PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: **February 16, 2024**
Docket: **LR23108**
Type: **Rental Appeal**

INDEXED AS: Ralph and Marion Paquet v. Neil and Darlene Lawless

Order No: LR24-06

BETWEEN:

Ralph and Marion Paquet

Appellants

AND:

Neil and Darlene Lawless

Respondents

ORDER

Panel Members:

Kerri Carpenter, Commissioner and Panel Chair
M. Douglas Clow, Vice-Chair

Compared and Certified a True Copy

(Sgd.) Michelle Walsh-Doucette

Commission Clerk
Corporate Services and Appeals

1. INTRODUCTION

1. At issue in this appeal, which was heard by the Commission on January 10, 2024, is whether the Residential Tenancy Office (the "Rental Office") erred in determining the distribution of a tenant's security deposit and awarding compensation to a landlord.

2. BACKGROUND

2. On August 1, 2013, Ralph Paquet and Marion Paquet (the "Tenants") entered into a written fixed-term rental agreement for the premises located at 8 Parkman Drive, Charlottetown, PE (the "Premises") with Neil Lawless and Darlene Lawless (the "Landlords"). Each year the Tenants renewed their fixed term agreement. Rent for the Premises was not disclosed. A security deposit of $750.00 was required and paid.

3. The Tenants vacated the Premises on July 17, 2023. The Landlords completed a Form 5 Landlord Condition Inspection Report dated July 27, 2023.

4. On July 28, 2023, the Landlords filed a Landlord Application (the "Landlords' Application") to Determine Dispute (Form 2B) with the Rental Office, seeking to make a claim against the security deposit and compensation for expenses incurred due to a contravention of the Act and/or tenancy agreement.

5. The Landlords' Application was heard by the Rental Office on October 10, 2023. In Order LD23-499, dated October 30, 2023, the Rental Office allowed the Landlords' Application and ordered that the Landlords retain the security deposit and accrued interest in the amount of $824.96 and that the Tenants pay the Landlords $2,091.70 in compensation on or before December 1, 2023.

6. The compensation awarded in Order LD23-499 was detailed in the following table:

Item	Amount
Cleaning	**$300.00**
Flooring	**$2,123.78**
Door Trim	**$277.24**
Door Stop/Swaps	**$143.81**
Maritime Electric	**$71.83**
Total Compensation:	**$2,916.66**
Less Security Deposit	**($750.00)**
Less Interest (08/ 01/13 – 10/30/23)	**($74.96)**
Total Less Amount:	**($824.96)**
Award to Landlords:	**$2,091.70**

7. On November 20, 2023, the Tenants filed an appeal with the Commission. At issue in this appeal is the subject matter of damage to the flooring, as discussed at paragraphs 24 and 25 of Order LD23-499. The Rental Officer awarded the Landlords $2,123.78 of the $2,316.28 requested by the Landlords.

8. The applicable legislation is the *Residential Tenancy Act* (the "Act").

9. On January 10, 2023 the Commission heard the appeal by way of telephone conference hearing. The Tenants were represented by Randy Paquet ("Mr. Paquet"). The Landlords were represented by Neil Lawless ("Mr. Lawless").

3. DISPOSITION

10. The appeal is allowed in part. The Commission finds that the cost of replacing the living room flooring was $2,316.28 and that the Tenants are responsible for 90% or $2,084.65 of that cost due to the undue damage caused to the flooring. The reasons are further discussed herein.

4. FACTS and ANALYSIS

11. Mr. Paquet testified as follows. The living room laminate flooring was new when the Tenants moved in. He acknowledged that there was damage to the living room flooring as shown in photos submitted by Mr. Lawless. He stated that he and the Tenants were informed (although he did not disclose who informed him) that depreciation should apply to the laminate flooring, given that the 10-year-old flooring was replaced with a new floor. He acknowledged that the flooring was in good condition other than the specific damaged portions that were pointed out by Mr. Lawless. In respect of depreciation, Mr. Paquet submitted tables under the previous Rental of Residential Property Act (the "Old Act"). He acknowledged that the Old Act is no longer in effect in the province, but suggested that the table is useful in determining the value of a floor that is replaced with a new floor.

12. Mr. Lawless stated the Act does not consider depreciation, that the financial tables submitted pertained to life expectancy under the Old Act, which is now repealed, and dated from 1989. Mr. Lawless submitted that the laminate flooring was new when installed 10 years ago, was good quality as demonstrated by pictures showing the condition of the undamaged portions and that the entire flooring had to be replaced as the particular flooring was no longer available and therefore it was not possible to replace only the portions that were damaged. Finally, Mr. Lawless testified that the costs he submitted for the flooring included $192.50 in costs for him to attend to the flooring replacement, including attending at the store to choose the flooring, transporting the flooring to the job site and other travel related to the job.

