



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

A matter regarding CASCADIA APARTMENT RENTAL  
LTD and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCL-S, FFL

### Introduction

On September 12, 2022, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the “Act”), seeking to apply the security deposit towards these debts pursuant to Section 38 of the Act, and seeking to recover the filing fee pursuant to Section 72 of the Act.

S.M. attended the hearing as an agent for the Landlord, and Tenant N.P. attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

S.M. advised that each Tenant was served with a separate Notice of Hearing and evidence package by registered mail on September 23, 2022, and the Tenant confirmed that these packages were received. Based on this undisputed testimony, I am satisfied that the Tenants were sufficiently served the Landlord’s Notice of Hearing and evidence packages. As such, I have accepted all of the Landlord’s evidence and will consider it when rendering this Decision.

The Tenant advised that their evidence was served to the Landlord, but some was served by WhatsApp. S.M. confirmed that this evidence was received, and she did not make any submissions about how this evidence served by WhatsApp was prejudicial to the Landlord. As such, I have accepted all of the Tenants' evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

#### Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards these debts?
- Is the Landlord entitled to recover the filing fee?

#### Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the most recent tenancy started on June 1, 2022, as a fixed term tenancy ending on May 31, 2023. However, the tenancy ended when the Tenants gave up vacant possession of the rental unit on August 31, 2022. Rent was established at \$1,500.00 per month and was due on the first day of each month. A security deposit of \$750.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

They also agreed that the Tenants provided their forwarding address by writing it on the Security Deposit Refund form on August 31, 2022.

S.M. submitted that the Landlord is seeking compensation in the amount of **\$750.00** for the cost of liquidated damages because the Tenants ended the fixed term tenancy early. She referenced the clause in the tenancy agreement, which indicated that the

liquidated damages clause was noted and agreed upon as \$750.00. She stated that the Tenants gave their written notice to end their tenancy on July 18, 2022, effective for August 31, 2022. She confirmed that she had no issue renting the unit for the next month, right away. She testified that she put ads up on Craigslist and their website, that it was rented after three showings, and that there was minor cleaning completed at the end of tenancy.

When she was asked to explain how the amount of \$750.00 was calculated as a genuine pre-estimate of loss, she stated that her company simply charges their customers half of a month's rent for liquidated damages for every rental unit that they are hired to manage. As well, she acknowledged that the efforts they took to re-rent the unit did not cost \$750.00 in total.

The Tenant did not make any submissions with respect to this claim.

### Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 38 of the *Act* outlines how the Landlord must deal with the security deposit at the end of the tenancy. With respect to the Landlord's claim against the Tenants' security deposit, Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenants' forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenants, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlord received the Tenants' forwarding address on August 31, 2022. Furthermore, the Landlord made an Application, using this same address, to claim against the deposit on September 12, 2022. As the Landlord made this Application within 15 days of receiving the Tenants' forwarding address in writing, I am satisfied that the doubling provisions do not apply in this instance.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Regarding the Landlord's claim for compensation in the amount of \$750.00 for the costs associated with re-renting the unit after the Tenants broke the fixed term tenancy, I am satisfied that the Landlord included a charge for liquidated damages in the tenancy agreement that both parties agreed to.

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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

Moreover, this policy guideline states the following:

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.

While S.M. attempted to outline the efforts made to re-rent the unit, I find it important to note that this amount is meant to be calculated as a genuine pre-estimate of the

Landlord's loss to do so. However, she admittedly conceded that the specific efforts she undertook to re-rent the unit did not equate to this amount being a genuine pre-estimate. As well, given that she acknowledged that her company simply charges half a month's rent for liquidated damages for every tenancy, I find that this further supports a conclusion that this clause is not a genuine pre-estimate of loss. It is apparent that little thought was actually put into what would be considered a genuine pre-estimate of loss, as this amount was simply chosen as it happened to be conveniently equivalent to the amount of the security deposit.

Ultimately, I find that the amount of liquidated damages noted on the tenancy agreement constituted a penalty. However, as the policy guideline indicates that if this is struck down as a penalty, it can still act as an upper limit on the amount that can be claimed. Based on what little information was provided, I find it appropriate to grant the Landlord a monetary award in the amount of **\$100.00** to satisfy this claim.

As the Landlord was partially successful in this claim, I find that the Landlord is entitled to recover \$50.00 of the \$100.00 filing fee paid for this Application.

Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Tenants a Monetary Order as follows:

#### **Calculation of Monetary Award Payable by the Landlord to the Tenants**

Liquidated damages	\$100.00
Filing fee	\$50.00
Security deposit	-\$750.00
<b>TOTAL MONETARY AWARD</b>	<b>-\$600.00</b>

#### Conclusion

Based on the above, the Tenants are provided with a Monetary Order in the amount of **\$600.00** for the return of the remaining balance of their security deposit. The Landlord must be served with **this Order** as soon as possible. Should the Landlord 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: June 21, 2023

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Residential Tenancy Branch