Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNDCL-S, MNRL-S, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for monetary orders totalling $17,566.75, for damages for the Landlord, retaining the security deposit to apply to these claims; and to recover the $100.00 cost of their Application filing fee.

The Tenant, B.D., and two agents for the Landlord, K.C. and K.C. ("Agents"), 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 it. The Parties were able to give some evidence in the first hearing, however, due to the disruptions of the male Agent, more time was needed than was available at this hearing. The Parties agreed to adjourn the hearing to continue the dispute resolution process at a later date. We required three hearings in all for review of the Landlord's claims.

I find that the male Agent was rude and disdainful of the Tenant and me throughout the hearings. As a result, I had to mute the Parties unless it was their turn to speak in the two reconvened hearings. The Tenant was pleasant and respectful throughout. Also, at one point the Agent said that he had not been given the opportunity to call a witness; however, the Agent never asked or expressed any interest in calling a witness during any of the hearings.

In the Interim Decision(s), which contained the Notices of Hearing for the reconvened hearing(s), I gave the Parties clear instructions as to my expectations regarding their behaviour, and the consequences of breaching these expectations. As required by the first Interim Decision, the Parties were muted at their subsequent hearings when it was not their turn to speak. This allowed both Parties to present their testimony without interruption. However, given the complexity of the Landlord's claims, we required three hearings to cover everything scheduled for the hearing.

In the third and final hearing, we still had two claims to review, but in order to save time

for the Parties, I allowed them to submit evidence regarding the two remaining claims, which I reviewed in lieu of a fourth hearing and further testimony.

During the hearings, the Tenant and the Agents were given the opportunity to provide their evidence orally and to 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.

I considered service of the Application, Notice of Hearing, and evidentiary submissions between the Parties. Section 59 of the Act and Rule 3.1 state that each respondent must be served with a copy of the Application for Dispute Resolution and Notice of Hearing. The Agent testified that he served the Tenants with the Notice of Hearing documents and evidence by email sent on September 10, 2021. However, the Tenant said that he had blocked the Agent from sending email to them, and did not provide him with their forwarding address, given the way that he said the Agent had treated them during the tenancy and after it ended.

To enable the Agent to effect service of the Landlord's documents during the break between the first and second hearings, I sent an Interim Decision in which I Ordered the Tenants to unblock the Agent from their email from April 11, 2022, through to April 15, 2022. Further, I Ordered the Agent to serve to the Tenants with the Landlord's Notice of Hearing documents, Application, and all the evidence that the Landlord submitted to the RTB as attachments to the email. I advised that the Tenants were free to re-block the Agent after this time period. I also advised the Agent that he would be expected to provide evidence of his proper service at the reconvened hearing.

At the first reconvened hearing, the Tenants said that they unblocked the Agent's email, as required, and that the female Tenant received an email from the Agent, but no evidence was attached. However, during the hearing, the Agent emailed his documentary evidence to the Tenant. I told the Tenant that he had the opportunity to submit evidence in response to that of the Agent. I said that this evidence must be received by the Agent and the RTB at least seven days prior to the next hearing. I explained this, as well as the administrative fairness behind it in the hearing.

Preliminary and Procedural Matters

The Landlord provided the Parties' email addresses in the Application and they confirmed these in the hearing. They also confirmed 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 Parties 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 the Application filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on May 1, 2019, and ran to April 30, 2020, and it then operated on a periodic basis. They agreed that the tenancy agreement required the Tenants to pay the Landlord a monthly rent of $1,900.00, due on the first day of each month. The Parties agreed that the Tenants paid the Landlord a security deposit of $950.00, and no pet damage deposit. The Agent confirmed that the Landlord holds the security deposit to apply to this Application.

The Parties agreed that the Tenants moved out on August 31, 2021, and that they chose not to give the Agent their forwarding address. Further, the Parties agreed that they did an inspection of the residential property at the start of the tenancy, although, the Agent could not say if the Tenants had been provided with a copy of the condition inspection report ("CIR") after the move-in inspection. In addition, they did not do a move-out inspection, as the Agent said the Tenants would not communicate with him at that point. I find this consistent with the Tenants' choice to block the Agent's email address and not provide him with their forwarding address. This is also consistent with the derogatory comments the Agent made about the Tenant throughout the hearings.

The Agents submitted the following monetary order worksheet, and we reviewed the items claimed therein, consecutively in the hearing.

	Receipt/Estimate From	For	Amount
1	Maintenance company	Landscaping	$4,200.00
2	Maintenance company	Painting	$3,675.00

3	Maintenance company	Maintenance	$997.50
4	Maintenance company	Carpet clean	$404.25
5	[N.B.]	Clean	$240.00
6	Maintenance company	Rubbish removal	$1,575.00
7	Lease agreement	Liquidated damages	$2,800.00
8	Agent's ledgers	Utilities & NSFs	$225.00
9	Lease agreement & ledgers	Unpaid rent	$3,350.00
10	RTB	Application filing fee	$100.00
		TOTAL monetary claim	**$17,566.75**

#1 LANDSCAPING → $4,200.00

I asked the Agent why the Tenants were responsible for a landscaping charge of this amount, and he said:

> Because the Tenant turned the irrigation off purposely and it destroyed the lawn. It caused weeds. [The Tenant] mowed the lawn. He looked after the yard. But there are weeds, dead grass – we had to re-sod and spread new seeds. And we incurred this bill.

