



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes

For the tenant: MNSD, FFT

For the landlord: MNDL-S, MNRL-S, MNDCL-S, FFL

### Introduction

This hearing was convened as a result of the Applications for Dispute Resolution (“applications”) by both parties seeking remedy under the *Residential Tenancy Act* (“Act”). The tenant applied for a monetary order for the return of double their security deposit and to recover the cost of the filing fee. The landlord applied for a monetary order for damage to the unit, site or property, for unpaid rent or utilities, for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, to retain the tenant’s security deposit, and to recover the cost of the filing fee.

The landlord, landlord agent (“agent”) and the tenant attended the teleconference hearing which began on November 13, 2018. 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. After 66 minutes, the hearing was adjourned to allow additional time to hear the evidence of the parties. On November 13, 2018, an Interim Decision was issued which should be read in conjunction with this decision. On January 8, 2019, the parties reconvened and after an additional 55 minutes the hearing concluded.

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.

Preliminary and Procedural Matter

The tenant confirmed their email address at the outset of the hearing. The landlord did not provide an email address and stated that they would prefer to receive the decision and any related order by regular mail. The parties confirmed their understanding that the decision would be emailed to the tenant and would be mailed by regular mail to the landlord.

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 tenant's security deposit under the *Act*?
- Is either party entitled to 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 December 1, 2017 and required vacant possession as of November 30, 2018. The tenant vacated the rental unit on May 30, 2018. The tenant paid a security deposit of \$392.00 at the start of the tenancy which has accrued no interest to date and which the landlord continues to hold.

Landlord's claim

The landlord has claimed a total amount of \$1,957.75 as follows:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Water bill	\$157.00
2. Repair to wooden floor	\$700.00
3. Suite cleaning (\$75.00 and \$37.00)	\$112.00
4. 1 week of rent	\$203.75
5. Liquidated damages	\$785.00
<b>TOTAL</b>	<b>\$1,957.75</b>

Regarding item 1, the landlord has claimed \$157.00 for an unpaid water bill. According to the tenancy agreement, the monthly rent does not include electricity or water. The landlord testified that every four months they receive a water bill and that in the building is six units with a total of nine tenants. The invoice submitted by the landlord indicates \$1,035.46 which is divided by 9 tenants for a total of \$115.05 per tenant, and that the billing period was December 21, 2017 to April 26, 2018. The landlord also stated that as the billing period was missing 20 days for December 2017 and 4 days for the remainder of April 2018, for an additional 24 days. The landlord then applied \$1.20 per tenant per day as a daily water rate and multiplied that amount by the 24 days described above for an additional amount of \$28.80 and added that to the \$115.05 per tenant for a total water bill owing for the tenant of \$143.85, which is less than the \$157.00 claimed which was an estimate by the landlord. The tenant agreed during the hearing to the tenant's unpaid portion of the water bill as claimed in the amount of \$143.85.

Regarding item 2, the landlord has claimed \$700.00 for damage to the wood flooring that the landlord claims was caused by the tenant during the tenancy. The tenant denies that she damaged the wood flooring. The landlord claims that the wood floors were refinished one year before the tenancy began. The tenant confirmed that an incoming condition inspection report was completed on November 30, 2017. Regarding the outgoing condition inspection, the tenant admitted that she stayed in the kitchen for the outgoing condition inspection and did not participate in the inspection other than signing off that she did not agree with the outgoing condition inspection report. The tenant later changed her testimony that her friend, K, walked through with the landlord on her behalf; however, the tenant signed the outgoing condition inspection report and not her friend, K.

The landlord admitted that they have not repaired the wooden flooring and that the rental unit has been re-rented for \$815.00 per month, which is more than the \$785.00 monthly rent that the tenant was paying during her tenancy.

The incoming condition inspection report indicates that the flooring was in good condition at the start of the tenancy and scratched at the end of the tenancy. The landlord referred to a page with the words written in pen "Estimate for Wood Floor \$700.00" and is not dated, signed, is not from a flooring company or other business, and does not include the address of the rental unit or another other information. While both parties referred to photos submitted in evidence, the tenant failed to serve colour photos on the landlord and instead served only the Residential Tenancy Branch ("RTB") with colour photos and made the decision to serve black and white photos on the landlord. The landlord stated that he could not see anything clearly in the black and white photos served on him by the tenant. The landlord provided photos that were very close up of the wood flooring scratches while the tenant provided photos that were taken at a distance of the wood flooring. I will address the fact that the tenant served different photos on the RTB than the landlord later in this Decision.

