



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOLMES LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MND, MNR, MNSD, MNDC, FF

### Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* (the Act) 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;
- 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 their filing fee for this application from the tenants pursuant to section 72.

The individual landlord appeared. The corporate landlord's agent appeared. The owner landlord appeared. Those in attendance were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The tenants did not attend this hearing, although I waited until 1352 in order to enable the tenants to connect with this teleconference hearing scheduled for 1330.

The individual landlord (the landlord) provided all of the testimony for the landlord.

The landlord testified that the landlords served the tenants with the dispute resolution package on 16 October 2015 by registered mail. The landlord testified that this package included all evidence before me. The landlords provided me with Canada Post tracking numbers that showed the same. The landlord testified that the mailings were sent to the forwarding address provided by the landlord and that the mailings were retrieved by the tenants. On the basis of this evidence, I am satisfied that the tenants were deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

Issue(s) to be Decided

Are the landlords entitled to a monetary award for unpaid rent, damage and losses arising out of this tenancy? Are the landlords entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Are the landlords entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the landlord, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlords' claim and my findings around it are set out below.

This tenancy began 1 March 2014. Possession of the rental unit returned to the landlord on or about 4 January 2015. Monthly rent in the amount of \$1,575.00 was due on the first. The landlord continues to hold the tenants' security deposit in the amount of \$787.50, which was collected at the beginning of this tenancy.

The parties entered into a tenancy agreement on 15 January 2014. The tenancy agreement was for the fixed-term period of 1 March 2014 to 28 February 2015. Clause 10 of the tenancy agreement provides for \$25.00 administration fee where the tenants pay rent late or where the tenants provide a cheque that is returned for insufficient funds. Clause 23 of the tenancy agreement and clause 4 of the addendum requires the tenants to professionally clean the carpets at the end of the tenancy.

The landlord testified that the tenants did not pay rent due 1 October 2014, 1 November 2015, or 1 December 2014. The landlord testified that she texted the tenants on 6 December 2014 and asked when the tenants would vacate the rental unit. On 9 December 2014, the landlords issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The landlord testified that between 6 and 15 December 2014 she posted the rental unit on four different online platforms for rent. On or about 16 December 2014, the landlord conducted a showing.

The tenants removed their possessions from the rental unit on or about 3 January 2015. The tenants retained possession of the rental unit until 4 January 2015 to complete cleaning of the unit. The landlord and tenants met on 5 January 2015 to conduct the condition move out inspection. The landlord testified that the tenants did not professionally clean the carpets.

The landlords and tenants engaged in settlement discussions prior to this hearing, but did not finalize any agreement.

The landlord testified that December and January is a difficult time for rentals because of the holiday season. The landlord testified that on 19 January 2015, the landlord made contact with prospective tenants and entered into a tenancy agreement beginning 23 January 2015.

The landlord testified that she is not aware of any reason that would entitle the tenants to deduct any amounts from rent. The landlord testified that there are no prior orders of the Residential Tenancy Branch in respect of this tenancy. The landlord testified that the tenants did not provide any receipts for emergency repairs.

The landlords claim for \$6,460.50:

<b>Item</b>	<b>Amount</b>
Unpaid October Rent	\$1,550.00
Unpaid November Rent	1,575.00
Unpaid December Rent	1,575.00
January Rent Loss	1,330.75
Late Fees	50.00
NSF Fees	75.00
Carpet Cleaning	204.75
Filing Fee	100.00
<b>Total Monetary Order Sought</b>	<b>\$6,460.50</b>

### Analysis

#### *Unpaid Rent*

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenants owed rent due on the first of October, November and December. On the basis of the evidence before me, the tenants did not pay rent and did not have any reason to lawfully withhold any amount from rent. I find that the landlords are entitled to recover the full claimed amount of rent arrears for October (\$1,550.00), November (\$1,575.00) and December (\$1,575.00).

### *Rent Loss*

The tenants and landlords entered into a fixed-term tenancy agreement ending 28 February 2015. The tenants did not fulfill the terms of the tenancy agreement.