The Tenant responded:

> I never turned off the irrigation. [The Agent] had a landscaper come and adjust the irrigation at the beginning of summer. And prior to us leaving the property, there was an extremely bad heatwave that killed many lawns in the area. I never sabotaged the property. I took care of the lawn. I mowed it. It is a shared space in the agreement. I was the only person who took care of the lawn, mowed, trimmed trees.
>
> [The Agent] agreed to do improvements as the lawn was in poor condition when he took over the property.

The Agent replied:

> Everything he said was dishonest. He could have seen the condition he left the

> lawn, if he had attended the move-out inspection. He was still residing, and I posted the notice of the move-out inspection. He ignored them all and abandoned the unit. There were no plans to weed or sod or seed. That's what [the Tenant] did.

I asked the Agent how he knows that the irrigation system was turned off by the Tenant, and he said:

> The lawn was his responsibility. We had someone out to open up the irrigation at our client's expense. While he was residing in the unit and after the inspection, the irrigation was on, and then when we did the move-out inspection, it was off.

I asked the Agent where in the tenancy agreement it places the landscaping obligation on the Tenant, and he said it was in the Addendum under "G. Maintenance": Tenant to maintain lawn.

This clause of the Addendum states:

> **(g) <u>Maintenance:</u>**
> **. . .**
> **Property Maintenance:** Tenant to maintain lawns and flower beds; Pool and Hot tub; Winter – Tenant to remove snow from sidewalks and driveway as required by Municipal Bylaws. .
>
> [emphasis in original]

I asked the Agent how he found the company to do the landscaping work, and he said: "We asked our landscaper to go out and quote on the lawn. We asked three trades to quote and took the best one."

I noted that the invoice does not set out any hours or rate of work, therefore, I asked the Agent how the amount was determined. He said: "This is the quote we received from our landscaper."

The Agent submitted over 70 photographs into evidence; however, he did not label them in any way that would allow me to know which photo was which. As such, it was difficult to review photos of the various parts of the property in the Landlord's evidence. I referred the Agent to the RTB Rules of Procedure, but his protest in the hearing when I mentioned the lack of labels or identifiers on the photographs indicated to me that he is unfamiliar with Rule 3.7, which states:

3.7 Evidence must be organized, clear and legible

All documents to be relied on as evidence must be clear and legible.

To ensure a fair, efficient, and effective process, identical documents and photographs, identified in the same manner, must be served on each respondent and uploaded to the Online Application for Dispute Resolution or submitted to the Residential Tenancy Branch directly or through a Service BC Office.

For example, photographs must be described in the same way, in the same order, such as: "Living room photo 1 and Living room photo 2".

To ensure fairness and efficiency, the arbitrator has the discretion to not consider evidence if the arbitrator determines it is not readily identifiable, organized, clear and legible. .

[emphasis added]

As such, I had to review the Landlord's photographs randomly, as there were more than 70 unidentified photographs submitted by the Agent. Luckily, the first photograph was of the lawn, and it shows a brown lawn with green patches. I infer the Agent expected the Tenant to maintain the lawn to a better level than that shown in this photograph from the end of the tenancy. However, I did not find, nor was I directed to a photograph of the condition of the lawn at the start of the tenancy for comparison purposes.

#2 PAINTING → $3,675.00

The Agent did not know when the rental unit was last painted prior to this tenancy. When I asked the Agent why these Tenants should pay for nearly $4,000.00 of painting of the residential property after a two-year tenancy, he said:

> Our painter went through and provided an estimate. There are lots of pictures. [The Tenant] and his family had done quite a bit of damage. We asked three different painters to attend and give us quotes. One was over $9,000.00, but we went with the best option.
>
> Look at the theme in the inspection reports. There are comments about the condition of the walls on move out, but there are no marks on the CIR on move in. That's why we do the move in inspection.

The Tenant said:

> The condition at the end – we left – I recognize we left it unclean and unpainted. The initial disagreement was we were asking for maintenance from [the Agent]. The painting – some was peeled off by my son. He is autistic, so he would peel the paint. But that's why we are not requesting our security deposit or funds from [the Agent].

The Agent submitted an invoice for painting, which has the following information:

> Patch and paint the entire house
> -4 bedrooms, 2 bathrooms, 2 hallways, stairwell, living room, rec room and kitchen
> Supply paint and patching supplies.
>
> $3,500.00
> 175.00 GST
> $3,675.00

#3 MAINTENANCE → $997.50

The Agent explained this claim, as follows:

> As you'll see by the maintenance invoice provided – it lists the different maintenance, how many hours, how much he charges an hour. This is supported by the pictures in our evidence.
>
> Someone ripped off the toilet paper holder, and the bathroom door knob, three closet doors. We had to replace a closet door, which we did not charge him for. And some small items were left behind, garbage mostly - see the photos.

