



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding NPR LTD PARTNERSHIP  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDC, MNSD, 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 tenants' 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 tenants, pursuant to section 72.

This hearing also dealt with the tenant JB's cross-application pursuant to the *Act* for:

- authorization to obtain a return of all or a portion of the security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord's agent, RS ("landlord") and the tenant, JB ("tenant") attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord confirmed that he had authority to represent the landlord company named in both applications, as an agent at this hearing. The tenant confirmed that he had authority to represent the other "tenant MB," named in the landlord's application, as an agent at this hearing.

The tenant confirmed that the landlord personally handed him and tenant MB the landlord's application for dispute resolution hearing package ("Landlord's Application") on January 16, 2015. In accordance with section 89 of the *Act*, I find that both tenants were duly served with the Landlord's Application. The Landlord's Application names both tenants as respondents.

The landlord confirmed receipt of the tenant's amended application for dispute resolution hearing package ("Tenant's Application") on January 19, 2015. In accordance with section 89 of the Act, I find that the landlord was duly served with the Tenant's Application. The tenant's Application was made only on behalf of the one tenant, JB, not the other tenant MB.

### Issues to be Decided

Is the landlord entitled to a monetary award for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?

Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested?

Is the tenant entitled to a monetary award equivalent to double the value of his security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*?

Are the landlord and/or tenant entitled to recover the filing fee for their applications?

### Background and Evidence

The landlord testified that this tenancy began on June 1, 2014 for a fixed term to end on May 31, 2015. Monthly rent in the amount of \$1,335.00 was payable on the first day of each month. A security deposit of \$647.50 was paid by the tenants and the landlord continues to retain this deposit. The tenants vacated the rental unit on December 23, 2014, after providing written notice to the landlord on November 10, 2014. The tenants returned the rental unit keys to the landlord on December 31, 2014. The tenants provided a forwarding address in writing to the landlord on November 13, 2014. A move-in condition inspection and report were completed on May 30, 2013 and a move-out condition inspection and report were completed on December 23, 2014.

The tenant seeks a return of double the amount of his security deposit, totaling \$1,295.00. The tenant testified that there was no damage or cleaning expenses at the end of this tenancy, that the move-out condition inspection and report indicate that no amounts were being deducted from the deposit, that he did not give permission to the landlord to retain any amounts from his deposit and that there was no unpaid rent at the end of this tenancy. The tenant states that he is entitled to double the amount of his deposit because the landlord did not return it to him within 15 days of the end of this

tenancy. The tenant also seeks to recover the \$50.00 filing fee for his application from the landlord.

In the landlord's original application, the landlord sought to recover a loss of January 2015 rent in the amount of \$1,335.00. At the hearing, the landlord withdrew his claim of \$1,335.00 for January 2015 rent. Accordingly, this portion of the landlord's application is withdrawn.

The landlord seeks to recover \$1,335.00 in liquidated damages because the tenant breached the fixed term tenancy agreement. The landlord stated that the tenants were required to fulfill their lease until May 31, 2015, but left early on December 31, 2014. The landlord stated that the tenancy agreement indicates that \$1,335.00 is payable for liquidated damages if the tenants vacate the rental unit prior to the end of the fixed term. The landlord provided a liquidation damages letter and a notice to the tenants, indicating that the tenants were responsible to pay the above amount. The tenant stated that he did not sign the notice acknowledging that he was responsible for liquidated damages because he disagrees with the landlord's claim. The landlord indicated that he mitigated his damages and found another tenant to rent the unit as of January 1, 2015 at an increased rent of \$1,450.00 per month. The landlord stated that it took approximately one month to find this new tenant. However, the landlord indicated that he expended 15% of \$1,335.00 in commission and additional salary costs for a leasing agent to show the rental unit to 5 to 7 prospective tenants. The landlord stated that he also expended costs for a maintenance person to check appliances in the rental unit after the tenants vacated as well as costs for a person to post free online rental advertisements for the rental unit.

