



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding MACDONALD COMMERCIAL REAL ESTATE SERVICE LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes:** OPR, CNR, MNR, MNSD, MNDC, FF

### **Introduction**

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*. The landlord applied for an order of possession and for a monetary order for liquidated damages and the filing fee. The landlord also applied to retain the security deposit.

The tenant applied for an order to cancel the notice to end tenancy, for the return of the pet and security deposits, for compensation for loss under the *Act* and for the recovery of the filing fee. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

The parties acknowledged receipt of evidence submitted by the other and gave affirmed testimony.

Less than ten days prior to the hearing, the tenant filed over 200 pages of documents into evidence. The landlord stated that she was not given adequate time to read and respond to the tenant's evidence. The tenant also increased the amount of her claim from \$16,700 to \$25,000+. Since the landlord did not have the opportunity to respond to the tenant's evidence, the additional portions of her claim are dismissed with leave to reapply. As per the tenant's request, her application for the cost of moving, storage, hotel stay and loss of income were also dismissed with leave to reapply.

The tenant moved out on November 16, 2015 and therefore the landlord's application for an order of possession and the tenant's application to cancel the notice to end tenancy are moot.

### **Issues to be decided**

Is the landlord entitled to a monetary order for liquidated damages, the filing fee and to retain the deposits? Is the tenant entitled to compensation?

## **Background and Evidence**

The tenancy started on April 01, 2015 for a fixed term of one year ending on March 31, 2016. Monthly rent was \$3,000.00 due on the first day of each month. Prior to moving in the tenant paid a security deposit of \$1,500.00 and a pet deposit of \$1,500.00. A copy of the tenancy agreement was filed into evidence

The tenant testified that on October 14, 2015, she noticed the presence of rats in the home. On October 18, 2015, the tenant informed the landlord of the problem. The landlord made immediate arrangements for an exterminator. On October 19, 2015, the exterminator met with the tenant and conducted a check of the rental unit. Due to the presence of the tenant's dog, the exterminator had to return with special equipment to treat the rodent problem.

The exterminator returned the next day on October 20, 2015 to carry out the treatment. On October 22, 2015, the tenant contacted the landlord and asked the landlord if she could use her own exterminator at the landlord's expense. The landlord agreed.

The tenant hired her own exterminator and the treatment continued until October 29, 2015, at which time the tenant decided to cease using her own exterminator and asked the landlord to send an exterminator to continue treatment. On October 30, 2015, the landlord's exterminator resumed services and as testified by the tenant, he returned every day to follow up on the treatment.

On November 12, 2015, the tenant gave the landlord notice to end the tenancy effective November 16, 2015. The tenant testified that she asked the exterminator to stop treatment on November 15, 2015 until she moved out on November 17, 2015. The tenant agreed that she had not paid rent for the month of November. She stated that the condition of the home was not fit for habitation and therefore she felt that the landlord was not entitled to rent.

The landlord stated that after the tenant moved out the treatment resumed and the problem was eradicated by December 04, 2015.

The landlord testified that immediately after she received a notice to end tenancy from the tenant, she started advertising the availability of the rental unit on the company website and on a popular online advertising web site. The landlord also stated that she had five showings but as of this date (January 14, 2016) she has not found a tenant.

The landlord has filed a claim as follows:

1.	Liquidated damages	\$7,500.00
2.	Filing fee	\$100.00
	<b>Total</b>	<b>\$7,600.00</b>

The tenant has filed a claim as follows:

1.	Cost of exterminator	\$357.00
2.	Home security	\$350.00
3.	Return of Security and pet deposit	\$3,000.00
4.	Mailing costs	\$55.00
5.	Cost of Air travel	\$800.00
6.	Rent reduction	\$1,500.00
7.	Filing fee	\$100.00
	<b>Total</b>	<b>\$6,162.00</b>

## **Analysis**

### **Landlord's Application**

#### 1. Liquidated Damages - \$7,600.00

A copy of the tenancy agreement filed into evidence contains a clause regarding liquidated damages that states:

*If the tenant ends the fixed term tenancy before the end of the original term as set out above, the landlord may, at the landlord's option, treat this tenancy agreement as being at an end. In such event, the tenant shall pay to the landlord, as liquidated damages, two months rent (\$6,000.00 or CAD Six Thousands) to cover the landlord's rental loss plus additional leasing fee (\$1,500.00 or CAD Fifteen hundreds) to re-rent the property. The landlord and tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the landlord from exercising any further right of pursuing another remedy available in law or in equity, including but not limited to, damages to the premises"*

In the tenancy agreement the landlord records the amount of the liquidated damages to be paid in the event the tenant ends the tenancy prior to the end date, as a total of \$7,500.00 which is equal to the amount of rent for two months plus \$1,500.00 for the cost of finding a new tenant.

