



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNDCL-S, FFL

### Introduction

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

- a Monetary Order for damage or compensation, pursuant to section 67; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

The landlord's agent (the "agent") and tenant M.S. attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Both parties confirmed their email addresses for service of this Decision.

### Preliminary Issue- Service

The agent testified that the tenants were each served with the landlord's application for dispute resolution and evidence via registered mail on February 25, 2022. Receipts for same were entered into evidence. Tenant M.S. testified that she received the above documents around that time but could not recall on what date. I find that both tenants

were deemed served with the landlord's application for dispute resolution and evidence on March 2, 2022, five days after their registered mailing, in accordance with sections 88, 89 and 90 of the *Act*.

The tenant testified that she did not serve her evidence on the landlord.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure states that the Respondent's evidence must be received by the Applicant and the Residential Tenancy Branch not less than seven days before the hearing.

The tenant's evidence is excluded from consideration for failure to serve as required by section 3.15 of the Rules.

#### Issues to be Decided

1. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

#### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2021 and the tenants moved out on February 15, 2022. The tenants paid rent until the end of February 2022. This was a fixed term tenancy set to end on October 31, 2022. Monthly rent in the amount of \$3,850.00 was payable on the first day of each month. A security deposit of \$1,925.00 and a pet damage deposit of \$1,925.00 were paid by the tenants to the landlord. A written Tenancy Agreement and Addendum were signed by both parties and a copy was submitted for this application.

Both parties agree that move in and out condition inspections and reports were jointly completed on October 29, 2021 and February 16, 2022, respectively. Both parties agree that tenant M.S. provided her forwarding address on the move out condition inspection

report. Both parties agree that sometime in February 2022 the landlord returned the pet damage deposit to the tenants. The landlord filed this Application for Dispute Resolution on February 17, 2022.

Both parties agree that the tenants broke the fixed term lease and moved out of the subject rental property before the end of the fixed term.

The agent testified that the Tenancy Agreement contained a liquidated damages clause and that pursuant to that clause, the tenants owe \$1,925.00 in liquidated damages.

Section A of the Tenancy Agreement Addendum states:

**A. LIQUIDATED DAMAGES**

If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in Section 2 above, or any subsequent fixed term, the tenant will pay to the landlord the sum set out in Schedule A (i) Lease Break Fee as liquidated damages and not as a penalty. Liquidated Damages are an agreed pre-estimated of the landlord's cost of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damages to the rental unit. The Landlord and Tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the premises and damages as a result of loss of rental income due to the Tenant's breach of the terms of this agreement.

The tenants initialled the bottom of the page on which section A is written in the Tenancy Agreement Addendum.

Schedule A(i) to the Addendum states:

**Schedule A (i) - Lease Break Charges**

Estimate of Liquidated Damages:

Manager/Licencee	13 Hr @ \$60.00/Hr	\$780.00
Admin Time	7 Hr @ \$40.00/Hr	\$280.00
Travel	12 Hr @ \$20.00/Hr	\$240.00

Advertising	12 ea @ \$25.00/ad	\$300.00
Credit Checks	13 ea @ \$25.00/ea	\$325.00
Total		\$1925.00

The tenants initialled below the above table.

Tenant M.S. testified that the liquidated damages listed in Schedule A of the Addendum to the Tenancy Agreement are only estimates and that since the landlord did not actually incur the above costs, the tenants don't have to pay them. Tenant M.S. testified that the landlord has not provided them with a full accounting of actual costs incurred by the landlord stemming from the breach of the fixed term tenancy agreement.

Tenant M.S. testified that the amount sought by the landlord for liquidated damages is unreasonable and constitutes a penalty.

The agent testified that both tenants were explicitly informed about the liquidated damage lease break fee at the time the tenancy agreement was signed, and both tenants agreed to it and signed the Tenancy Agreement and Addendum.

### Analysis

Policy Guideline #4 states that 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.

In this case, I find that the liquidated damage clause was clearly and carefully laid out in the Tenancy Agreement Addendum and Schedule A of the Addendum and detailed the consequences of breaking the fixed term Tenancy Agreement. I find that both parties, as evidenced by their signatures and initials, agreed to the liquidated damages set out therein. Pursuant to my above findings, I find that the tenants are liable to pay liquidated damages for causing the tenancy to end prematurely.

As noted above, liquidated damages are an agreed pre-estimate of damages, and the tenants are required to pay them, even if the actual damages suffered are negligible or non-existent. Pursuant to Policy Guideline #4, I find that the fact that the landlord may not have incurred the entire estimated cost of re-renting the property does not impact the landlord's right to collect the entire sum of liquidated damages set out in the Tenancy Agreement Addendum and Schedule A of the Addendum.

I find that the amount of ½ a month's rent stipulated to cover the costs that the landlord would have likely incurred due to the tenant's breach of the fixed term Tenancy Agreement is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy. I find that the liquidated damages clause is not a penalty, and that the landlord is entitled to the full amount of liquidated damages as set out in the Tenancy Agreement Addendum and Schedule A of the Addendum.

Section 38(1) of the *Act* states that within 15 days after the later of:

- (a) the date the tenancy ends, and
  - (b) the date the landlord receives the tenant's forwarding address in writing,
- the landlord must do one of the following:
- (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
  - (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security and pet damage deposits pursuant to section 38(1)(a) and 38(1)(b) of the *Act*

because the landlord filed for authorization to retain the security and pet damage deposits one day after receiving tenant M.S.'s forwarding address and two days after the tenants moved out.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's security deposit in the amount of \$1,925.00.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the \$100.00 filing fee for this application for dispute resolution from the tenants.

### Conclusion

I find that the landlord is entitled to retain the tenants' security deposit.

I issue a Monetary Order to the landlord in the amount of \$100.00.

The landlord is provided with this Order in the above terms and 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: October 06, 2022

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Residential Tenancy Branch