13. The Issues to be determined are:

    a. Are the Tenants responsible under subsection 28(4) of the Act for having caused undue damage?

b. If the Tenants caused undue damage, what amount should be awarded to the Landlord in respect of the obligation of the tenants under subsection 28(4) of the Act to repair undue damage?

(a) Undue Damage

14. The provisions of the Act that deal with tenant and landlord responsibility for damage are contained within section 28. Under subsection 28(4), the tenant is responsible for repairs of "undue damage to the rental unit." However, under subsection 28(5), tenants are not required to make repairs for "reasonable wear and tear to the rental unit." The applicable sections state:

> *28(4) A tenant of a rental unit shall repair, in a good and professional manner, undue damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.*
>
> *28(5) A tenant is not required to make repairs for reasonable wear and tear to the rental unit or common areas of the residential property.*

15. The Commission finds, based upon the photographic evidence submitted by the Landlords, as well as the testimony of Mr. Paquet and Mr. Lawless, that the damage to the living room flooring goes beyond normal wear and tear, and in fact constitutes undue damage. Accordingly, in accordance with subsection 28(4) of the Act, the Tenants are responsible for repairing the said undue damage.

(b) Quantification of the Undue Damage

16. The Commission must now quantify the undue damage caused by the Tenants. The Landlords submit that the Commission should accept he cost of replacing the entire living room floor with a new floor as the appropriate quantification of the undue damage. The Tenants say that the cost of replacement should be discounted to account for the fact that the Landlords are getting a new floor in place of a 10-year-old floor and are therefore put in a better position than they would have been had the undue damage not occurred.

17. First, in addressing the actual cost of replacing the flooring, the Commission notes that the Rental Officer disallowed $192.50 of the $2,316.28 in costs submitted by the Landlords. However, in the present appeal, the evidence revealed that the Landlords personally selected and transported the flooring and thus took their time to do so on the basis that the costs were mainly travel related and should not be charged to the Tenants.

18. The Commission finds that the overall amount submitted as the cost of the flooring replacement, being $2,316.28, is reasonable given that the entire living room floor was replaced. The Commission accepts Mr. Lawless' testimony that he handled buying and transporting the flooring in order to save money on the overall cost of the job because the contractor would have charged more than he did. The Commission allows the sum of $2,316.28 as being the cost of replacement.

19. The Commission now must consider how much of the $2,316.28 the Tenants are responsible for.

20. In determining amounts to be awarded to landlords where a tenant has caused undue damage, the simplest of circumstances are ones where it is possible to effect repairs only to the specific items (or in this case, the specific areas of the floor) that were the subject of “undue damage”. In such cases, reasonable costs of those repairs would be awarded to the Landlord in full.

21. It is more complicated in situations where it is not possible to effect repairs only to the specific portions of the item that has been subject to undue damage. It is not uncommon in situations such as the present one, for it to be impossible to repair only portions of the floor. Given that the flooring is no longer available for purchase, the Landlord had to replace the entire floor in the room where the damage occurred. This puts the Landlord in the position of having a new floor, rather than one that had 10 years of normal wear and tear on it. As such, the costs incurred by the Landlord are partially in relation to repairing undue damage, and in addition, they are partially for replacing a floor that had some normal wear and tear with a brand-new floor. The landlord is in a better position with a new floor than he would have been in had the undue damage not occurred, in which case he would have a 10-year-old floor with some normal wear and tear.

22. The Commission must be mindful of the tenants’ obligation under subsection 28(4) and the limits to the tenants’ obligations under subsection 28(5) of the Act. The Tenants are responsible for repairs to rectify undue damage, but they are not responsible for a full replacement of the floor over which normal wear and tear has occurred.

23. The Commission notes that section 101 of the Act permits the Commission to consider common law principles except where the common law is “modified or varied” by the Act. Therefore, to ensure subsections 28(4) and 28(5) are both respected, the Commission finds that consideration of depreciation as a result of a betterment is appropriate

24. The Tenants’ representative has asked the Commission to account for depreciation in determining the amount to be awarded to the Landlords. The Act does not expressly mention depreciation, however in order to reconcile subsections 28(4) and 28(5), the Commission finds it necessary to look to the common law. The principle of betterment has been applied in similar situations by Canadian courts, with the effect being that depreciation is considered. The basic principle at common law is that a party should not be put in a better position than they would have been had the wrongdoing not occurred.

25. For example, in British Columbia the applicable legislation does not specifically contemplate betterment or depreciation. However, the BC Court of Appeal has held that the common law still applies to application of that province’s rental legislation to the extent that it is not modified by substantive provisions in the legislation and that “application of the common law of contract is at the core of the director's dispute resolution function” (*Jestadt v Performing Arts Lodge Vancouver*, 2013 BCCA 183 at paras 34-35).

26. While not specifically binding on the Commission, there is helpful guidance from other Canadian Provinces. British Columbia's Residential Tenancy Branch publishes "Policy Guidelines". Two of those guidelines address betterment. Guideline #40 directs that where a landlord makes repairs, 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 replacement. