



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **FFL MNDCL-S MNRL-S OPR**

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55;
- a monetary order for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- a monetary order for rent pursuant to section 67;
- authorization to retain all or a portion of a security deposit pursuant to section 38; and
- authorization to recover the filing fee pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 9:41 a.m. to enable the tenants to call into this teleconference hearing scheduled for 9:30 a.m.

The landlord attended the hearing, represented by HG ("landlord"). The landlord was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord testified that he served the Application for Dispute Resolution ("Application") upon each of the tenants via Canada Post Xpresspost on December 27, 2018. Tracking numbers are listed on the cover page of this decision. Section 1 of the *Act* defines registered mail as any method of mail delivery provided by Canada Post for which confirmation of delivery to a named person is available. As Canada Post Xpresspost provides a confirmation of delivery, I am satisfied the tenants were deemed served with the Application the fifth day after mailing, or January 1, 2019 in accordance with sections 89 and 90 of the *Act*.

### Preliminary Issue

At the commencement of the hearing, the landlord advised that the tenants had filed an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent ("Notice") The case number is cited on the cover page of this decision. That application was heard by the Residential Tenancy Branch on January 4, 2019 and resulted in an Order of Possession in favour of the landlord. The landlord is therefore no longer seeking an Order of Possession and I allowed the landlord's request to amend the application to withdraw this relief in accordance with rule 4.2 of the Residential Tenancy Branch Rules of Procedure.

The landlord's application, filed on December 27, 2018 seeks compensation in the amount of \$24,850.00 for lost rent, damages for breaches of the tenancy agreement, and bank fees, however the monetary order worksheet uploaded on December 29, 2018 includes additional compensation for registered post and cleaning costs. I find the inclusion of these additional items are an attempt to amend the original application, not done in accordance with Rule 4 of the *Residential Tenancy Branch Rules of Procedure* and I dismiss these additional portions of the landlord's claim, with leave to reapply under a new and separate Application for Dispute Resolution.

### Issue(s) to be Decided

Is the landlord entitled to a monetary order for the tenants' non-payment of rent?  
Is the landlord entitled to compensation for the tenants' damage or loss?  
Can the landlord retain the security deposit?  
Can the landlord recover the filing fee?

### Background and Evidence

The landlord provided a copy of the tenancy agreement which states this fixed one-year tenancy began on November 1, 2018, ending on October 31, 2019 pursuant to section 13.1 of the *Residential Tenancy Regulations* as the landlord's family was to move into the unit. The landlord and tenant initialled the tenancy agreement acknowledging this clause. The rent of \$2,600.00 was due on the first day of the month and a security deposit of \$2,600.00 was due on October 1, 2018. A six-page addendum containing twenty-five additional terms was initialled and signed by the parties.

The landlord drew my attention to clauses 2 and 4 of the addendum which read:

#### 2.) Late Payment or Returned Payment

A minimum fee of Fifty (\$50.00) dollars per occurrence will be collected from the tenant for each late or returned payment (including bounced cheque).

#### 4.) Tenant Leaves Before the End of Tenancy

If the tenant request to leave before the end of this agreement set out in ITEM-2 of this Residential Tenancy Agreement, the tenant hereby acknowledges and agrees to pay the landlord all the rent for the remaining months of this agreement as landlord's loss and additional rent in half-month as liquidated damage, and not as penalty, to cover the administration cost and expenses for re-renting this rental unit.

The landlord testified that the tenant's first cheque for the security deposit, in the amount of \$2,598.00 was returned with insufficient funds. A copy of the returned cheque advice from the landlord's bank was provided as evidence. A copy of a returned cheque advice for the tenants' cheque for November 2018 rent was also provided as evidence. The landlord testified that the tenants did not pay rent for the month of December 2018, but no copy of a December rent cheque was provided as evidence.

On November 28, 2018, the landlord served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent which was disputed by the tenants at a hearing at the Residential Tenancy Branch. The landlord testified that after receiving the Order of Possession on January 4, 2019, the tenants moved out of the unit on January 9, 2019. When the tenants vacated, they left one set of keys on the dining table and did not leave a forwarding address. The unit is vacant now and the landlord did nothing to re-rent the unit until January 16, 2019 when they started to clean it in anticipation of re-renting it. The reason the landlord waited a week was because he did not get the second set of keys back from the tenants.

The landlord testified that he tried to re-rent the unit by placing online advertisements on a popular online classified ad website and a popular Chinese language classified ad website on or about January 16 and January 17, 2019. The rental unit was advertised at \$2,588.00 per month and the landlord has not succeeded in re-renting the rental unit. Copies of the advertisements were not provided.

