



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes

Parties	File No.	Codes:
(Landlord) Q.L.	310072073	MNDCL-S, FFL
(Tenant) I.D., N.D.	310072481	MNSD, FFT

### Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Tenants filed claims for:

- \$2,330.00 compensation for the return of their remaining unpaid security and pet damage deposits; and
- recovery of their \$100.00 application filing fee;

The Landlord filed claims for:

- \$3,078.50 compensation for damage caused by the tenant, their pets or guests to the unit or property – holding the pet and security deposits; and
- recovery of their \$100.00 application filing fee.

The Tenants and an agent for the Landlord, E.F. ("Agent"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process.

During the hearing, the Tenants and the Agent were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this decision.

The Agent said that the Landlord received the Tenants' Notice of Hearing documents and evidence; however, the Tenants said that they received only the Landlord's Notice of Hearing documents, but not their evidence. The Tenant noted that he saw a photograph of the packages the Landlord sent to the Tenants, and these packages had his surname misspelled and the wrong address.

Based on this evidence, I find that the Landlord received the Tenants' Notice of Hearing documents and evidence; however, I find that the Tenants only received the Landlord's Notice of Hearing documents, but not the Landlord's evidence. As such, I find it would be administratively unfair and against the Rules for me to consider the Landlord's evidence in making my Decision.

### Preliminary and Procedural Matters

The Parties provided their respective email addresses in their applications, and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Tenants that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

### Issue(s) to be Decided

- Is the Landlord entitled to a monetary order, and if so, in what amount?
- Is the Landlord entitled to recovery of their \$100.00 Application filing fee?
- Are the Tenants entitled to a Monetary Order, and if so, in what amount?
- Are the Tenants entitled to recovery of their \$100.00 Application filing fee?

### Background and Evidence

The Parties agreed that the fixed-term tenancy began on July 1, 2021, and was scheduled to run to December 31, 2022, and then operate on a month-to-month basis. However, the Tenants explained that they purchased their own residence, therefore, they moved out on April 30, 2022. The Tenants said they were motivated to find another place to live, because soon after they moved in, there was talk of the Landlord's interest in selling the residential property.

The Parties agreed that the tenancy agreement required the Tenants to pay the Landlord a monthly rent of \$4,500.00, due on the first day of each month. They agreed that the Tenants paid the Landlord a security deposit of \$2,250.00, and a pet damage deposit of \$2,250.00. The Parties agreed that the Landlords returned \$2,170.00 of the total deposits at the end of the tenancy; and therefore, the Tenants are seeking recovery of \$2,330.00 - the remaining amount of their deposits

## **LANDLORD'S CLAIMS**

### **#1 UTILITIES PAID BY LANDLORD → \$828.50**

The Agent explained this claim, as follows:

First, I sent all utility bills to [the Tenant], and he agreed to pay for that. He has our management agreement, which says we charge service for half a month's rent – our policy. I'm a property manager, not a realtor. They are a nice couple, but the Landlord's daughter went to university in the U.S., so they decided to sell this property. I talked to the Landlord, saying 'it's not right, when they just moved in'. So, no open house held. Not a reason to break fixed lease.

I asked the Agent where in the tenancy agreement that it states the Tenants will pay the utilities. She said they do not have to pay the water bill. She said it is the addendum, although I could not find any reference to the utilities in the addendum. I checked the tenancy agreement, and on page two, section 3, it indicates what services and facilities are included in the rent. Items such as free laundry and appliances are checked off as included in the rent; however, water, electricity, natural gas, heat, recycling services, and so on are not checked off as included in the rent. As such, I find that utilities are not included in the rent paid by the Tenants to the Landlord.

I asked the Tenants if they are disputing this claim, and they said:

I'm happy to pay the water bill, but I'm disputing the amount; they are taking a guess at how much water we would have used for two periods of billing. I'm happy to pay for what we received while in the property, but they didn't have the last bill, so they just guessed.

We did pay the water bills as we were living there, but the last water bill hadn't been served when we moved out. We're not happy for them to take a guess at how much we owe for that period.

I asked the Agent how she calculated the amount claimed for utilities, and she said:

I sent the calculation to [the Tenant]. We have the water bill for the first decision. Now it cost \$618.00 for January to March 31. We also estimated the amount for April. I sent the number to [the Tenant] and he agreed.