Regarding item 3, the landlord has claimed \$112.00 for suite cleaning costs, which is comprised of \$75.00 for the first portion, and \$37.00 for the second portion. The landlord submitted two receipts for the cleaning costs claimed. The \$75.00 receipt is dated June 6, 2018 and includes the name of AR and a phone number and indicates:

Stove/oven & behind	1 hr 5m
Shower stall	30 min
Washin floors	
Bathroom toilet & sink & floor	30 min
Floors/ledges	
Cupboards kitchen	1 hr
Sink & mirrors	

The \$37.00 receipt is not dated and includes the name of TV and a phone number and indicates:

Wood floor scrub	1 hr
Floor polish	20 min
Second coat	20 min

Both parties referred to several photos in evidence. As mentioned above, the tenant's photos served on the landlord were black and white and the landlord testified that the photos were very difficult to view in black and white. I also note that some of the photos provided by the landlord such as the shower and toilet photos were blurry. The tenant's response to the colour photos from the landlord was that the tenant spent hours cleaning. It appears that the photos provided from the landlord were primarily close up while the tenant's photos were taken at a more distant view. I find that none of the photos were taken at the same angle or distance which made comparison of the photos more difficult. The landlord testified that the tenant told the landlord that if he didn't like the cleaning to "get someone else to clean then" which the tenant denied saying during the hearing. The tenant stated that a couple of days were spent cleaning the unit before they vacated.

Regarding item 4, the landlord has claimed \$203.75 for one week's rent that was lost due to the tenant vacating the rental unit earlier than the fixed term tenancy end date of November 30, 2018. The landlord testified that he was able to secure a new tenant who began to rent the rental unit as of June 8, 2018. The landlord stated that the amount of \$203.75 was reached by taking the new rental amount of \$815.00 and dividing that by 4 weeks in the month of June for the amount of \$203.75. The tenant stated that she asked the landlord to sublet her rental unit and was denied her request. The landlord first denied that the tenant asked her to sublet the rental unit and later changed his testimony to confirm that the tenant did ask the landlord's permission to sublet the rental unit.

Regarding item 5, the landlord has claimed \$785.00 for liquidated damages due to the tenant ending the fixed term earlier than November 30, 2018. The liquidated damages clause on page one of the tenancy agreement was not initialed by either party.

#### *Tenant's claim*

The tenant has claimed for the return of double her security deposit and the filing fee which was dismissed during the hearing as the parties were advised that I was finding that the tenant extinguished their right to the return of their security deposit by failing to properly participate in the outgoing inspection with the landlord and decided to remain in the kitchen for the entire inspection instead. I will deal with this matter further below in more detail.

#### 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**

**Item 1** - The landlord has claimed \$157.00 for an unpaid water bill. According to the tenancy agreement, the monthly rent does not include electricity or water. The landlord testified that every four months they receive a water bill and that in the building is six units with a total of nine tenants. As described above, the landlord indicated how the landlord reached the corrected amount claimed of \$143.85 which I find to be reasonable. I have also taking into account that the tenant agreed during the hearing to the tenant's unpaid portion of the water bill as claimed in the amount of \$143.85. Therefore, I find the landlord has reached the burden of proof as I find the tenant failed to pay the unpaid water bill amount of \$143.85 and as a result, I grant the landlord the full amount claimed for item 1.

**Item 2** - The landlord has claimed \$700.00 for damage to the wood flooring that the landlord claims was caused by the tenant during the tenancy. The tenant denies that she damaged the wood flooring. The landlord claims that the wood floors were refinished one year before the tenancy began. The incoming condition inspection does indicate the flooring was in good condition at the start of the tenancy and scratched at the end of the tenancy. Therefore, even though the landlord's photos were taken at such a close distance when compared to the tenant's photos which were taken at a much further distance, I prefer the photos from the landlord which showed scratches on the hardwood flooring. However; I find the landlord has failed to prove the value of the loss of \$700.00 as the quote provided was not from a flooring company and the landlord confirmed that he re-rented the rental unit effective June 8, 2018 for more rent per month and has not repaired the flooring. Section 37 of the *Act* states:

**Leaving the rental unit at the end of a tenancy**

- 37** (1) Unless a landlord and tenant otherwise agree, the tenant must vacate the rental unit by 1 p.m. on the day the tenancy ends.

(2) **When a tenant vacates a rental unit, the tenant must**

**(a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear, and**

**(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.**

[Emphasis added]

I find that it is more likely than not that the tenant caused the scratches on the wood flooring but I am not satisfied that the landlord suffered a \$700.00 loss. Therefore, as I find the tenant breached section 37 of the *Act* by causing the scratches, I grant the landlord a nominal amount of **\$200.00** to reflect the breach of the *Act* and to have the repairs completed to the wood flooring after the current tenancy ends.

**Item 3** – The landlord has claimed \$112.00 for suite cleaning costs, which is comprised of \$75.00 for the first portion, and \$37.00 for the second portion. The landlord submitted two receipts for the cleaning costs claimed. The receipts were described in detail above.

