



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes FFT MNDCT MNECT

#### Introduction

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

- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. As accommodations were made to allow the parties to appear in person rather than through the teleconference system, this hearing was not recorded by the Branch. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording.

As the parties were in attendance, I confirmed that there were no issues with service of the tenant's application for dispute resolution ('application') and evidence package. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenant's application and evidence.

Due to a change of address, the landlord was unable to serve the tenant with their evidence package before the hearing. This issue was discussed during the hearing, and the tenant consented to being forwarded a copy of the evidentiary materials by an

employee of the RTB. After receiving the materials by email, the tenant was provided time to review the materials during the hearing. The tenant confirmed that they had sufficient time to review the materials, and did not take any issue with the admittance of the landlord's evidence for the purpose of this hearing. The hearing proceeded as scheduled.

### **Issues**

Is the tenant entitled to a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement?

Is the tenant entitled to recover the cost of the filing fee from the landlord for this application?

### **Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on September 1, 2021, and was to end on July 31, 2022. Monthly rent was set at \$1,450.00, payable on the first of the month. No security deposit was collected for this tenancy.

The tenant is seeking the following monetary compensation, which the tenant set out in their evidentiary materials. During the hearing, the tenant removed the claims that are marked with a strikethrough.

<b>Item</b>	<b>Amount</b>
1 month's rent for illegal eviction	\$1,450.00
Compensation for no heat in December 2021	1,450.00
Mail forwarding and PO Box	230.00
Damaged property: scale	43.00
Damaged property: electric toothbrush	85.00
Damaged property: hair dryer	55.00
Damaged property: storage bin	7.00
December lack of heat expenses: covid test	222.00

December lack of heat expenses: health insurance	54.00
December lack of heat expenses: dinner with cousins	93.00
December lack of heat expenses: roaming fees	50.00
<del>Long underwear</del>	<del>165.00</del>
<del>Propane heater and fans, carbon monoxide sensors</del>	<del>236.00</del>
<del>Duvet and duvet cover</del>	<del>157.00</del>
Compensation for physical and mental damage	1,450.00
<b>Total Monetary Order Requested</b>	<del>\$5,747.00</del> \$5,189.00

The tenant testified that they had left the rental unit on December 24, 2022 to stay with family in the United States as they had no heat in the rental unit. The tenant testified that the snow was falling, and the rental unit was very cold. The tenant testified that the rental unit only had one heat source, which was a radiator that did not sufficiently heat the rental unit. The tenant testified that they had attempted to use a portable heater, but the wiring in the home would cause the appliances to short if used at the same time.

The tenant confirmed that they did not inform the landlord of the heat issue as they were unhappy about the rental unit and issues, and did not want to continue with the tenancy in the long term. The tenant also felt that the issue should have been obvious to the landlord.

The tenant confirmed that they had left the heat completely off when they had left on December 24, 2022 as they did not want to waste electricity. The tenant testified that they had lived in a much warmer climate since 2000, and was not familiar with the local winter conditions. The tenant testified that they did not anticipate the lack of adequate heat in the rental unit when they entered into the tenancy agreement.

The tenant testified that while away, the landlord sent them an email on January 2, 2022 informing the tenant that there was a flood in the rental unit caused by a burst pipe under the bathroom sink. The landlord informed the tenant that the entire rental unit was flooded, and that a remediation company was onsite. The tenant replied on January 3, 2022 that they were staying with their cousins due to the cold weather, and lack of heat in the rental unit. The tenant returned to the rental unit on January 5, 2022 in order to

start removing their belongings. The landlord returned to the tenant the rent paid for January and February 2022, and the tenant returned the keys to the landlord on January 10, 2022.

The tenant feels that they were wrongly evicted, and therefore should be entitled to the equivalent of one month's rent for the early end of this fixed-term tenancy. The tenant is also seeking reimbursement related to the lack of heating in the rental unit, including a refund of the rent for December 2021, and expenses related to the tenant's evacuation of the rental unit in December due to lack of heat such as the cost of a covid test required for travel, health insurance, reimbursement for dinner with the tenant's cousins, and roaming fees.

The tenant is also seeking reimbursement for losses associated with the flood and remediation such as damaged personal items and the cost of mail forwarding and a PO Box. The tenant is also seeking compensation for "physical and mental damage". The tenant testified that the rental unit was left unsecured while remediation and repairs were taking place, and the landlord failed to secure the tenant's belongings. The tenant confirmed that no items were lost or stolen, but that they were concerned about the possibility of this happening. The tenant testified that they had nowhere to go, and felt like they had been thrown out on the street.

The landlord is disputing the tenant's claims as they feel that the flood was not caused by the landlord's actions. The landlord testified that the tenant was the negligent party who failed to keep the heat on while away, causing the pipes to freeze and burst.