I asked the Agent if she had the bill for the last period in which the Tenants lived in the residential property, and she said:

After he moved out, I can't find him to pay; usually, if agreed, we take part for utilities, and when the real number is out, we will make it even. Right now, I don't have the bill from April – July.

The Tenant said:

I think we've covered it. We agreed and we paid while we were there. I don't believe I have agreed to paying what they have guessed is the last water bill before we left. If they can tell me how much water I used in that time I'll pay for it.

## **#2     SEEKING NEW TENANT → \$2,250.00**

The Agent explained the Landlord's next claim, as follows:

Because we charge money for finding a new tenant. We do a lot of work to find a new tenant. Showing, and background checks, prepare agreements, inspection .... [The Tenant] knows that we have agreement with the Landlord to manage property. When we gave termination letter, he agreed to pay the cost to find the new tenant.

I asked the Agent what she had actually spent in finding a new tenant. She said: "Hard to say how much I used to do the promotion; usually more than 15 hours. How can I get this number? We have an agreement."

I asked the Tenants if at any point they had agreed to pay this fee, and they said: "No absolutely not." The Agent said: "I also sent a printout of the text message that he agreed to pay some costs. I'm searching the emails, but you can go on."

The texts to which the Agent referred say the following:

Hi [Tenant],

This is the utilities bill for Jan-March, we will hold another \$210 for April. Total \$828.5.

New tenant placement \$1500 after deduction from \$2250 (4500x50%)

I will send you the deposit cheque \$4500-\$1500-\$828.5

\$2171.5

Any questions please let me know

The Tenant responded:

I don't think 1500 is reasonable for the new tenant placement

The new tenant placement fee is an agreement between [your company] and the owner

It has nothing to do with me

I am only liable for possibly some advertising costs, which would have been minimal, and then maybe your time (2 hours) in showing the house

\$1500 is way too much

And I do not agree to it.

I am not responsible for any costs agreed between you and the owner of the property as I was simply a tenant. There is no liquidated damages term in the rental agreement that I signed. If you refuse to pay me the fair amount that I have asked for then I will go to dispute resolution. In this case I will ask for the full deposit to be refunded to me.

\$300 to find a new tenant is more than fair. If you don't accept this you will have to prove why it cost more than this with receipts.

### **TENANTS' CLAIMS**

The Tenants seek the return of the remaining amounts of their \$2,250.00 security deposit, and \$2,250.00 pet damage deposit that the Landlord has not yet paid them. The Parties agreed that the Landlord returned \$2,170.00, after the Agent deducted \$828.50 in utilities and \$1,500.00 for the new tenant placement fee. The Tenants said that they did not agree to pay this fee, and that it is a matter between the Agent and the Landlord, not the Tenants.

The Tenant said:

[The Agent] was aware that we wanted to find a new place to move to. We secured a new place a month in advance, and we said we'd like to end the

tenancy mutually. We paid professional cleaners to clean the house before the showing. The new tenant is paying \$300.00 more than we were paying. Have I missed anything? The new people moved in after one month.

We have a mutual agreement to end the tenancy early. During the CIR, you can see that it was signed as being in exactly the same state as we got it - no damage. The tenancy ended mutually and was beneficial to the Landlord, because she is getting more rent. So, the Landlord has not suffered any loss as a result of us moving out. The property manager is fine, as well. Money has been withheld since the beginning of May.

[The Agent] is referring me to – she told me about the agreement between the property manager and the Landlord. There's no liquidated damages clause in this agreement or the addendum. It has nothing to do with me. \$1,500.00 for showing the house for an afternoon is a high amount of money. On May 11, I said we'd pay \$300.00 and utilities, They said no. I'm no longer offering that. I'm not interested in their guess of the amount.

### Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I let them know how I analyze the evidence presented to me. I said that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Landlord must prove:

1. That the Tenant violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Landlord to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Landlord did what was reasonable to minimize the damage or loss.

("Test")

## **LANDLORD'S CLAIMS**

### **#1 UTILITIES PAID BY LANDLORD → \$828.50**

The Tenants' evidence is that they paid the utilities bills that were presented to them by the Landlord while the Tenants lived in the residential property. The Agent did not dispute that she has not provided the Tenants with a bill for the last portion of their tenancy.