Once again, both parties provided different photos taken from different distances and angles. The landlord photos were primarily close-up photos while the tenant's photos were taken at a distance. I prefer the landlord's photos; however, as I find the tenant's photos to be of very little weight given that the tenant failed to serve colour photos on the landlord and only served black and white photos. I have made this finding as I find that the detail would be impacted on each photo as claimed by the landlord when viewing a black and white photo versus a more detailed colour photo which shows much more detail and colour variation.

Therefore, based on the above I find the landlord has met the burden of proof and I find the tenant failed to leave the rental unit in a reasonably clean condition as required by section 37 of the *Act*. I also find the amounts claimed for cleaning by the landlord are reasonable. Consequently, I grant the landlord the full amount of **\$112.00** for cleaning costs for this item.

**Item 4** - The landlord has claimed \$203.75 for one week's rent that was lost due to the tenant vacating the rental unit earlier than the fixed term tenancy end date of November 30, 2018. Section 45(2) of the *Act* states:

- (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
    - (a) is not earlier than one month after the date the landlord receives the notice,
    - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and**
    - (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
- [Emphasis added]

I am not satisfied that the tenant provided sufficient notice and sufficient time to the landlord to consider a sublet arrangement as it must be sought in writing and I have insufficient evidence before me from the tenant. Therefore, I find the tenant breached section 45(2) of the *Act* as a result. However, I find the landlord's amount to be incorrect as claimed. I find the landlord is unable to seek one week at the new amount of rent of \$815.00 per month as the tenant was only paying \$785.00 per month. Therefore, I find that since June has 30 days, that \$785.00 divided by 30 days would equal \$26.17 per day for rent. I also find that \$26.17 multiplied by 7 days equals \$183.19. Given the above, I grant the landlord **\$183.19** for loss of June 1-7, 2018 rent inclusive, due to the tenant's breach of section 45(2) of the *Act*.

**Item 5** - The landlord has claimed \$785.00 for liquidated damages due to the tenant ending the fixed term earlier than November 30, 2018. The liquidated damages clause on page one of the tenancy agreement was not initialed by either party. RTB Policy Guideline 4 – Liquidated Damages states in part:

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. These include:

- **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.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

[Emphasis added]

Based on the above, I find that the landlord seeking an entire month of rent of \$785.00 without having submitted any supporting evidence such as advertising costs or other related evidence, the landlord has requested an extravagant amount and is not a genuine pre-estimate of the loss. Therefore, I find that this amount is a penalty and is unenforceable as a result under the *Act*. Therefore, this item is dismissed without leave to reapply, due to insufficient evidence.

As the landlord's claim had merit, I grant the landlord the recovery of the filing fee in the amount of **\$100.00** pursuant to section 72 of the *Act*.

Given the above, I find the landlord has established a total monetary claim of **\$739.04**, comprised of \$143.85 for item 1, \$200.00 for item 2, \$112.00 for item 3, \$183.19 for item 4, and \$100.00 for the recovery of the cost of the filing fee.

#### *Tenant's claim*

Section 36 of the *Act* states in part:

#### **Consequences for tenant and landlord if report requirements not met**

**36 (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if**

- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*],  
and
- (b) **the tenant has not participated on either occasion.**

Based on the above, I find that the tenant extinguished their right to the return of their security deposit as I find the tenant failed to participate in the inspection by remaining in the kitchen and then signing the report without having witnessed what the landlord was pointing out as damaged or dirty, etc. In addition, I do not accept the tenant's version of event that she assigned an agent to do the inspection, as the agent should have signed the inspection report in that case which did not occur. Therefore, I find the tenant will not be entitled to any return of her deposit in this matter.

As the tenant's claim did not have merit, I do not grant the tenant the recovery of the cost of the filing fee under the *Act*.

The landlord has established a total monetary claim of **\$739.04** as described above. I authorize the landlord to retain the tenant's full security deposit of \$392.00 in partial satisfaction of the landlord's monetary claim pursuant to section 72 of the *Act*. The landlord is granted a monetary order pursuant to section 67 of the *Act*, for the balance owing by the tenant to the landlord in the amount of **\$347.04**.

Conclusion

The landlord's application was partially successful. The tenant's application has no merit and is unsuccessful.

The landlord has established a total monetary claim of \$739.04 as described above. I authorize the landlord to retain the tenant's full security deposit of \$392.00 in partial satisfaction of the landlord's monetary claim pursuant to section 72 of the *Act*. The landlord is granted a monetary order pursuant to section 67 of the *Act*, for the balance owing by the tenant to the landlord in the amount of \$347.04. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision will be emailed to the tenant and sent by regular mail to the landlord as indicated above.

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: January 21, 2019

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Residential Tenancy Branch