The Tenant said:

> Only that these repairs were brought up with [the Agent] before the eviction, and he refused to make them. The evidence was provided in the prior RTB case. We were requesting in writing these repairs, and he showed up, did some stuff, but never returned to complete the repairs. And then when I asked him to do it, as there were cold snaps in the winter - this is starting to cost me, financially. He said he wouldn't do any repairs "while you're smoking marijuana or I'll give you an eviction notice". We're talking about what's going on here. It's not fair to pay for things that he should have fixed for us. We walked away from this situation,

> and within 24 hours, [the Agent] violated point six of the tenancy agreement where he contacted me. It clearly says such communication should be with the ….

The Agent cut in, saying, “The reason why they decided to cut ties was because we were awarded an order of possession.” The Agent began insulting the Tenant and it all went off the rails, so I ended the hearing, which was ten minutes over the allotted hearing time, anyway. The claim review continued at the next reconvened hearings.

I note in the CIR that there are no notes about the downstairs bathroom in the move-in side, but on the move-out side it states: “toilet paper holder broken” and door “handle broken”. However, I could not find any comments on missing or removed closet doors.

#4 CARPET CLEANING → $404.25

Both the Agent and the Tenant agreed that the Tenants did not have the carpets cleaned at the end of the tenancy. The Agent said: “The invoice is for $418.80; however, the original estimate – what we had entered into the portal – what we uploaded was less by $14.55. It didn’t seem worth it to amend it.”

The Tenant did not have any further comments on this claim.

#5 CLEANING → $240.00

When I asked the Agent how he found this cleaner, he said that they use her on all of their properties. He referred me to the invoice, which states:

> Provide one professional clean at [rental unit address] 6 hrs @ 40/hr
> $240.00

The Agent said: “We’ve also submitted pictures of what needed to be cleaned.”

I asked the Tenant if they cleaned at the end of the tenancy, and he said:

> No, we did not. I have comments, but they are not appropriate at this time. But to recap, we left the property in a hasty time. [The Agent] violated the agreement we set out on June 4, 2021. Our objective was to find alternate accommodation as quickly as possible. It came up quickly, that’s why the carpet cleaning and cleaning didn’t get done. We wanted to return the property to [the Agent] as quickly as possible.

The Parties made discourteous comments about each other, and raised issues that were not relevant to this claim. I, therefore, declined to include these comments.

In photos I randomly reviewed, as none were identified, I noted the following:

- Dirt and stains on carpeting;
- Box with garbage on floor by hot water tank;
- Dirty/damaged baseboard in bathroom;
- Food left in the freezer;
- Dirty walls;
- Dirty sofa; and
- Boxes and recycling left inside and outside.

#6 RUBBISH REMOVAL → $1,575.00

I said to the Agent that, “It looks like you have invoiced yourself for this claim. Who did the rubbish removal for the Landlord?” The Agent said:

> We have maintenance men who do work for us. As per the move out inspection, [the Tenants] left a lot of items at the property when they abandoned the unit like they did. In order to get the unit available. We had to rent a trailer and load up all these items, some were donated, others were mostly taken to the dump. We have several pictures that show the rubbish that needed to be removed. [The Tenant] didn’t attend the move-out inspection, so he cannot dispute all the items about removing. We gave the tenant multiple opportunities. How can he dispute the rubbish removal bill?

The Agent listed the following items as garbage that he either donated or had taken to the dump: Couch, chair, desk chair, dresser, contents in fridge, kitchen cupboards, boxes (empty and with items).

I asked the Agent why he did not store these items for the Tenants, as is required by section 25 of the Regulation. He said:

> It was garbage, Ma’am. The couch had rips and stains. We tried to communicate with them. They abandoned the unit. They abandoned these items. They took their kitchen table and chairs and left the rest of this.
>
> As I previously said, if you’ve looked at the pictures, you’ll see it is garbage. It is

> not reasonable for my client to incur storage costs for garbage in the unit. Things that were left behind were abandoned. We tried to communicate – no communication was returned. Their expectation – no forwarding address, run away, and fortunately we were able to get substituted service, despite [the Tenant's] attempt to block our email.

The Tenant said:

> With regard to [the Agent] offering our belongings back, it never happened. He never put them in storage – he did not comply with the Act. His section 35 (5) (b) – abandonment - he's talking about in restricting my rights, but I didn't say I give up my right to dispute anything.
>
> Based on those grounds, I'm going to request that the whole rubbish removal be removed, because [the Agent] did nor follow the process of the Act appropriately. If it's all garbage, but some was donated, that means it was not all garbage.
>
> I'd like to request a detailed invoice of the rubbish removal, because the invoice in front of me is one line saying rubbish removal. Chair . . . no mention of the rental of a trailer, any hours – anything, other than a number that came out of somewhere. How did he come up with this? How much did the dump cost? How much in fuel and vehicles? There's no detail to this other than an arbitrary number. Unless there's evidence of where that was spent, I don't believe this is a legitimate invoice. It would be nice to get my stuff back and if he didn't want to incur more costs, he would have taken the appropriate steps, but he did not.