I find that the Landlord has not provided sufficient evidence to prove this claim on a balance of probabilities. I find the Tenants have not been provided with the utilities bill setting out what they owe the Landlord in this regard. I find the Landlord has made this claim too soon, as even they do not know how much the Tenants really owe in this matter. As such, and pursuant to section 62 of the Act, I **dismiss this claim without leave to reapply**. I suggest that the Landlord provide the Tenants with the applicable water bill when it has arrived, and the Tenants said they will pay for it.

### **#2 SEEKING NEW TENANT → \$2,250.00**

Fixed-term tenancy agreements sometimes contain a clause called a "liquidated damages" clause. Such a clause requires a tenant who ends the tenancy early to reimburse the landlord for costs of re-renting the suite, such as advertising costs. However, the Agent did not direct me to a liquidated damages clause in the tenancy agreement, and I could not find one when I searched the tenancy agreement.

Further, I find that the evidence that the Landlord pointed me to in terms of the Tenants' agreement to this claim does not, in fact, establish the Tenants' agreement to this compensation for the Landlord.

Policy Guideline #4, "Liquidated Damages", states:

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

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.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee **will be a penalty** if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

Based on the evidence before me I find that there is insufficient evidence that the Parties agreed that the Tenants would pay the Landlord a fee that the Parties agreed was a genuine pre-estimate of the loss faced by the Landlord, should the Tenants end the tenancy early. The Agent said she could not even estimate the costs she incurred in finding a new tenant for this rental unit. Accordingly, I find that this is not a reasonable claim and I **dismiss it without leave to reapply**, pursuant to section 62 of the Act.



## **TENANTS' CLAIMS**

The Tenants seek the return of the remaining amounts of their \$2,250.00 security deposit, and \$2,250.00 pet damage deposit that the Landlord has not yet paid them.

Section 38 of the Act states that a landlord must do one of two things at the end of the tenancy. Within 15 days of the later of the end of the tenancy and receiving the tenant's forwarding address in writing, the landlord must: (i) repay any security deposit and/or pet damage deposit; or (ii) apply for dispute resolution claiming against the security deposit and/or pet damage deposit(s). If the landlord does not do one of these actions within this timeframe, the landlord is liable to pay double the security and/or pet damage deposit(s) pursuant to section 38 (6) of the Act.

In the hearing, the Parties agreed that the Tenants gave the Landlord their forwarding address in writing on April 25, 2022, and that the tenancy ended when the Tenants vacated the rental unit on April 30, 2022. That means the Landlord had until May 15 to return the deposits or apply for dispute resolution and hold the deposits for the claims(s). The Landlord applied for dispute resolution on May 11, 2022, therefore, she is within her rights to retain the deposits. However, the Landlord's claims have been dismissed without leave to reapply. Further, the Parties agreed that the Landlord returned \$2,170.00 of the deposits, and therefore, the Tenants seek the return of the remaining \$2,330.00 of their deposits.

As I have dismissed the Landlord's claims wholly and I accept the Tenants' evidence before me, I **award the Tenants with \$2,330.00 from the Landlord** pursuant to section 67 of the Act. Given their success, I also award the Tenants with recovery of their **\$100.00** Application filing fee from the Landlord, pursuant to section 72 of the Act.

### **Summary and Set Off**

	<b><u>Claims</u></b>	<b><u>Awards</u></b>
Landlord:	Utilities	\$ 0.00
	Seeking new Tenant	\$ 0.00
Tenants:	Return of deposits	\$2,330.00
	Filing Fee	\$ 100.00

The Tenants are granted a **Monetary Order** from the Landlord for **\$2,430.00** for the return of their remaining security deposit that was held by the Landlord for her dispute resolution claims.

Conclusion

The Landlord is unsuccessful in her application, as she failed to provide sufficient evidence to meet her burden of proof on a balance of probabilities. The Landlord's application is dismissed wholly without leave to reapply.

The Tenants were successful in their application for the return of **\$2,330.00** from the Landlord for their remaining security and pet damage deposits, as well as recovery of their **\$100.00** Application filing fee from the Landlord.

The Tenants are granted a **Monetary Order** from the Landlord of **\$2,430.00** for the Tenants' success in their application.

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: September 13, 2022

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Residential Tenancy Branch