Section 4 of the *Residential Tenancy Policy Guideline* deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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. Pursuant to section 4 of the *Residential Tenancy Policy Guideline*, a sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. In this case, I find the sum of \$7,500.00 to be extravagant when compared to what it would cost the landlord to re rent the unit.

Clauses of this nature can also be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. I find the amount of the clause to be invalid and I therefore interpret the liquidated damages provision to be a penalty and unenforceable. Accordingly, the landlord's claim for \$7,500.00 is dismissed.

2. Filing fee - \$100.00

The landlord has not proven her case and therefore must bear the cost of filing her application.

Even though I find that the liquidated clause is a penalty and unenforceable, the landlord is at liberty to apply for unpaid rent for November and loss of income for December 2015. The tenant agreed that rent for November was not paid. The tenant also agreed that she provided notice to end the tenancy on November 12, 2015 effective November 16, 2015. This resulted in a loss of income for December even though the landlord made efforts to mitigate her losses.

Tenant's application

1. Cost of exterminator - \$357.00

During the hearing the landlord agreed to cover this cost as she had given the tenant her consent to hire an exterminator. Therefore the tenant is entitled to \$357.00.

2. Home Security - \$350.00

The parties discussed the cost of installing a security system in the home and the landlord agreed to cover half the cost of the installation. The tenant stated that since the tenancy has ended, she moved out without taking the security equipment with her and is claiming \$350.00.

Based on the testimony of both parties, I find that the parties had a verbal agreement that the landlord would cover half the cost of the installation and that the landlord followed through with her part of the agreement. The tenant is claiming an amount that was not part of the agreement and therefore the tenant's claim for \$350.00 is dismissed.

3. Return of security and pet deposit - \$3,000.00

The tenant is entitled to the return of the deposits.

4. Mailing costs - \$55.00

The legislation does not permit me to award any litigation related costs other than the filing fee. Accordingly the tenant's claim for mailing costs is dismissed.

5. Cost of air travel - \$800.00

The landlord is not responsible for the cost of air travel for a tenant who chooses to live at a distance from the rental unit.

6. Rent reduction - \$1,500.00

Section 32 of the *Residential Tenancy Act*, states that a landlord must provide and maintain the residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law and having regard to the age, character and location of the rental unit, make it suitable for occupation by a tenant.

In this case, I find that the landlord acted immediately upon the tenant's complaint and sent out an exterminator to take care of the rodent problem. The tenant requested to use an exterminator of her own and the landlord cooperated by agreeing to cover the cost. The landlord further cooperated with the tenant and sent in an exterminator immediately after the tenant stopped using the services of her exterminator and requested the landlord to send in the original exterminator.

Overall I find that the landlord was not negligent and acted responsibly in response to the tenant's request for maintenance. Accordingly, I find that the tenant is not entitled to a rent reduction of \$1,500.00.

7. Filing fee - \$100.00

The tenant has proven a portion of her application and therefore I award her half the recovery of the filing fee in the amount of \$50.00

Overall the tenant has established a claim as follows:

1.	Cost of exterminator	\$357.00
2.	Home security	\$0.00
3.	Return of Security and pet deposit	\$3,000.00
4.	Mailing costs	\$0.00
5.	Cost of Air travel	\$0.00
6.	Rent reduction	\$0.00
7.	Filing fee	\$50.00
	<b>Total</b>	<b>\$3,407.00</b>

Overall the tenant has established a claim for \$3,407.00 and accordingly I grant the tenant an order under section 67 of the *Residential Tenancy Act* for this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

### **Conclusion**

I grant the tenant a monetary order in the amount of **\$3,407.00**.

The landlord's claim is dismissed. The landlord is at liberty to make her own application for unpaid rent for November 2015 and loss of income for December 2015.

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 14, 2016

---

Residential Tenancy Branch