The landlord testified that although the tenant did complain about other issues such as the mattress, shower head, and hotplate, the tenant failed to ever inform the landlord of any issues with the heat before leaving the country, and turning the heat off. The landlord testified that they never had any complaints in the thirty years that the rental unit was tenanted, nor did the tenant inform the landlord while residing there.

### **Analysis**

Under the *Act*, a party claiming a loss bears the burden of proof. In this matter the tenants must satisfy each component of the following test for loss established by **Section 7** of the *Act*, which states;

#### ***Liability for not complying with this Act or a tenancy agreement***

**7** (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

The test established by Section 7 is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (the landlord)* in violation of the *Act* or Tenancy Agreement
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof the claimant (tenant) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss.*

Therefore, in this matter, the tenant bears the burden of establishing their claims on the balance of probabilities. The tenants must prove the existence of the loss, and that it stemmed directly from a violation of the tenancy agreement or a contravention of the *Act* on the part of the other party. Once established, the tenant must then provide evidence that can verify the actual monetary amount of the loss. Finally, the tenant must show that reasonable steps were taken to address the situation to *mitigate or minimize* the loss incurred.

Section 44 of the *Residential Tenancy Act* states how a tenancy may end:

- 44** (1) A tenancy ends only if one or more of the following applies:
- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
    - (i) section 45 [*tenant's notice*];
    - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
    - (ii) section 46 [*landlord's notice: non-payment of rent*];
    - (iii) section 47 [*landlord's notice: cause*];
    - (iv) section 48 [*landlord's notice: end of employment*];

(v)section 49 [*landlord's notice: landlord's use of property*];

(vi)section 49.1 [*landlord's notice: tenant ceases to qualify*];

(vii)section 50 [*tenant may end tenancy early*];

(b)the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

(c)the landlord and tenant agree in writing to end the tenancy;

(d)the tenant vacates or abandons the rental unit;

(e)the tenancy agreement is frustrated;

(f)the director orders that the tenancy is ended;

(g)the tenancy agreement is a sublease agreement.

(2)[Repealed 2003-81-37.]

(3)If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

**Residential Tenancy Policy Guideline 34** states the following about a Frustrated Tenancy:

*A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.*

*The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.*

*A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been*

*frustrated if the frustration is the result of their own deliberate or negligent act or omission.*

*The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15<sup>th</sup> day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.*

In consideration of the evidence and testimony before me, I find that this tenancy became frustrated on January 2, 2022 when a pipe burst, flooding the rental unit, and space below. I find that the flooding and the resulting damage prevented the landlord from fulfilling their obligations under this contract, and therefore the tenancy ended on January 2, 2022. It is undisputed that the cause of the burst pipe was the freezing of the pipe.

I am not satisfied that this tenancy ended due to the deliberate or negligent act or omission of the landlord. I find that this tenancy ended by way of frustration in accordance with section 44(1)(e) of the *Act*. As the landlord had already returned to the tenant the rent for January and February 2022 as required by the *Act*, I find that no further rent or compensation is required for the remainder of the tenancy after the tenancy agreement became frustrated on January 2, 2022. The tenant's claim for "illegal eviction" is dismissed without leave to reapply. I also dismiss the tenant's claims for mail forwarding and a PO Box without leave to reapply.

I will now consider the tenant's claims related to the lack of heat in the rental unit and losses related to the flood. It is undisputed by both parties that the tenant never reported any issues with the heating system before leaving the rental unit on December 24, 2021. It is also undisputed that the tenant had left the heat off despite the fact the winter temperatures. Although I accept the tenant's explanation of why they had left the heat off, and how they were not aware of how cold winters could be, I find it unreasonable and unjustified to lay blame on the landlord for not resolving an issue that they were not informed of. As the landlord said under oath, none of the previous tenants had raised any issues with the heat in the rental unit before this incident.

Section 33 of the *Act* states the following in regards to emergency repairs:

## Emergency repairs

**33** (1) In this section, "**emergency repairs**" means repairs that are

- (a) urgent,
- (b) necessary for the health or safety of anyone or for the preservation or use of residential property, and
- (c) made for the purpose of repairing
  - (i) major leaks in pipes or the roof,
  - (ii) damaged or blocked water or sewer pipes or plumbing fixtures,
  - (iii) the primary heating system,
  - (iv) damaged or defective locks that give access to a rental unit,
  - (v) the electrical systems, or
  - (vi) in prescribed circumstances, a rental unit or residential property.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

- (a) emergency repairs are needed;
- (b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;
- (c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

- (a) claims reimbursement for those amounts from the landlord, and
- (b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.