I asked the Agent how he knew that the Tenants' personal property had been abandoned, and that the Tenants would not come back for it – did you have their express oral or written notice that they did not intend to return?

The Agent said:

> At no time did he try to reach out and get his garbage back. It was rotten food in the fridge. You will see the rubbish we had to remove. At no time did they make any effort to get back their stained, broken couch or their boxes full of garbage.

#7 LIQUIDATED DAMAGES → $2,800.00

I asked the Agent to explain the purpose of the liquidated damages clause in the

Parties' tenancy agreement. He said:

> Your assessment of liquidated damages is incorrect. Liquidated damages is in the addendum of the lease agreement. See the Addendum for how we define liquidated damages.

The Parties' liquidated damages clause in the Addendum states:

> (e) **Liquidated Damages**
>
> If the tenant terminates the tenancy for any reason before the dated specified, then the landlord shall charge and the tenant agrees to pay the sum of **$(2800)** for liquidated damages. Such sum may be deducted from the security deposit, if any security deposit is payable to the tenant after applicable charges are made against the security deposit, or otherwise collected. The liquidated funds shall be utilized to cover the landlord's costs of placement fees, rent reductions to re-rent the suite and other costs as deemed necessary to rent the suite.
>
> If there is damage to the rental unit above the value of the liquidated damages the owner will have the right to apply for any monetary order for the costs over and above the agreed upon amount.

The Agent noted that the Tenants' signatures were on the second page of the Addendum. The Agent explained this claim further, saying: "When you break a material term of the lease, you pay liquidated damages." I asked him which material term was breached, and the Agent said:

> Smoking. This is not the lease that we signed with [the Tenant]; he had a previous property manager.
>
> We reached an agreement that he would end the tenancy. The liquidated damages funds shall be paid.

I asked the Agent if it cost the Landlord $2,800.00 to re-rent the rental unit, and he said: "No, but that is the charge for breaking the lease. It would cost our client half a month's rent to place a new tenant, plus cost of advertising, plus time of doing showings."

However, I also note that the Parties testified that they had come to a Settlement in a previous hearing, in which they agreed that the Tenants would vacate the residential property by August 31, 2021, at 1:00 p.m. The evidence before me is that the Tenants did, in fact, vacate the residential property ***by*** August 31, 2021. I find that they did not, in

fact, breach the lease by leaving early. I find that August 31, 2021, was the last date by which the Tenants had to be out, not the date ***on which*** they were obliged to leave.

The Tenant responded:

> My first question, so [the Agent] is claiming that I violated this material lease by leaving early? That wasn't part of a material term, if I'm understanding correctly. I'm not sure where this claim comes from.
>
> Yes, I did leave it early before the dispute resolution we agreed to. And I articulated why we left early - due to his violating of that resolution. So as far as I'm aware, if [the Agent] had behaved in the appropriate manner and agreed in our Settlement, we would have stayed until the end of our time. But due to the continued failure of him to abide by the Act and agreement, we had to vacate as quickly as possible. He had no intention to abide by the Act, so we felt that the only course of action was to separate ourselves from [the Agent], as quickly as possible.

In terms of the Agent's claim that no smoking was a material term of the tenancy agreement, I note the following clause in the Addendum, which addresses smoking:

(a) **NO SMOKING PREMISES** – tenants and any guest agree not to smoke inside or on the premises this includes, smoking and vaping tobacco, cannabis (including medical cannabis), and any other combustible materials.

#8 UTILTIES AND NSF FEES → $225.00

The Parties reviewed this and the next claim somewhat in the third hearing, however, as the end of the hearing arrived, I offered the Parties the opportunity to submit further evidence about which they could not testify on these two points only. I gave the Parties two weeks to submit their additional documentary submissions.

However, the Agent submitted additional evidence on other claims, which we had already reviewed in the participatory hearings. As the purpose of documentary submissions after the hearing was solely to provide the Parties with an opportunity to finish their evidence on the final two claims, I have not considered the Agent's other evidence, which I infer he inserted to bolster his hearing submissions.

In the hearing, I asked the Agent if he provided the Tenants with notice of these utilities

and NSF costs and 30 days to pay. He said: “Yes, there is evidence where outstanding funds for utilities and [not sufficient funds (“NSF”)] were brought to their attention.”

In his written submissions, the Agent said:

> I provided copies of ledgers where the tenant still owed outstanding fees and utilities according to the ledgers provided by [the Agent’s company]. The tenant provided in his brief evidence labeled as EXHIBIT #3 a utility bill that went up to August 10th, when he vacated the unit. The utility cost and NSF fees were prior to our client purchasing the unit who also purchased any amounts owing to the previous owner.

