



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

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

### Introduction

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

- Authorization to recover the filing fees from the tenant pursuant to section 72;
- Authorization to retain a security deposit pursuant to section 38; and
- A monetary order for damages, compensation and unpaid rent pursuant to section 67.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord was represented by property manager, AR ("landlord"). As both parties were in attendance, service of documents was confirmed. As the tenant confirmed receipt of the Landlord's Application for Dispute Resolution and evidentiary package by registered mail, I find that the tenant was duly served with these documents in accordance with sections 88 and 89 of the Act. The landlord also confirmed receipt of the tenant's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

### Issue(s) to be Decided

Is the landlord entitled to a monetary order for damages, compensation and unpaid rent?

Can the landlord recover the filing fee for this application from the tenant?

Is the landlord entitled to retain the security deposit?

### Background and Evidence

A copy of the tenancy agreement was supplied by both parties. The fixed term tenancy began on September 15, 2018 with an end date of August 31, 2019. Rent was set at \$4,300.00 per month payable on the first day of each month. A security deposit in the amount of \$2,150.00 was collected by the landlord which he still holds. A five page addendum was attached to the agreement. Of note is term 23 which reads, in part:

The tenants understand and agree that should the tenants want to move before the end of the fixed term tenancy, the tenants will have to pay the rent until the end of the term unless the landlord agrees in writing that the tenants can end the tenancy early or can assign or sublet the unit, or if the landlord is able to mitigate the potential loss by renting out the premises. In the event of an early termination agreed by the landlord, the tenants acknowledge and agree that the sum of \$4,300.00 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty to cover the commission costs to re-renting the property, advertising and vacancy costs. *(reproduced exactly as written)*

The landlord testified he was served with the tenant's Notice to End Tenancy ("Notice") on December 31, 2018 with an effective date of January 31, 2019. The landlord testified he seeks the liquidated claim for \$4,300.00 to be made up a \$2,150.00 commission paid directly to him as a property manager and another \$2,150.00 for the anticipated vacancy. Advertising costs were part of his commission. He also seeks payment of rent for the month of February 2019 as well as an insufficient fund fee since the landlord did not agree with the early end to the tenancy. The rental unit was successfully re-rented for mid-April 2019.

The tenant alleges the home heating was not repaired after 2 months of requests, affecting his family's health. In his evidence, the landlord provided copies of email exchanges where the tenant repeatedly asks for the heating to be fixed. The landlord testified handymen were sent out to check the issue and discovered the tenant had failed to turn on the heaters. None of the handymen were called as witnesses. The house is mainly heated by electric baseboard heating, however there is one hot water heater in the main room of the house which takes a long time to heat up. Videos of the home taken by the landlord's witness on December 28<sup>th</sup> was entered as evidence which shows the temperature of the house to 18 degrees or less, with the exception of one room which reached 23 degrees. An unsigned, undated letter from the previous tenant indicating no issues with the heating was provided by the landlord.

A condition inspection report was completed at the beginning and at the end of the tenancy. At the end of the tenancy, the landlord claims the tenant left the home dirty with hair debris and dust. The landlord hired professional cleaners to clean the unit and were charged \$315.00 to do so. No invoice was submitted, but photographs of

the rental unit were provided, depicting unwiped appliances, unwiped baseboards and windows and other evidence of debris.

The tenant provided the following testimony. Since the weather started to get cold, he noticed he couldn't raise the temperature in the house above 18 degrees. After repeatedly asking the property manager to fix the heating and having non-professional handymen sent to look at the situation, he grew worried for his family's health and issued the Notice. The tenant provided evidence of email exchanges between himself and the landlord indicating the lack of heat as a problem, however does not indicate a deadline for the landlord to fix before he would end the tenancy.

The tenant's daughter began to develop cold sores on her body as evidenced by the photographs provided by the tenant. Although it is not identified in written correspondences to the landlord, the tenant testified the heating of the house is a material term of the tenancy and the repeated attempts to have it fixed were unsatisfactory. A person finally came to fix the heat pump on January 15 and there was a noticeable improvement in the home heating however it happened after he gave the Notice on December 31<sup>st</sup>.

The home was left in a clean and tidy condition at the conclusion of the tenancy. He acknowledges not every cabinet and drawer was wiped down but the condition was better than it was when he first moved in.

