fee;
- a return of \$62.00 per month in deductions provided to the tenant from February 1, 2011 until October 1, 2011 pursuant to a Rental Incentive Agreement for a total of \$558.00 (i.e., \$62.00 x 9 months = \$558.00).

At the hearing, the landlord said that he had only identified the \$558.00 from the Rental Incentive Agreement, although he said that he could alternatively have sought the \$350.00 lease break fee set out in the residential tenancy agreement.

At the hearing, the landlord testified that the lease break fee was to cover the landlord's costs for such items as advertising, interview, administration and re-renting of the premises if the tenancy ended early. Section 4 of the residential tenancy agreement reads in part as follows:

*...However, if the Tenant terminates the tenancy in less than 6 months, \$350.00 will be charged by the Landlord and the Tenant will pay this amount as a service charge for tenancy change over costs, such as advertising, interviewing, administration, re-renting, for this short term tenancy. This is not a penalty.*

The Rental Incentive Agreement signed by both parties on February 1, 2011 established that if the tenant broke the lease before the scheduled end to this tenancy on January 31, 2012, the \$62.00 monthly rental concession allowed the tenant as a rental incentive will be immediately due and payable to the landlord. Rather than any incentive payment from the landlord, the tenant's rent payments were \$62.00 less than the stated monthly amount identified in the tenancy agreement.

### Analysis

I find that the \$350.00 lease break fee identified in the residential tenancy agreement is a liquidated damages clause. Although the landlord said that he believed that he could alternatively have claimed for the \$350.00 lease break fee identified in the residential tenancy agreement, I find that this would not have been possible. Since this tenancy extended beyond the six-month period identified in section 4 of the residential tenancy

agreement, the landlord is not entitled to any claim for breach of this clause designed to recover the landlord's costs for advertising, interviewing, administration and re-renting.

The question that arises is whether the landlord's claim for reimbursement of \$62.00 per month for the tenant's failure to remain in this tenancy until the termination of the 12-month fixed term constitutes a penalty or if it can be allowed under the *Act*.

Residential Tenancy Branch Policy Guideline # 4 provides the following useful guidance in interpreting liquidated damages and when a provision of such an agreement constitutes a penalty.

*A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.*

*There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:*

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

*If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...*

The landlord drafted the residential tenancy agreement calling for payment of \$350.00 as liquidated damages in the event that the tenant ended the tenancy within six months of the start of this tenancy. The clause in the contract specified that the amount was not a penalty. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question to be decided upon a consideration of the entire agreement. The amount claimed in an agreement as liquidated damages is

intended to be an estimate of the loss that may be suffered by the landlord if the tenant breaches the agreement by ending the tenancy early. In this case, the landlord had two separate agreements whereby amounts would become payable if the tenant ended the tenancy early. If the tenancy ended within the first six months, the landlord would receive a \$350.00 liquidated damage amount and \$62.00 for each month's rent concession. If the tenancy extended beyond six months but was terminated before the scheduled end date for the fixed term tenancy, the landlord would only be entitled to a return of \$62.00 for each month's rent concession, an amount that increased by \$62.00 for each month of the tenancy.

I find that this latter rent concession amount does not constitute a penalty because the liquidated damage provision, the genuine pre-estimate of the landlord's loss in the event that the tenant breached the agreement by ending the tenancy within the first six months of this tenancy, ended before the tenancy vacated the premises.

Since the landlord made no formal claim for the \$350.00 lease break (i.e. liquidated damage) fee set out in the residential tenancy agreement, the only fee eligible for claim by the landlord was the return of the \$62.00 monthly rent concession fee for a nine-month period. The tenant did sign this Rental Incentive Agreement. However, for a tenancy that extended beyond six months, there is no indication that the amounts identified in this Agreement were intended to be a pre-estimate of any loss that the landlord would encounter if the tenant did not fulfill the full terms of her tenancy agreement. In this case, the landlord testified that he was able to find a new tenant who took occupancy of the rental unit on November 1, 2011. He said that monthly rent for this new tenant was set at \$750.00, without the benefit of the Rental Incentive Agreement. Without this provision, the landlord was guaranteed a higher rent than was being paid by the tenant during the 9 months of her tenancy. Under these circumstances, it would appear that the landlord actually benefitted by \$62.00 per month for the three month period from November 1, 2011 until the end of the respondent's fixed term tenancy on January 31, 2012. In other words, had the tenant fulfilled the entire term of her tenancy, the landlord would have received \$186.00 less in rent for the period from November 1, 2011 until January 31, 2012. I find that the landlord's receipt of these additional rent funds for this tenancy offsets three of the nine months identified in the landlord's application for this monetary award.

I find that both parties agreed to the Rental Incentive Agreement at the commencement of this tenancy. The landlord only agreed to deduct \$62.00 for each month's rent on the understanding that these deductions would be recovered if the tenant did not remain in the tenancy for the entire 12-month period. As the tenant did not remain in this tenancy for the entire period of the tenancy, I find that the terms of the Rental Incentive

Agreement allow the landlord to recover the \$62.00 deduction for each month that the tenant paid rent during this tenancy, a total monetary award of \$558.00. However, had the tenant complied with the terms of her fixed term tenancy agreement, the landlord would not have received the additional \$62.00 from this rental that were obtained without any such Agreement being signed by the new tenants. As such, I deduct the amount of the landlord's entitlement to a monetary award by the difference in monthly rent that the landlord has been receiving from the new tenants from November 1, 2011 until January 31, 2012, a total deduction of \$186.00. I find that the landlord is entitled to a monetary award of \$372.00 (i.e.,  $\$558.00 - \$186.00 = \$372.00$ ).

As the landlord has been partially successful in this application, I allow the landlord to recover \$25.00 of the filing fee for this application from the tenant.

I allow the landlord to retain the tenant's \$375.00 security deposit plus applicable interest in partial satisfaction of the landlord's total monetary award of \$397.00 (i.e.,  $\$372.00 + \$25.00 = \$397.00$ ). No interest is payable over this period. I issue a monetary award in the landlord's favour in the amount of \$22.00.

### Conclusion

I issue a monetary Order in the landlord's favour in the following terms which allows the landlord to recover losses arising out of this tenancy (less deductions as noted in this decision), to recover one-half of the landlord's filing fee for this application, and to retain the tenant's security deposit.

Item	Amount
Landlord's Recovery of 9 months of Rental Incentives (9 x \$62.00 = \$558.00)	\$558.00
Landlord's Gain of 3 months of Increased Rent during the Remainder of the Fixed Term Tenancy from New Tenants (3 x \$62.00 = \$186.00)	-186.00
Less Security Deposit	-375.00
Recovery of Filing Fee for this application	25.00
<b>Total Monetary Order</b>	<b>\$22.00</b>

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: January 18, 2012

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Residential Tenancy Branch