The first ledger runs from April 4, 2019, to July 6, 2020. The second ledger runs from September 1, 2020, to August 12, 2021. I note that the ledgers set out the utilities and NSF fees owing, but they also document the rent paid and owing by the Tenants. All utility, NSF, late fees, and rent charges are contained in the ledgers. The totals from the next claim are based on the ledgers, which detail more than unpaid rent, and as such, I find that this 8th claim is rendered redundant by the amounts requested in the 9th claim. As such, I dismiss this claim as belonging rightly to the next amount claimed.

#9 UNPAID RENT → $3,350.00

In the hearing, the Agent explained this claim, as follows:

> There’s the loss of rent due to the condition in which [the Tenant] left the property. I’m very disappointed that you have allowed [the Tenant] to sit there and say things like I didn’t follow the process; I failed to follow the Act? I’ve been licensed for 22 years; I tried to facilitate this matter out of respect for [Ms. D] and her children. The process how it has been going over three different hearings. The last hearing, we reserved two hours for today. Now we’re out of time. It is what it is. These are our submissions and you have our evidence.

The Tenant replied:

> I provide a utility bill showing I paid them until August 10th of that year. That is a utility bill and on the top half is charges for the address, and that I have blacked out for my privacy, my address and account number. But you can see I paid utilities until the 10th of August. I vacated on the 1st of August and I paid an additional 10 days of utilities, as a show of good faith.

> [The Agent] violated our agreement, and that was nullified and the failure to pay rent was 10 Day Notice left I my possessions until August 10th, so that's why - I was desperate to get away from [the Agent] and his inability to follow Act as we've laid out in the hearing. His accusation that I forfeit the right to dispute, does not exist. He needs a refresh in the Act.

The Tenant said the following about the Landlord's claim for unpaid rent:

> He's claiming - [the Agent] did not manage the property at that time, I had missed a couple rent payments from the previous owner, and I had arranged to pay the previous owner. I have an agreement - a rent repayment plan – which outlines the repayment [the previous owner].
>
> As for August's rent – we moved out at the beginning of August. If he had followed the Act and best practices of the Branch, we wouldn't be in this position. That's where we'll leave it.

In the Landlord's written submissions that were allowed to be submitted after the hearings had ended, the Agent said:

> On August 1st we were informed that the tenants [B. and C.D.] failed to pay rent. Communication to [B. and C.D.] went unreturned. We were notified by other residents of the fourplex that the tenants were packing as much as they could into their vehicle, as quickly as they could, and left the property. When my partner [K.C.] and I attended the property, all doors were locked, no keys were left, the irrigation had been turned off and the grass and some of the trees surrounding the property were dead. Two days later, on August 12th, we were notified by our office in [another town] that keys belonging to [rental unit address] were received by mail. Please note that prior to the keys being returned to our office 2 hours away, we hired and paid for a locksmith so we could secure the home. We did not file for the locksmith bill.
>
> Upon inspecting the inside of the property, based on the condition in which it was left, we were directed by our client [J.D.] to file a dispute resolution against [B. and C.D.] and serve them via email as they failed to provide a forwarding address. Prior to filing, we offered the [Tenants] several opportunities to meet to conduct the move out inspection. That communication went unanswered.
>
> . . .
>
> Rather than paying August rent [the Tenant] admittedly avoided to pay August

> rent as he was ‘waiting for a 10-day notice.’ Because they lived in a fourplex with other tenants of the Landlord, they moved out quickly, took what they could, left without cleaning the home, or removing a lot of their furniture albeit damaged, and to add insult to injury the tenant once again turned off the irrigation so the lawn couldn’t recover, damaged . . ..

The Agent again continued his assertions on other matters we had already reviewed in the hearings, which were, therefore, irrelevant to my considerations of the evidence of the Landlord’s last two claims. However, later in the written submission, the Agent said the following, which I consider to be relevant to this claim. The Agent referred to a decision of another arbitrator, who provided an order of possession for the Landlord stating:

> I AUTHORIZE AND COMMAND YOU, [B.D. AND C.D.], and All Occupants and any guest or other person occupying the above noted rental unit, to deliver full and peaceable vacant possession and occupation of the rental unit to the Landlord not later than 1:00 p.m. on August 31st, 2021.

The Parties reached a Settlement Agreement in this arbitration on the remaining matters before them. This Agreement included:

1. The tenancy shall end, and the Tenants shall vacate the rental unit by no later than **1:00 p.m. on August 31, 2021.**

   . . .

6. Should communication between the parties be required, such communication shall be with the Landlords’ representatives and the Tenant C.D. only.

I recognize that the Settlement Agreement and the order of possession state that the tenancy shall run until no later than 1:00 p.m. August 31, 2021. Based on this, I find it was acceptable of the Tenants to more out earlier than the latest date and time allowed. However, I find this also means that the Tenants owed the Landlord full rent for August 2021, which was $1,900.00.

