



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding NPR GP INC (GENERAL PARTNER FOR NPR LIMITED PARTNERSHIP)  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR MNR MND MNDC MNSD FF

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("the *Act*") for an Order of Possession pursuant to section 55; a monetary order for unpaid rent, damage or loss 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. The landlord withdrew the application for an Order of Possession as the tenant had vacated the rental unit.

The landlord's representatives ("Landlord T and Landlord S") and the tenant's advocate both attended this hearing. Both parties were given a full opportunity to make submissions regarding this application. The tenant's advocate did not have instructions to act on behalf of the tenant without his presence and was therefore unable to confirm the tenant's receipt of the landlord's Application for Dispute Resolution package ("ADR"). However, the landlord testified that the tenant had been served with the landlord's ADR by registered mail and provided Canada Post receipts in support of that testimony. I find that the tenant is deemed served with the landlord's ADR on April 10, 2016 (5 days after its registered mailing).

### Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent, damage or loss as a result of this tenancy? Is the landlord entitled to retain the tenant's security deposit? Is the landlord entitled to be compensated for the filing fee for this application?

### Background and Evidence

This tenancy began on September 1, 2015 as a one year fixed term tenancy. According to Landlord T, the \$1150.00 monthly rental amount was based on a lease incentive, reducing the rent from \$1350.00 per month for the first six months. Landlord T testified that the landlords continue to hold a security deposit in the amount of \$299.00 paid by the tenant at the outset of this tenancy (August 18, 2015). The landlord testified that the Residential Tenancy Branch issued an Order of Possession to the landlord on February 24, 2016 and the tenant vacated the rental unit as of March 7, 2016. The landlord sought to recover a total of \$3164.54 from the tenant.

The landlord testified that the tenant owes outstanding utility bill amounts of \$34.52 and \$86.31 totalling \$120.83. The landlord referred to the residential tenancy agreement section that provides for administrative fees with respect to outstanding monies owed by the tenant. The landlord seeks a further \$5.18 and \$12.95 for each utility bill outstanding respectively as well as the tax on those amounts. The landlord was unable to point to the portion of the residential tenancy agreement that allows for these administrative costs.

The landlord sought to recover \$2300.00 for 2 month's rent (January and February 2016) claiming that the tenant remained in the rental unit for the full months of January and February 2016.

The landlord submitted that the tenant vacated the rental unit without providing sufficient notice and in contravention of the lease agreement. The landlord referred to section of the agreement that provides as follows,

*If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written or oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$1350 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

The landlord referred to the portion of the residential tenancy agreement that allows the landlord to charge \$25.00 for each late or unpaid month of rent. The residential tenancy agreement provides that “[late] payment, returned or non-sufficient funds (N.S.F) cheques are subject to an administrative fee of not more than \$25.00 each, plus the amount of any service fees charged by a financial institution to the landlord. ...” The landlord also sought to recover 7 days rent at \$31.00 a day totalling \$259.67 as the tenant remained in the rental unit until March 7, 2016.

Within the residential tenancy agreement, overholding is addressed with,

*If the tenant remains in possession of the rental unit after the last day of the term as set out in this Agreement, or after any other lawful end of the tenancy, the landlord may claim for damages against the tenant and the tenant will be liable for damages suffered by the landlord...*

Finally, the landlord submitted evidence, in sworn testimony and the submission of the landlord’s financial ledger for the rental unit, that repairs and cleaning were required at the end of the tenancy including;

- Carpet cleaning \$110.00
- Cleaning of unit \$180.00
- Garbage removal \$60.00
- Repairs \$37.00 & \$30.00

The landlord submitted that the tenant agreed and signed the rental agreement with the provisions outlined above. The landlord submitted that the tenant’s failure to comply with these terms allows the landlord to collect on the terms as outlined in the agreement. The tenant’s advocate made general submissions with respect to the lease incentive and the type of damages sought by the landlord. He submitted, generally, that this attempt to “clawback” the rental incentive is a penalty and should not be imposed on the tenant in the circumstances. He submitted that the landlord/applicant should only be returned to the same position that they would have been in should the tenancy have continued.