(6) Subsection (5) does not apply to amounts claimed by a tenant for repairs about which the director, on application, finds that one or more of the following applies:

- (a) the tenant made the repairs before one or more of the conditions in subsection (3) were met;
- (b) the tenant has not provided the account and receipts for the repairs as required under subsection (5) (b);
- (c) the amounts represent more than a reasonable cost for the repairs;
- (d) the emergency repairs are for damage caused primarily by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(7) If a landlord does not reimburse a tenant as required under subsection (5), the tenant may deduct the amount from rent or otherwise recover the amount.

Under Section 33 (1)(c) of the *Act*, issues with the primary heating system is considered an emergency repair. However, in review of the evidence and testimony before me, I find that the tenant failed to follow the required steps as set out above. I note that despite the tenant's concerns about discomfort in relation to the lack of adequate heating in the rental unit, the tenant never informed the landlord of the issue before leaving the rental unit on December 24, 2022. As supported by the fact that the tenant had communicated with the landlord in the past about other issues, I am not satisfied that the tenant had provided a reasonable explanation for why they did not inform the landlord, which is a required step pursuant to section 33(3)(b) of the *Act*. Instead, the tenant made the decision to vacate the rental unit, without giving the landlord an opportunity to properly address the problem. Furthermore, the tenant did not provide any expert evidence, invoices, or reports confirming that there was in fact a problem with the primary heating or electrical system. As noted above, the applicant bears the burden in supporting their claim. I find that the tenant not only failed to establish that the heating system was damaged or defective, I find that the tenant failed to provide the landlord with opportunity to address the issue within a reasonable amount of time. Instead, the tenant made the decision to stay with family members, incurring the expenses claimed. I find that the tenant failed to establish that the losses claimed stemmed directly from a violation of the agreement or a contravention of the *Act* by the landlord. Accordingly, the tenant's claims related to the lack of heat, including the 100% reimbursement of the rent for December 2021, are dismissed without leave to reapply.

Lastly, although I acknowledge the fact that the tenant did face considerable stress, especially at the end of this tenancy, I am not satisfied that this is caused by the actions of the landlord. As noted above, I find that the tenancy ended by way of frustration, and not due to a wrongful eviction on part of the landlord. I am not satisfied that the evidence supports any negligence or contravention of the Act on part of the landlord. The Act does not require that the landlord insure the tenant's personal belongings, nor does the Act require that the landlord specify whether tenant insurance is required.

Residential Tenancy Policy Guideline #5 addresses the duty of the claimant to mitigate loss:

*"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss<sup>1</sup>. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.*

*The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation<sup>2</sup>. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.*

*The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."*

I find that the tenant failed to mitigate the losses claimed by not only failing to report issues with the heating system immediately to the landlord before leaving the rental unit, the tenant failed to carry the proper tenant insurance coverage for losses of their own

personal belongings. The duty to mitigate losses is only one of the criteria that needs to be met when making a claim. As stated earlier in this decision, the claimant must not only prove the value of the loss, the claimant must also prove that the losses were solely due to the other party's contravention of the *Act* or tenancy agreement. Only after these requirements are met, can the applicant be successful in their claim. In consideration of the claim for personal items lost or damaged due to the flood, I am not satisfied that the tenant had sufficiently supported that these losses were due to the landlord's contravention of the *Act*. Accordingly, I dismiss the tenant's claims without leave to reapply.

Lastly, the tenant filed monetary claim equivalent to one month's rent for physical and mental damage. In addition to other damages an arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Intangible losses for physical inconvenience and discomfort, pain and suffering, loss of amenities, mental distress, etc.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's behaviour. They are measured by the wronged person's suffering.

The damage must be caused by the deliberate or negligent act or omission of the wrongdoer. However, unlike punitive damages, the conduct of the wrongdoer need not contain an element of wilfulness or recklessness in order for an award of aggravated damages to be made. All that is necessary is that the wrongdoer's conduct was highhanded. The damage must also be reasonably foreseeable that the breach or negligence would cause the distress claimed.

They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must specifically be sought. The damage award is for aggravation of the injury by the wrongdoer's highhanded conduct.

The tenant requested \$1,450.00 in aggravated damages for the pain and suffering caused by the landlord's actions. In this case, although the tenant did suffer from emotional and physical distress during this tenancy, I am not satisfied that the suffering was due to the landlord's actions or contravention of the *Act* or tenancy agreement. Although I find that the expectations of the tenant were definitely not met by the landlord, I am not satisfied that the tenant had sufficiently supported that their suffering was a direct result of the landlord's actions. For these reasons, I dismiss this claim without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenant was unsuccessful with their claims, the tenant must bear the cost of this filing fee.

**Conclusion**

The tenant's monetary claims are dismissed without leave to reapply.

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: September 29, 2022

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Residential Tenancy Branch