The Tenants submitted a copy of a Repayment Plan, #RTB-14, in which they and the previous landlord arranged a repayment plan for $1,950.00 that was due to the previous landlord as of July 1, 2020. This form, which was digitally signed by the prior landlord, [C.], on July 30, 2021, indicates that the Tenants paid the Landlord $1,068.84 toward the $1,950.00 owing at that time. I find this indicates that the amount owing on this debt went down to $881.16; however, the first ledger does not reflect this payment.

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")

Claims for compensation related to damage to the rental unit are meant to compensate the injured party for their actual loss. In the case of fixtures to a rental unit, a claim for damage and loss is based on the depreciated value of the item and **not** based on the replacement cost. This reflects the useful life of fixtures, such as carpets, countertops, doors, etc., which depreciate all the time through normal wear and tear.

#1 LANDSCAPING → $4,200.00

RTB Policy Guideline #1, "Landlord & Tenant – Responsibility for Residential Premises" ("PG #1) states:

> **PROPERTY MAINTENANCE**
>
> 1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.
>
> 2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.

> 3. Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.
>
> 4. Generally the tenant living in a townhouse or multi-family dwelling who has exclusive use of the yard is responsible for routine yard maintenance, which includes cutting grass, clearing snow.
>
> 5. The landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.
>
> 6. The landlord is responsible for cutting grass, shovelling snow, and weeding flower beds and gardens of multi-unit residential complexes and common areas of manufactured home parks. .
>
> [emphasis added]

I have considered the evidence before me overall in this matter, and I have also considered the common knowledge of BC residents that the Province experienced a heat dome with exceptionally high, prolonged heat in the summer of 2021. This was the summer before the Tenants moved out. I find the fact that the lawn was green at all at the end of the summer of 2021, indicates that the Tenants were not as irresponsible with the landscaping as the Agent asserts.

Further, the Agent did not direct me to anything, and I was unable to find any reference to landscaping in the CIR – neither at the start of the tenancy, nor in the move-out portion of the CIR. This contradicts the Agent's assertion that the Tenants left the landscaping in worse condition than it was at the start of the tenancy. Further, and as noted above, the Agent did not direct me to, nor did I find any photographs of the landscaping at the start of the tenancy.

In addition, when I have an irreconcilable "He said/He said" situation, such as whether the Tenant turned off the sprinkler system or not, I must find that the Party holding the burden of proof has not met that burden, if this is not resolved by the evidence before me.

Given a lack of comparable evidence of the condition of the lawn before and after the tenancy, and because the Agent was unable to provide proof that the sprinkler system was turned off by the Tenant, I find that the Agent has not provided sufficient proof on a

balance of probabilities to fulfill his burden of proof on this matter. I, therefore, **dismiss this claim without leave to reapply**, pursuant to section 62 of the Act.

#2 PAINTING → $3,675.00

Policy Guideline #40 ("PG #40") is a general guide for determining the useful life of building elements and provides guidance in determining damage to capital property. The useful life is the expected lifetime, or the acceptable period of use of an item under normal circumstances. If an arbitrator finds that a landlord makes repairs to a rental unit due to damage caused by the tenant, the arbitrator may consider the age of the item at the time of replacement and the useful life of the item when calculating the tenant's responsibility for the cost of the replacement. However, in terms of paint, the Agent did not know when the residential property was last painted.

Another consideration is whether the claim is for actual damage or normal wear and tear to the unit. Section 32 of the Act requires tenants to make repairs for damage caused by the action or neglect of the tenant, other persons the tenant permits on the property or the tenant's pets. Section 37 requires tenants to leave the rental unit undamaged. However, sections 32 and 37 also provide that reasonable wear and tear is not damage and a tenant may not be held responsible for repairing or replacing items that have suffered reasonable wear and tear.

In PG #40, the useful life of interior paint is four years. There is no evidence before me of when the rental unit was last painted. I find that the notes on the move-in CIR indicate that there was normal wear and tear, plus an 8 to 9 inch gouge in the living room before this tenancy began. Based on this, I find it more likely than not that the rental unit was not newly painted at the start of this tenancy. The Agent did not know when it was last painted, and therefore, I find that he was unable to provide sufficient evidence to establish the amount of damage that the Tenants did to the walls and trim.

The Tenant acknowledged that his autistic son sometimes peeled the paint off, therefore, I find that the Tenants did some damage to the paint in the rental unit. However, the amount the Landlord has claimed for this matter would mean that painters who were earning a generous rate of $40.00 an hour, would have worked approximately 92 hours on this job. However, if we take $1,000.00 off for supplies, the painters would have worked 67 hours painting this residential property, which I find is unreasonable in the circumstances.

The residential property has 12 rooms or units to be painted, including hallways, and stairwell. If the material cost was approximately $1,000.00, and each unit took a reasonable amount of approximately three hours to paint, at $40.00 an hour, this would amount to $1,440.00, or a little more than half of what these painters charged.