The tenant stated that the landlord is attempting to impose a penalty in the form of liquidated damages. The tenant indicated that one month's rent is an excessive cost and that the Residential Tenancy Branch ("RTB") Policy Guideline for liquidated damages prohibits a penalty being imposed for breach of the fixed term lease rather than costs to re-rent the suite. The tenant stated that the landlord did not lose any rental revenue because he was able to find a tenant quickly and re-rent the unit as of January 1, 2015. The tenant maintained that the landlord is now charging a higher monthly rent of \$1,450.00 and that this profit more than covers any costs the landlord incurred for the above expenditures. The tenant stated that the landlord has not provided any written documentation, exact amounts or estimates for the above costs being claimed. The tenant further indicated that the landlord would have had to find another tenant to occupy the rental unit at the end of the fixed term lease anyway, so he would have expended the above costs in any event.

The landlord seeks to retain the tenants' security deposit of \$647.50 in partial satisfaction of the monetary award. The landlord also seeks to recover the \$50.00 filing fee for the Landlord's Application from the tenants.

### Analysis

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the both parties' claims and my findings around each are set out below.

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. 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 or 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. In this case, the onus is on the landlord to prove, on a balance of probabilities, that the tenants caused a loss to the landlord and that the tenants are responsible for liquidated damages as per the tenancy agreement.

As per RTB Policy Guideline #4, a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance on the amount of 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 this case, the liquidated damages clause, as per the tenancy agreement, indicates that it is intended to compensate the landlord for losses resulting from the costs of re-renting the rental unit after a tenant breach. The cost of re-renting a rental unit to new tenants is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why landlords enter into fixed-term tenancy agreements is to attempt to limit the number of times the landlord must incur the costs of re-renting.

When a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord may incur costs of re-renting earlier than it would have without the breach. This may expose the landlord to extra costs of re-rental. However, when the

sum of the liquidated damages is a high amount, it can be viewed as a penalty rather than the actual cost of re-rental. While the landlord testified that he incurred costs for a leasing agent, posting advertisements online, showing the rental unit and appliance checks by a maintenance person, the landlord did not satisfy me that these costs equal a full month's rent of \$1,335.00. The landlord has not met its burden to show that the liquidated damages are intended to cover the cost of re-rental. The landlord also failed to provide any evidence to demonstrate how an amount equal to one month's rent was selected as a reasonable pre-estimate for the cost of re-rental at the time of the signing of the tenancy agreement. Therefore, I find that the landlord is attempting to impose a penalty upon the tenant by charging liquidated damages of \$1,335.00 for breach of the fixed term lease. I find that the liquidated damages clause in the tenancy agreement is unenforceable. Accordingly, the landlord's claim for liquidated damages in the amount of \$1,335.00 is dismissed without leave to reapply.

The Landlord's Application to retain the tenant's security deposit of \$647.50 and to recover the \$50.00 filing fee is dismissed.

Section 38 of the *Act* requires the landlord to either return all of the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or if an amount at the end of the tenancy remains unpaid (section 38(3)(b)).

The landlord made his application to retain the tenant's security deposit within 15 days of the end of the tenancy. Accordingly, the tenant is not entitled to the return of double the amount of the security deposit. The tenant is entitled to the return of his security deposit in the original amount of \$647.50 from the landlord. I make this finding because the landlord was unsuccessful in his application, there were no outstanding amounts at the end of this tenancy and the tenant did not give written permission to the landlord to retain any amount from his deposit. I also find that the tenant provided a written forwarding address to the landlord and there was no damage or cleaning expenses at the end of this tenancy.

As the tenant was successful in his application, he is entitled to recover the \$50.00 filing fee from the landlord.

Conclusion

I issue a monetary order in the tenant's favour in the amount of \$697.50 against the landlord. The tenant is provided with a monetary order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlord's entire application is dismissed without leave to reapply.

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 2, 2015

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Residential Tenancy Branch