### Analysis

#### Unpaid Rent

I accept the landlord's undisputed evidence that the tenants' cheque for the month of November was returned with insufficient funds and the December rent went unpaid. I award the landlord two months unpaid rent. The tenants did not vacate the rental unit until January 9, 2019, and I accept the landlord's evidence that he could not find a tenant for the remainder of the month of January. The landlord is awarded an additional month rent. Total monetary award for unpaid rent is **\$7,800.00**.

#### Returned Cheque Payment Fee

Clause 2 of the addendum seeks a fee of \$50.00 for each occurrence of a late or returned payment cheque. While the landlord has provided documents to show two occurrences of returned payments, he testified that it happened three times and I accept this.

Section 7 of the *Residential Tenancy Regulations* says that a landlord may charge an administration fee of not more than \$25.00 for the return of a tenant's cheque by a financial institution to the landlord for the return of a tenant's cheque. Accordingly, I award the landlord for three returned cheques, a total of **\$75.00**.

#### Accelerated rent

Addendum 4 to the tenancy agreement has two parts. First, the tenants are to "*pay the landlord all the rent for the remaining months of this agreement as landlord's loss*". This is known as acceleration. Section 22 of the *Act* specifically deals with acceleration terms in a tenancy agreement, reproduced below.

#### **Acceleration term prohibited**

**22** A tenancy agreement must not include a term that all or part of the rent payable for the remainder of the period of the tenancy agreement becomes due and payable if a term of the tenancy agreement is breached.

As acceleration terms are specifically prohibited in the *Act*, any claim seeking compensation to enforce such a term cannot succeed. This portion of the landlord's claim is dismissed. Despite the dismissal, the landlord remains at liberty to seek compensation for any lost revenue the landlord may have suffered as a result of the tenant's actions after such time as the fixed term has expired or the landlord has re-rented the rental unit. The landlord's right to claim for this is still subject to any applicable deadlines in the *Act*.

#### Liquidated Claim

The second part the addendum 4 of the tenancy agreement reads, "*and additional rent in half-month as liquidated damage, and not as penalty, to cover the administration cost and expenses for re-renting this rental unit.*"

Residential Tenancy Branch Policy Guideline PG-4 [liquidated damages] sets out the test to determine if a clause is a penalty clause or a liquidated damages clause. The test is set out below and each will be analysed:

1. 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.
2. 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.
3. A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.

1. There was no agreement to pay an amount greater than an original amount, therefore this part of the test is not applicable.
2. There were no multiple occurrences of events leading to activation of this clause, therefore this part of the test is also not applicable.
3. The landlord testified that his attempt to re-rent the unit consisted of free online advertisements. He didn't provide any evidence to show what administrative costs or expenses were paid to re-rent the unit. The financial loss for re-renting the unit is closer to zero than \$1,300.00 and for this reason, I find the half month rent is extravagant in comparison to the greatest loss that could follow a breach. I determine the second part of clause 4 to the addendum is a penalty clause and not liquidated damage.

PG-4 says If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover. Since the landlord has not provided any evidence of expenses paid to re-rent the unit, I dismiss this portion of the landlord's claim.

#### Security Deposit

The landlord testified that the cheque for the security deposit was returned with insufficient funds. As the landlord is not holding a security deposit, I dismiss the landlord's claim to retain it.

Residential Tenancy Branch Policy Guideline PG-29 [Security Deposits] provides guidance to landlords and tenants with respect to the requirement for tenants to pay security deposits. I caution the landlord of the following excerpt from PG-29 which reads:

a security deposit must not exceed one-half of one month's rent. If one or more of the above payments, together with other monies paid, exceeds one-half of one month's rent then the remedies afforded by the Act would be available to a tenant. In addition, section 95 of the *Act* provides that a landlord who contravenes these provisions commits an offence and is liable, on conviction, to a fine of not more than \$5,000.00.

#### Filing Fee

As the landlord's application was successful, the landlord is also entitled to recovery of the \$100.00 filing fee for the cost of this application.

I issue a monetary order in the landlord's favour according to the following terms.

Item	Amount
3 months of Unpaid Rent from Nov 1, 2018 to Jan. 31, 2019	\$7,800.00
Returned Cheque Payment fees	\$75.00

Recovery of Filing Fee for this Application	\$100.00
<b>Total Monetary Order</b>	<b>\$7,975.00</b>

Conclusion

I issue a monetary order in the landlord's favour in the amount of **\$7,975.00**.

The tenants must be served with this Order as soon as possible. Should the tenants 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: February 12, 2019

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Residential Tenancy Branch