### Analysis

The landlord sought a monetary order totalling \$3164.54 in order to have the landlord compensate the landlord for; unpaid rent; overholding; unpaid utilities; and liquidated

damages as a result of causing the landlord to end the tenancy before the end of the fixed term. The landlord bears the burden of proof in showing that the tenant is responsible for the items sought within the monetary request and that the landlord has in fact incurred the costs.

With respect to unpaid rent, the landlord has shown that the tenant resided in the rental unit and failed to pay rent for the months of January and February 2016. The rental amount for those two months totals \$2300.00. The landlord is entitled to recover the \$2300.00 in rental arrears for these months.

The landlord provided sworn, undisputed testimony that the tenant remained in the rental unit until March 7, 2016 resulting in overholding, defined in the *Act* as continuing to occupy the rental unit after the tenancy has ended. The tenant's rental amount of \$1150.00 divided by the 31 days in March results in a daily rental amount of \$37.00 per month. As the tenant continued to reside in the rental unit for 7 additional days, I find that the landlord is entitled to \$259.00 for the overholding period.

The landlord provided evidence with respect to unpaid utilities in the amount of \$34.52 and \$86.31 totalling \$120.83. The utility bills provided indicate the tenant's rental unit and the period that he resided in the unit. Therefore, the landlord is entitled to recover \$120.83 towards unpaid utilities.

With respect to the fees (late payment and administrative for utilities) sought by the landlord, I refer to section 7 of the Residential Tenancy Regulation;

**7** (1) A landlord may charge any of the following non-refundable fees:

...(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent; ...

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

I note that the landlord has provided a copy of the residential tenancy agreement that includes a provision for charging late fees of not more than \$25.00. Therefore, I find that the landlord is entitled to recover \$50.00 for late fees for the months of January and February 2016. I note that the landlord was unable to point me to a provision allowing

the charging of administration fees, taxes, and other charges as a result of unpaid utilised. Therefore, I decline to order the payment of these fees.

Policy Guideline No. 4 provides guidance with respect to claims by the landlord for 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.*

The Policy Guideline provides a variety of considerations in determining if a liquidated damages clause is a penalty. Among the considerations is, as stated in the guideline, “[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.” This tenant was issued a Notice to End Tenancy, a subsequent Order of Possession and ultimately vacated the rental unit as a result of his failure to pay rent in accordance with the tenancy agreement. The landlord made a calculated decision to end this tenancy after attempts to arrange for payment with the tenant. The landlord can now re-rent the unit. One of the material terms, and the one that required addressing in ending this tenancy, is payment of rent. While the amount sought by the landlord is not extravagant with respect to the liquidated damages clause, it reflects an unreasonable obligation on the tenant in the circumstances. I do not find that the landlord is entitled to liquidated damages.

The landlord also noted that they wish to recover costs for repairs and cleaning at the end of this tenancy. They provided sworn, undisputed evidence that the tenant did not leave the rental unit clean and tidy in accordance with the Act. Therefore, based on the ledger provided indicating costs for cleaning and repair totalling \$ 417.00, the landlord is entitled to recover \$400.00 for the cost of cleaning and repairs.

As the landlord was successful in their application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

I grant a monetary order in favour of the landlord as follows,

<b>Item</b>	<b>Amount</b>
January 2016: Unpaid Rent	\$1150.00
February 2016: Unpaid Rent	1150.00
March 2016: 7 days overholding	259.00
Unpaid Utilities (\$34.52 + \$88.31)	120.83
Late Rent Fees (\$25 x 2)	50.00
Cleaning and Repairs	400.00
Less Security Deposit	-299.00
Recovery of Filing Fee for this Application	100.00
<b>Total Monetary Order to Landlord</b>	<b>\$2930.83</b>

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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.

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: May 24, 2016

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Residential Tenancy Branch