Based on the evidence before me overall, I find that the Landlord failed to mitigate or minimize their damage or loss in this claim. However, I find that the Tenant did acknowledge having done some damage, therefore, and pursuant to Policy Guideline #16 ("PG #16"), I **award the Landlord** with a nominal amount of ten percent of their claim or **$367.50** for this claim, pursuant to section 67 and PG #16.

#3 MAINTENANCE → $997.50

Section 37 of the Act states that a tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear. I find from the Tenant's testimony that the items listed as needing to be repaired were, in fact, damaged during the tenancy, as the Tenant said he asked for them to be repaired during the tenancy. Given this and the comparison of the move-in and move-out CIRs, I find that the Tenants are responsible for the repairs of these items listed in the repair invoice.

I, therefore, **award the Landlord** with **$997.50** from the Tenants, pursuant to sections 37 and 67 of the Act.

#4 CARPET CLEANING → $404.25

Based on the undisputed evidence before me, I **award the Landlord** with recovery of **$404.25** from the Tenants for the carpet cleaning that was not done by the Tenants at the end of the tenancy, and pursuant to section 67 of the Act.

#5 CLEANING → $240.00

Section 37 states that tenants must leave the rental unit "reasonably clean and undamaged".

Policy Guideline #1 helps interpret section 37 of the Act:

> The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. <u>The tenant is not responsible for</u> reasonable wear and tear to the rental unit or site (the premises), or for <u>cleaning to bring the premises to a higher</u>

> standard than that set out in the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act* (the Legislation).
>
> Reasonable wear and tear refer to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.
>
> [emphasis added]

I find from the photos and the CIR that the Tenants left the residential property dirty. The Tenant acknowledged that they did not clean the unit before they vacated it. As a result, and since I find the amount billed is reasonable for the size of the residential property, I **award the Landlord** with **$240.00** from the Tenants for cleaning, pursuant to sections 37 and 67 of the Act.

#6 RUBBISH REMOVAL → $1,575.00

From the sampling of unidentified photographs at which I looked, I agree that it appears the Tenants left a certain amount of garbage and debris behind. However, the *Residential Tenancy Act* Residential Tenancy Regulation ("Regulation"), states the following about a Landlord's responsibilities surrounding "abandonment of personal property".

Section 24 of the Regulation states that a landlord may consider that a tenant has abandoned personal property if [emphasis added]:

(1) (a) the tenant leaves the personal property on residential property that he or she has vacated after the tenancy agreement has ended, or

(b) subject to subsection (2), the tenant leaves the personal property on residential property

(i) that, for a continuous period of one month, the tenant has not ordinarily occupied and for which he or she has not paid rent, or

(ii) from which the tenant has removed substantially all of his or her personal property.

(2) The landlord is entitled to consider the circumstances described in paragraph (1)(b) as abandonment **only if**

(a) the landlord receives an express oral or written notice of the tenant's intention not to return to the residential property, or

(b) the circumstances surrounding the giving up of the rental unit are such that the tenant could not reasonably be expected to return to the residential property.

(3) **If** personal property is abandoned as described in subsections (1) and (2), the landlord may remove the personal property from the residential property, and on removal **must deal with it in accordance with this Part**.

(4) Subsection (3) does not apply if a landlord and tenant have made an express agreement to the contrary respecting the storage of personal property.

Landlord's obligations

25 (1) The landlord must

(a) store the tenant's personal property in a safe place and manner for a period of not less than 60 days following the date of removal,

(b) keep a written inventory of the property,

(c) keep particulars of the disposition of the property for 2 years following the date of disposition, and

(d) advise a tenant or a tenant's representative who requests the information either that the property is stored or that it has been disposed of.

(2) Despite paragraph (1) (a), the **landlord may dispose of the property** in a commercially reasonable manner if the landlord reasonably believes that

(a) the property has a total market value of less than $500,

(b) the cost of removing, storing, and selling the property would be more than the proceeds of its sale, or

(c) the storage of the property would be unsanitary or unsafe.

(3) A court may, on application, determine the value of the property for the purposes of subsection (2).

When I asked the Agent about his disposal of the Tenants' personal property left behind, the Agent did not direct me to any list of items, nor any evaluation that indicated a reasonable valuing of the items at less than $500.00. Rather, I find that the Agent treated the Tenants' belongings in the same disdainful way that he treated the Tenant in the hearing. For instance, there was a photograph of a large couch that looked to be

dirty, but for which the Tenants may have intended to return. The Tenants may have intended to return for the other items listed on the "rubbish removal" invoice: chair, desk chair, and dresser, as well.

Further, as the Tenant pointed out, the disposal invoice does not set out any amounts for labour or mileage, or a dump fee.

In terms of the Test, I find that the Tenants breached section 37 by not leaving the residential property reasonably clean. I find that the Landlord had to incur cost to remove the personal property that the Tenants left behind. However, the value of this loss or damage incurred by the Landlord pursuant to step three of the Test is not clear, given the lack of detail setting out how the item removal cost was calculated. Further, the only sign that the Agent minimized or mitigated the Landlord's costs, pursuant to the fourth step of the Test was by ignoring the requirements of the Act and Regulation. I find that this is not a reasonable, nor appropriate means of mitigation.

