

# Submission

## A) Issues to be Decided

1. Tenant Doe (the "Tenant") requests the dismissal of the landlord's application for a monetary order for \$1,450.
2. The Tenant requests \$1,350 for double the security deposit.

## B) Relevant Facts

### The Parties

3. Tenant Doe was a tenant at [ADDRESS] (the "Unit"), pursuant to a one-year fixed term tenancy agreement (the "Tenancy Agreement").

*Tab 1: Tenancy Agreement, page 6*

4. Landlord Smith (the "Landlord") was the tenant's landlord.

*Tab 1: Tenancy Agreement, page 6*

5. The Tenancy Agreement began on April 1, 2020, and was to end on March 31, 2021.

*Tab 1: Tenancy Agreement, page 6*

### The Issues

6. On April 1, 2020, the Tenant and Landlord signed a tenancy agreement requiring \$1,350 in monthly rent and a security deposit of \$675.

*Tab 1: Tenancy Agreement, pages 6, 8*

7. On April 1, 2020, the Tenant and Landlord signed a tenancy agreement containing a liquidated damages clause of \$675.

*Tab 1: Tenancy Agreement, page 8*

8. On April 1, 2020, the Tenant and Landlord signed a tenancy agreement containing a term requiring the automatic forfeiture of the security deposit in the event of a broken lease.

*Tab 1: Tenancy Agreement, page 9*

9. On August 22, 2020, the Tenant gave one month's written notice of her intention to move out by September 30, 2020.

*Tab 2: Tenant's Notice Letter, page 12*

10. On August 23, 2020, the Landlord advised the Tenant that as a result of breaking her lease, she would be charged a \$675 "penalty" according to the liquidated damages clause in the Tenancy Agreement.

*Landlord's evidence: Landlord's Email #1, page 6*

11. On August 24, 2020, the Tenant replied by email and explained her willingness to cooperate with the landlord's efforts to re-rent the Unit.

*Tab 2: Tenant's Email, page 9*

12. On September 30, 2020, the Tenant moved out of the Unit.

*Tab 3: Empty Unit Photo, page 10*

13. On September 30, 2020, the Tenant and Landlord completed and signed a move-out condition inspection report, on which the Tenant included her forwarding address for the return of her security deposit.

*Landlord's Evidence: Condition Inspection Report, pages 1-3*

14. On October 2, 2020, the Landlord informed the tenant via email that, in addition to the liquidated damages clause of \$675, she will be charged \$100 for cleaning costs.

*Landlord's Evidence: Landlord's Email #2, page 7*

## **C) Relevant Law / Policy**

### First Issue: Liquidated Damages and Cleaning Costs

15. *RTB Policy Guideline 4: Liquidated Damages* sets out 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.

16. *Guideline 4* goes on to say that:

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.

17. *Guideline 4* also sets out some tests to determine if a clause is a penalty 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.

18. Section 20 (e) of the *Residential Tenancy Act* (the "Act") specifies that a landlord may not "require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement."
19. Section 5 (1) of the *Act* says that "Landlords and tenants may not avoid or contract out of this Act or the regulations." Section 5 (2) of the *Act* says that "Any attempt to avoid or contract out of this Act or the regulations is of no effect."
20. *RTB Policy Guideline 8: Unconscionable and Material Terms* sets out that "a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party." It goes on to describe the test for whether a term is unconscionable as being:

whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

### Second Issue: Security Deposit

21. Sections 38 (1) and (6) of the *Act* govern the return of a tenant's security deposit at the end of a tenancy where a Condition Inspection Report was completed:

38 (1) Except as provided in subsection (3) or (4) (a), 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.

....

(6) If a landlord does not comply with subsection (1), the landlord

(a) **may not make a claim against the security deposit** or any pet damage deposit, and

(b) **must pay the tenant double the amount of the security deposit**, pet damage deposit, or both, as applicable.

## D) Analysis / Argument

### Unlawful request for liquidated damages

22. In “RTB Decision Liquidated Damages”, the arbitrator found that a liquidated damages clause which consisted of a half-month’s rent was unenforceable, stating in part:

I am not convinced that the amount... was a genuine pre-estimate of costs or loss. Rather, in this case... I find the clause acts as an automatic forfeiture of a tenant’s security deposit, which is not allowed under the *Act*.

I also find that the landlord failed to submit convincing evidence that the liquidated damages were a genuine pre-estimate or were intended to compensate them for time and expense in re-renting the rental unit as a result of the early end to tenancy by the tenant.

*Tab 4: RTB Decision Liquidated Damages, page 12*

### Unlawful request for cleaning costs

23. The Landlord acknowledged in the move-out Condition Inspection Report that a small dent in the wall was repaired as agreed, and that no deductions were to be made from the security deposit, as the unit was in satisfactory condition.

*Landlord’s Evidence, Condition Inspection Report, pages 1-3*

### Unlawful retention of security deposit

24. The Landlord and Tenant completed a Condition Inspection Report on move in and on move out. The Landlord had the Tenant's forwarding address in writing, and he did not have permission to retain any part of the security deposit. The final report, signed by both parties on the last day of the tenancy, indicates no outstanding concerns. The Landlord has no claim against the deposit.
25. Since the Landlord did not return the deposit or file to retain it within 15 days of receiving the Tenant's forwarding address in writing, the Landlord may not make a claim against the deposit, and must repay the tenant double the deposit.

### **E) Conclusion**

26. The Landlord has provided no evidence that the liquidated damages clause is a genuine pre-estimate of loss. Further, the money claimed for cleaning costs cannot be substantiated, as the Condition Inspection Report agreed to and signed by both parties indicates the Unit was in satisfactory condition.
27. The Landlord's attempt to avoid the Act by requiring the automatic forfeiture of the Tenant's security deposit is of no effect.
28. The Tenant dutifully cleaned the Unit to a reasonable standard on move out and complied with the requirement to complete the Condition Inspection Report. The Tenant promptly provided her forwarding address in writing, and the landlord failed to return the deposit or file to retain it within the 15-day deadline established in Section 38 of the *Act*. As such, the Landlord's claim must be dismissed and the Tenant's counterclaim upheld.

All of which is respectfully submitted, [MM/DD/YYYY].

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[Tenant's Name]

or

[Advocate's Name],

Advocate for the Tenant