



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNRL-S, FFL

### Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution, made on February 5, 2019, (the "Application"). The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for unpaid rent or utilities;
- an order granting authorization to retain the security deposit; and
- an order granting recovery of the filing fee.

The Landlord's Agent G.T. as well as the Tenants attended the hearing at the appointed date and time, and provided affirmed testimony.

G.T. testified that she served the Landlord's Application and documentary evidence package to the Tenants by registered mail on February 10, 2019. The Landlord made an amendment to the Application on February 11, 2019 to increase the monetary amount of the claim, as well as to correct the spelling of the dispute address and the Tenant's mailing address. G.T. testified that she served a copy of the amendment to the Tenants by registered mail on February 12, 2019. The Tenants confirmed receipt of both mailings. Pursuant to section 88 and 89 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The Tenants testified that they served the Landlord with their documentary evidence by fax and email on February 12 and again on May 20, 2019. G.T. confirmed receipt. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to 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.

#### Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order for unpaid rent or utilities, pursuant to Section 67 of the *Act*?
2. Should the Landlord be authorized to apply the security deposit against their claim, in accordance with Sections 38 and 72 of the *Act*?
3. Is the Landlord entitled to recover the filing fee, pursuant to Section 72 of the *Act*?

#### Background and Evidence

The parties testified and agreed that the fixed term tenancy began on August 15, 2018 and was meant to end on August 31, 2019. Rent in the amount of \$2,000.00 was due to the Landlord on the first day of each month. The Tenants paid a security deposit in the amount of \$1,000.00 which the Landlord continues to hold. G.T testified that the tenancy ended on January 31, 2019. The Tenants stated that they moved the last of their possessions out of the rental unit and completed the move out condition inspection report on February 9, 2019, which marked the end of their tenancy.

G.T. stated that the Landlord is seeking \$2,000.00 for unpaid rent for the month of February 2019 as well as \$25.00 for an NSF fee. G.T stated that she received notification from the Landlord on February 5, 2019 stating that the Tenant's rent payment cheque had been returned from the bank as NSF. G.T. testified that she immediately contacted the Tenants to inquire about the NSF cheque at which point the Tenants informed G.T. that they will not be paying rent for February 2019, as they have already moved out of the rental unit.

G.T. stated that the Tenants did not provide the Landlord with any notice that they intended on moving out of the rental unit. As such, the Landlord was unable to re-rent the rental unit for the month of February 2019.

In response, the Tenants confirmed that they did not provide any notice to the Landlord regarding their intent to vacate the rental unit. The Tenants stated that they had not planned on moving out of the rental unit until after they learned that the Landlord had made an Application for dispute resolution on February 5, 2019 regarding the unpaid rent for February 2019. The Tenants later admitted that they had started moving their possession out of the rental unit prior to the Landlord making the Application, but that they removed the last of their possession on February 9, 2019.

The Tenant argued that the Landlord was obligated to serve the Tenants with a 10 Day Notice to End Tenancy for unpaid rent. The Tenant stated that the Landlord's Application should be dismissed based on the fact that they failed to serve a 10 Day Notice.

The Landlord is also seeking \$2,000.00 in liquidated damages as a result of the Tenants ending their fixed term tenancy early. The Landlord stated that the liquidated damages clause was included in the tenancy agreement between the parties, which the Tenants agreed to at the start of the tenancy. G.T. testified that the liquidated damages is equal to one month's rent and is applied to a tenant if they breach the tenancy agreement. In this case, G.T testified that the Tenants moved out of the rental unit at the end of January 2019 without notice, therefore they are in breach of the fixed term tenancy agreement and are required to pay the Landlord \$2,000.00 as a result.

The Tenants stated that the liquidated damages clause should not be applied as a penalty.

If successful, the Landlord is also seeking the return of the filing fee. The Tenants had prepared a monetary worksheet in preparation for the hearing; however, it was explained to the Tenants at the time of the hearing that they need to make their own Application for their claims to be considered.

### Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Section 26(1) of the Act confirms a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations

or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

According to the Residential Tenancy Policy Guideline #30 (the “Policy Guideline”); during the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties. A tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Legislation. Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

According to Section 45 of the *Act*, 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.*

Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

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 for in sections 7 and 67 of the *Act*. Pursuant to Residential Tenancy Policy Guideline #16 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 case, the burden of proof is on the Landlord to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did what was reasonable to minimize the damage or losses that were incurred.

I accept that the parties entered into a fixed term tenancy which was meant to end on August 31, 2019. The parties agreed that the Tenants did not provide any notice to end tenancy to the Landlord on prior to vacating the rental unit. As such, I find that it was not possible for the Landlord to have anticipated that the Tenants would be vacating the rental unit, therefore, would not be able to secure a new tenant for the month of February 2019. I accept that the Tenants did not pay rent when due for February 2019. I find that the Tenants were not entitled to end the fixed term tenancy early, therefore are responsible to pay rent for February 2019 in the amount of \$2,000.00 as well as the \$25.00 NSF fee.

The Landlord is seeking \$2,000.00 for liquidated damages associated with the Tenant's breaching their fixed term tenancy.

According to Policy Guideline #4; 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.

I find that the Landlord provided insufficient evidence to demonstrate that the liquidated damages clause in the tenancy agreement in the amount of \$2,000.00 is genuine pre estimate of the loss at the time of the contract was entered into. Rather, I find that the clause constitutes a penalty, as it is extravagant in comparison to the greatest loss that could follow a breach; therefore, I render the clause unenforceable.

In light of the above, I dismiss the Landlord's claim for \$2,000.00 for liquidated damages without leave to reapply.

Having been partially successful, I find the Landlord is entitled to recover the filing fee paid to make the Application. I also find it appropriate in the circumstances to order that the Landlords retain the security deposit held in partial satisfaction of the claim.

Pursuant to section 67 of the *Act*, I find the Landlord is entitled to a monetary order in the amount of \$1,125.00, which has been calculated as follows:

<b>Claim</b>	<b>Amount</b>
Rent February 2019	\$2,000.00
NSF Fee:	\$25.00
Filing fee:	\$100.00
<i>LESS</i> security deposit:	-( \$1,000.00)
<b>TOTAL:</b>	<b>\$1,125.00</b>

### Conclusion

The Tenants have breached the Act by ending the fixed term tenancy early and not paying rent when due to the Landlord. The Landlord is granted a monetary order in the amount of \$1,125.00. The order should be served to the Tenants as soon as possible and may be filed in and enforced as an order of the Provincial Court of BC (Small Claims).

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: June 7, 2019

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Residential Tenancy Branch