The landlords claim a rental loss for a portion of January. *Residential Tenancy Policy Guideline*, “3. Claims for Rent and Damages for Loss of Rent” provides guidance in determining damages in an application such as the landlord’s:

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. ...[A]s a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. ...

On the evidence before me, I find that the tenant fundamentally breached the tenancy agreement by failing to pay rent due under the tenancy agreement. I find that the landlords’ discussion with the tenants prior to filing the application and the landlords’ application dated 15 October 2015 provides the tenants with sufficient notice that the landlords have claimed for this loss.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, regulations or a tenancy agreement, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant’s duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

The landlord has testified that the rental unit was not rerented until 23 January 2015. I find that the landlords have established a rental loss for 22 days of January. This loss was the direct result of the tenants breaching their fixed-term tenancy agreement. The landlord testified as to various efforts that have been made on the landlords’ behalf to

rent the rental unit. On the basis of the landlord's sworn and uncontested testimony, I find that the landlords have proven they have mitigated their loss. As such, the landlords are entitled to the full amount of their proven loss: \$1,330.75.

### *Late and NSF Fees*

The landlords claim \$50.00 in late fees and \$75.00 for cheques returned for insufficient funds.

Paragraphs 7(1)(c) & (d) of the *Residential Tenancy Regulations* (the Regulations) set out the collection of non-refundable fees in relation to returned cheques and late fees:

- 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;

[emphasis added]

Pursuant to subsection 7(2) of the *Regulations* a late fee charge may only be applied if the tenancy agreement provides for that fee. Subsection 5(1) of the Act prohibits contracting out of the provisions of the Act and Regulations. Any term that attempts to contract out is of no effect.

The tenancy agreement contained this clause:

ARREARS: 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...

[emphasis added]

Paragraph 7(1)(d) of the Regulations uses the singular article "an" in relation to the fee. Unlike the tenancy agreement, the provision does not include the word "each". I find that the use of the singular article "an" in paragraph 7(1)(d) of the Regulations and the exclusion of a word such as "each", "per", or "both" that would denote that the fee could be applied in the plural is intentional. I find that paragraph 7(1)(d) of the Regulations permits a charge of up to \$25.00 only for late payment of rent, a returned check, or late payment of rent and a returned cheque.

As the provision attempts to contract out of the Regulations, pursuant to subsection 5(1) of the Act, the provision is of no force and effect. The result is that there is no clause

that provides for a late fee as required by subsection 7(2) and no late fee, of any amount, is collectable. Thus, I dismiss the landlords' monetary claim in respect of the late fees and returned cheque fees.

### *Carpet Cleaning*

Subsection 37(2) of the Act specifies that when a tenant vacates a rental unit, the tenant must leave the unit reasonably clean and undamaged except for reasonable wear and tear. *Residential Tenancy Policy Guideline*, "1. Landlord & Tenant – Responsibility for Residential Premises" states:

The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. ...

Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year.

The landlord provided me with a receipt for carpet cleaning in the amount of \$204.75. I find that the tenants and landlords agreed in the tenancy agreement that the carpets will be professionally cleaned at the end of the tenancy. I recognize that the total combined tenancy was for less than one year; however, I find that this term does not contradict the Act as the policy guideline is just that: a guideline. Accordingly, I find that the landlords are entitled to recover this amount from the tenants.

### *Security Deposit*

The landlords applied to keep the tenants' security deposit. I allow the landlords to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

### Filing Fee

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

### Conclusion

I issue a monetary order in the landlords' favour in the amount of \$5,548.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Unpaid October Rent	\$1,550.00
Unpaid November Rent	1,575.00
Unpaid December Rent	1,575.00
January Rent Loss	1,330.75
Carpet Cleaning	204.75
Filing Fee	100.00
Offset Security Deposit	-787.50
<b>Total Monetary Order</b>	<b>\$5,548.00</b>

The landlords are provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) 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 subsection 9.1(1) of the Act.

Dated: May 06, 2016

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**Residential Tenancy Branch**