Based on the evidence before me and on a balance of probabilities, I find that it is again appropriate to **award the Landlord** with nominal damages of 10% or **$157.50** for this claim, pursuant to section 67 and PG #16.

#7 LIQUIDATED DAMAGES → $2,800.00

Policy Guideline #4, "Liquidated Damages" ("PG #4"), is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. PG #4 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 if 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.

In the hearing, the Agent said that he was invoking the liquidated damages clause, because the Tenant broke a material term of the lease by smoking. However, a material term as set out in Policy Guideline 8 (PG #8) states:

Material Terms

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of

the breach. **It falls to the person relying on the term** to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

The Addendum does not identify the no smoking clause as a material term, the breach of which gives the Landlord the right to end the tenancy agreement. As it falls to the person relying on the term to present evidence supporting the proposition that the term was material, I find that the Agent has failed to direct me to any evidence other than his testimonial assertions of this matter. I searched the Agent's documentary submissions for "liquidated" damages and for "material term"; however, I was unable to find anything in this regard to support the Agent's testimony.

Further, the Agent said in the hearing that the liquidated damages clause is the charge for breaking the lease. He said: "It would cost our client half a month's rent to place new tenant plus the cost of advertising, plus time of doing showings." However, the Agent

did not set out how he made this calculation. Half a month's rent is $950.00, which leaves $1,850.00 in the remaining liquidated damages claim.

As noted above, "A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach." I find that there is insufficient evidence that at the time the tenancy agreement was entered into, the Parties agreed that $2,800.00 is a genuine pre-estimate of the loss the Landlord would suffer from the end of the tenancy.

I find that the Agent has failed to provide sufficient evidence to support this claim on a balance of probabilities. I, therefore, **dismiss this claim** without leave to reapply, pursuant to section 62 of the Act.

#8 UTILTIES AND NSF FEES → $225.00

As noted above, the debts set out in this claim are included the totals from the next claim, and therefore, I dismiss this claim as being covered in the next amount claimed. I, therefore, **dismiss this claim as a separate amount** from the 9th claim below.

#9 UNPAID RENT → $3,350.00

Section 26 of the Act states: "A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the 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." There is no evidence before me that the Tenant had a right to deduct any portion of the rent from the monthly rent due to the Landlord in August 2021. Further, the fact that the Tenants chose to leave sooner than they were required to does not remove their obligation to pay rent for August 2021.

The amounts set out as owing in the first ledger total $1,450.00, and the second ledger totals $2,125.00, both of which I find include late fees and NSF charges, which the Tenant did not dispute. However, I note that these two amounts combine to $3,575.00 or 8th and 9th claim amounts combined.

However, I also note that the ledgers do not reflect the Tenants' evidence of having paid the previous landlord $1,068.84, which I find to be credible evidence, as it was digitally signed by the previous landlord. As a result, I decrease the amount I award the Landlord for these two claims by $1,068.84, and I **award the Landlord $2,506.16** for these claims.

Given the Landlord's limited success in this Application, I decline to award him with recovery of the $100.00 Application filing fee, pursuant to sections 62 and 72 of the Act.

Summary and Off Set

I find that this claim meets the criteria under section 72 (2) (b) of the Act to be offset against the Tenants' **$950.00** security deposit in partial satisfaction of the Landlord's monetary award.

Claim	Description	Amount Awarded
1	Landscaping	$0.00
2	Painting	$367.50
3	Maintenance	$997.50
4	Carpet cleaning	$404.25
5	Cleaning	$240.00
6	Item Removal	$157.50
7	Liquidated damages	$0.00
8	[*redundant*]	$0.00
9	Rent, NSF, Utilities	$2,506.16
	Sub-Total	**$4,672.91**
	Less security deposit	$950.00
	TOTAL	**$3,722.91**

The Landlord is awarded **$4,672.91** from the Tenants for this Application. The Landlord is authorized to retain the Tenants' **$950.00** security deposit in partial satisfaction of these monetary awards. I grant the Landlord a **Monetary Order** of **$3,722.91** from the Tenants for the remainder of the awards owing, pursuant to section 67 of the Act.

Conclusion

The Landlord is partially successful in his Application, as the Agent provided sufficient evidence to meet the Landlord's burden of proof on balance of probabilities for the claims noted above. The Landlord is awarded **$4,672.91** from the Tenants for this Application.

The Landlord is authorized to retain the Tenants' **$950.00** security deposit in partial satisfaction of the monetary awards. The Landlord is granted a **Monetary Order** of **$3,722.91** from the Tenants for the remainder of the awards owing. This Order must be served on the Tenants by the Landlord and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

Although this Decision has been rendered more than 30 days after the conclusion of the proceedings, section 77(2) of the Act states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a Decision affected, if a Decision is given after the 30-day period set out in subsection (1)(d).

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: February 02, 2022

Residential Tenancy Branch