



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes

For the tenants: MNSD, FFT  
For the landlord: MNDCLS, FFL

### Introduction

This hearing was convened as a result of Applications for Dispute Resolution (“applications”) by both parties under the *Residential Tenancy Act* (“Act”). The tenants applied for a monetary order for double their \$825.00 security deposit and other unspecified relief and to recover the cost of the filing fee. The landlord applied for a monetary order in the amount of \$882.00 comprised of the cost to re-rent the rental unit, and to recover the cost of the filing fee.

The landlord agent (“agent”), the managing broker who supervises the agent (“broker”), and the tenants attended the teleconference hearing. The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither party raised any concerns regarding the service of documentary evidence. Both parties confirmed that they had the opportunity to review the documentary evidence prior to the hearing. I find the parties were served sufficiently under the *Act* as a result.

Preliminary and Procedural Matter

The parties confirmed their email addresses at the outset of the hearing. The parties confirmed their understanding that the decision would be emailed to both parties and that any applicable orders would be emailed to the appropriate party.

Issues to be Decided

- Is either party entitled to a monetary order under the *Act*, and if so, in what amount?
- What should happen to the tenants' security deposit under the *Act*?
- Is either party entitled the recovery of the cost of the filing fee under the *Act*?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed-term tenancy began on May 15, 2017. The parties agreed that the tenancy ended on November 30, 2017 based on a Mutual Agreement to End Tenancy agreement dated October 31, 2017 ("mutual agreement"). The tenants paid a security deposit of \$825.00 at the start of the tenancy which the landlord continues to hold.

*Landlord's claim*

The landlord has claimed a total amount of \$882.00 as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Time spent to find a new tenant	\$882.00
<b>TOTAL</b>	<b>\$882.00</b>

I note that although the Monetary Order Worksheet document submitted in evidence by the landlord also indicated a second item which reads "court hearing with RTB 5 hrs at \$75/hr for time and work spent \$375.00" the landlord failed to amend their application formally and reserve the amendment on the tenants. As a result, I dismiss that portion of the landlord's monetary order and note that the *Act* does not permit the landlord to divide a claim so I dismiss the \$375.00 portion for that reason, without leave to reapply. I also note that the time spent to prepare for a dispute resolution hearing is not a cost that there is a remedy to claim for under this *Act*.

Regarding item 1, this item was dismissed in full without leave to reapply during the hearing as the parties confirmed the tenancy ended by way of a mutual agreement and that the cost to re-rent the rental unit was not part of the signed mutual agreement. I also note that #18 of the tenancy agreement addendum which covers Liquidated Damages reads in part:

**18. LIQUIDATED DAMAGES**

- a) If the Tenant terminates the tenancy before the expiry, a sum of equivalent to **TWO (2)** months rent will be charged by the Landlord and the Tenant will pay this amount as a service charge to tenancy changeover cost, such as advertising, interviewing, administration and re-renting, for this short term tenancy. This is not a penalty.

[Reproduced as written]

I note that the amount of “two (2) months rent” is excessive and is not permitted under the *Act* or Residential Tenancy Branch (“RTB”) Policy Guideline 4 – Liquidated Damages (“policy guideline”) indicates the following test:

**“-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.”

[Reproduced as written with my emphasis added]

In the matter before me, monthly rent was only \$1,650.00 and yet the landlord writes in clause 18 that two (2) month’s rent or \$3,300.00 would be charged as a re-renting fee which I find to be not only excessive but exceeds the greatest loss that could follow a breach would be the monthly rent of \$1,650.00. In addition, I find that not calling it a penalty does not change the fact that I find the amount of \$3,300.00 to be a penalty.

Notwithstanding my finding above, I have dismissed the \$882.00 amount claimed for item 1 due to the parties agreeing in writing by way of a signed mutual agreement to end the tenancy on November 30, 2017. I therefore find the tenants are not liable for the cost to re-rent and that the amount of \$882.00 will be between the landlord and the landlord’s agent and that the *Act* does not apply to landlord versus landlord agent disputes.

*Tenants’ claim*

Regarding the tenants' claim, the tenants have claimed \$3,000.00 and stated that the amount was an arbitrary amount as they feel the landlord should be penalized for holding their security deposit. There is no dispute that the tenants paid a security deposit of \$825.00 at the start of the tenancy.

The parties agreed that the tenants provided the landlord with their written forwarding address on the outgoing condition inspection on November 30, 2017 which was submitted in evidence. The landlord continues to hold the tenants' security deposit and applied to retain the tenants' security deposit by filing their application on December 6, 2017.

### Analysis

Based on the documentary evidence and the oral testimony provided during the hearing, and on the balance of probabilities, I find the following.

#### *Test for damages or loss*

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on each applicant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the respondent. Once that has been established, the applicant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the applicant did what was reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Landlord's claim

As noted above, I have dismissed the landlord's claim for \$882.00 as the cost to re-rent the rental unit as I find the landlord has failed to meet part one of the test for damages or loss under the *Act*. In fact, the landlord specifically agreed to end the tenancy early by allowing the tenancy to end by way of a signed mutual agreement. Therefore, I dismiss the landlord's claim in full due to insufficient evidence, without leave to reapply.

As the landlord's claim did not have merit, I do not grant the filing fee to the landlord.

Tenants' claim

Section 38 of the *Act* applies and states in part:

**Return of security deposit and pet damage deposit**

**38** (1) Except as provided in subsection (3) or (4) (a), **within 15 days after the later of**

**(a) the date the tenancy ends, and**

**(b) the date the landlord receives the tenant's forwarding address in writing,**

**the landlord must do one of the following:**

**(c)** repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

**(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.**

[Reproduced as written with my emphasis added]

Given the above and taking into account that the tenants provided their written forwarding address on the outgoing condition inspection report on November 30, 2017, I find the landlord had 15 days to either return the deposit or claim against it. As the landlord filed their application claiming against the tenant's security deposit on

December 6, 2017 I find the landlord did not breach the *Act* and I dismiss the tenant's application for double the security deposit in full without leave to reapply as a result. I find the tenants are entitled to the return of their \$825.00 original security deposit. Therefore, I order the landlord to return the tenants' \$825.00 security deposit which has accrued \$0.00 in interest to the tenants within 15 days of July 19, 2018 which is the date of this decision. I note that the parties agreed that the landlord will pay the tenants by e-transfer and that the tenants' email address was confirmed during the hearing. Should the landlord fail to comply with my order, I grant the tenants a monetary order pursuant to section 67 of the *Act* in the amount of **\$825.00**.

I do not grant the tenants the cost of the filing fee as the tenant's claim for double has no merit.

### Conclusion

The landlord's application is dismissed without leave to reapply due to insufficient evidence.

The tenant's application for double their security deposit is dismissed without leave to reapply. The landlord is ordered to return the tenants' \$825.00 security deposit within 15 days of July 19, 2018.

The tenants are granted a monetary order pursuant to section 67 of the *Act*, in the amount of \$825.00. Should the tenants required enforcement of this order, the landlord must be served by the tenants before the monetary order may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the *Act*, and 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: July 19, 2018

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Residential Tenancy Branch