### Analysis

- Liquidated damages claim and claim for February 2019 rent

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the Act, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

Both parties have given compelling evidence to support the tenant's claim the heating of the house was in disrepair and wasn't corrected. The landlord provided copies of email exchanges whereby the tenant expresses his frustration at the lack of heat during the cold winter months. The landlord has not provided any evidence of heating professionals coming to analyze and correct the situation during the tenancy; only providing testimony that handymen and colleagues from the property management

company were sent to take a look. None of the handymen were called to corroborate the landlord's claim that the tenant failed to turn on the heating system as alleged by the landlord. The video evidence of the landlord's colleague further corroborates the tenant's claim that the house was cold, failing to reach temperatures above 18 degrees in most parts of the house. The letter from the previous tenants, not called as witnesses, holds little evidentiary value as the letter is neither dated nor signed. I do not accept the landlord's claim that the tenants simply failed to turn on their heaters as it's inconceivable the tenant would knowingly cause health issues due to a lack of heat for his family. On a balance of probabilities, the landlord has not satisfied me that the tenant has violated the Act by ending the fixed term tenancy in contravention of section 45. I find the tenant gave legitimate notice in accordance with section 45(3) of the Act, ending the fixed term tenancy as the landlord's failed to correct a material term.

The Notice ends the tenancy on a date that is not earlier than one month after the date the landlord received the notice. In other words, the tenant provided a full month's notice. The landlord had the entire month of January to advertise the rental unit and show it to prospective tenants, which would have mitigated his damages. There is no evidence to show the landlord took advantage of this opportunity, choosing instead to rely on clause 23 of the addendum to the tenancy agreement, the liquidated claim.

Policy Guideline PG-4 [Liquidated Claims] provides guidance to landlords and tenants regarding liquidated claims, excerpt below:

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.

I find the liquidated damages clause to be oppressive to the tenant and not a genuine pre-estimate of loss. The clause to pay a \$2,150.00 commission to the property manager to find a new tenant is extravagant and excessive and should already be part of the property manager's tasks and duties. Further, the additional \$2,150.00 to be recovered by the landlord in anticipation of a lapse in vacancy I would characterize as a penalty. The landlord is required to mitigate his losses by finding a new tenant without delay. The landlord's claim for the liquidated damages is dismissed.

The landlord seeks payment of rent for the month of February 2019. As the tenancy ended in compliance with section 45(3) of the Act on January 31, 2019, the landlord has no claim for compensation for February rent and I dismiss this claim. Likewise, the tenant is not responsible for paying an insufficient fund fee for not paying February rent and I dismiss this as well.

- Cleaning

Policy Guideline PG-1 [Landlord & Tenant -Responsibility for Residential Premises] is intended to clarify the responsibilities of the landlord and tenant regarding maintenance, cleaning, and repairs of residential property and obligations with respect to services and facilities. The tenant must maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit or site, and property or park. 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. The tenant is not responsible for reasonable wear and tear to the rental unit or site, or for cleaning to bring the premises to a higher standard than that set out in the *Residential Tenancy Act*.

Windows: The tenant is responsible for cleaning the inside windows and tracks during, and at the end of the tenancy, including removing mould. The tenant is responsible for cleaning the inside and outside of the balcony doors, windows and tracks during, and at the end of the tenancy.

Major appliances: At the end of the tenancy the tenant must clean the stove top, elements and oven, defrost and clean the refrigerator, wipe out the inside of the dishwasher.

Baseboards and Baseboard heaters: The tenant must wipe or vacuum baseboards and baseboard heaters to remove dust and dirt.

Based on the evidence provided by the landlord, including the photographs provided, the tenant did not clean the rental unit to the standard required by the policy guideline and is responsible for paying the cleaning costs. The landlord has not provided any documentary evidence to show how the costs of \$315.00 to clean the rental unit was arrived at. However, the condition inspection report estimates \$200.00 as a deduction to the security deposit to clean the unit. I award the landlord \$200.00 for the cleaning.

As the landlord was only partially successful in his claim, he will not recover the filing fee.

The landlord continues to hold the tenant's security and pet damage deposits totaling \$2,150.00. In accordance with the offsetting provisions of section 72 of the Act, I order the landlord to retain \$200.00 of the tenant's security deposit in full satisfaction of the

monetary claim. The landlord is to return \$1,950.00 of the tenant's security deposit in accordance with section 72 of the Act.

Conclusion

The tenant is entitled to a monetary order in the amount of \$1,950.00.

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: May 28, 2019

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Residential Tenancy Branch