



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNDL, FFL

### Introduction

This hearing was scheduled in response to the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- a monetary order for damage to the rental unit pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant and the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Each party was represented; the landlord by legal counsel and the tenant by an articling student.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. As neither party raised any issues regarding service of the application or the evidence, I find that both parties were duly served with these documents in accordance with sections 88 and 89 of the *Act*.

On July 31, 2018 the landlord applied for dispute resolution naming the tenant as the respondent. During the hearing, the articling student for the tenant submitted that the landlord incorrectly spelled the tenant's surname in the application. Accordingly, I have amended the landlord's application to reflect the spelling provided by the articling student during the hearing.

### Preliminary Issue – Jurisdiction

The articling student contended that the landlord's application is founded in negligence and falls outside the jurisdiction of the Residential Tenancy Branch ("RTB") and therefore should be dismissed. In the alternative, the articling student submitted that the application should be dismissed on the basis that the claim is statute barred due to the expiration of the limitation period for claims of negligence as set out under the *Limitation*

*Act*. The articling student also referred to section 58(2) of the *Act* which establishes that those matters before the Supreme Court cannot be accepted or resolved by the RTB.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, specifically due to the actions or neglect of one party, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. I find that because the claim is in relation to an incident that occurred during a tenancy I have the authority to award damages for negligence. Therefore, I decline the tenant's request to dismiss the application on this basis.

This tenancy ended July 31, 2016. The landlord filed her application for dispute resolution on July 31, 2018. Pursuant to subsection 60(1) of the *Act* an application for dispute resolution must be made within two years of the date that the tenancy to which the matter relates ends. Therefore, I find the landlord made her application within the prescribed limits and the landlord's application is not statute barred. I decline the tenant's request to dismiss the application on this basis.

In the absence of corroborating evidence that the dispute is linked substantially to a matter that is before the Supreme Court, I decline the tenant's request to dismiss the application on this basis.

Overall, I find this matter falls within the jurisdiction of the RTB.

#### Preliminary Issue – Amendment

At the outset of the hearing, legal counsel requested to reduce the landlord's monetary claim. I find that a reduction of the landlord's monetary claim does not prejudice the tenant and as a result, I amend the landlord's claim from \$35,000.00 to the reduced amount of \$24,032.61 pursuant to section 64(3) of the *Act*.

#### Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage to the rental unit?

Is the landlord authorized to recover the filing fee for this application from the tenant?

### Background and Evidence

As per the submitted tenancy agreement and testimony of the parties the tenancy began on September 15, 2003 on a fixed term until September 14, 2004 at which time the tenancy continued on a month-to-month basis. Rent in the amount of \$1,840.90 was payable on the first of each month. The tenant remitted a security deposit in the amount of \$750.00 at the start of the tenancy, which the landlord returned to her at the end of tenancy. The tenant vacated the unit July 31, 2016.

### Landlord's Claim

The landlord seeks compensation in the amount of \$24,032.61, including the following;

<b>Item</b>	<b>Amount</b>
Emergency Repairs	\$13,181.22
Flooring for Unit 1800	\$6,744.07
Damages to Repair Units	\$4,107.32
<b>Total Claim</b>	<b>\$24,032.61</b>

Landlord's legal counsel presented that on March 12, 2016, the tenant left a jacuzzi bathtub running. As a result water escaped and caused extensive damage to the unit and the two levels below. Legal counsel stated that on March 15, 2016, the tenant disclosed to the insurance adjuster, that the overflow of water from the tub occurred while she slept. It was the landlord's position that the water escape and resulting damage was caused by the actions, or in the alternative, by the neglect of the tenant. The landlord seeks the total cost of remediating the loss in the amount above.

During the hearing, legal counsel acknowledged the landlord did not incur the costs as listed above as the landlord carried insurance and paid the deductible in the amount of \$10,000.00. Legal counsel contended that pursuant to section 36 of the *Insurance Act*, the landlord is entitled to subrogate the entire amount from the tenant.

### Tenant's Response

The tenant denied all liability for the events that unfolded on March 12, 2016. It was the tenant's position that the cause of the incident was a defective drain in the bathtub which the landlord failed to fix prior to the incident. The articling student contended that despite the tenant's multiple reports of the defective drain to building maintenance, it

remained unrepaired by the landlord. The articling student reasoned that the landlord knew or ought to have known of the risks posed by the defective drain, and the landlord's willful or negligence to repair it prior to the incident is what led to the damage.

The articling student submitted that in the event the tenant is held liable, the amount the landlord has claimed is unjustified as it exceeds the actual loss the landlord incurred. The articling student maintained that the maximum amount the landlord is entitled to claim is \$10,000.00, the cost of the insurance deductible.

### Analysis

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 this case, the onus is on the landlord to prove, on a balance of probabilities, the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the tenant in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Pursuant to section 32(3) of the *Act*, a tenant of a rental unit must repair damage to the rental unit that is caused by the actions or neglect of the tenant. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

Upon review of the reports, photographs and invoices before me, I find the landlord has met her onus in proving the damage to the unit and two levels below. In the absence of documentary evidence from the tenant substantiating her claim of a defective drain or the report of such, and on the basis of the insurance reports submitted by the landlord, I find the damage occurred as a result of the tenant's negligence. In regards to the actual amounts claimed, I find the landlord has failed to prove she suffered the loss in the amount claimed. Although the insurer may have suffered this loss, the application was filed by the landlord, which limits the landlord to the actual loss sustained by her. I am satisfied the landlord mitigated her loss by taking immediate action to repair the damage

and by carrying insurance. Accordingly, I find that the landlord is entitled to compensation in the amount of \$10,000.00, the cost of her insurance deductible.

As the landlord was successful in this application, I find the landlord is entitled to recover the \$100.00 filing fee for a total award of \$10,100.00.

### Conclusion

I issue a monetary order in the landlord's favour in the amount of \$10,100.00 against the tenant.

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: December 24, 2018

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Residential Tenancy Branch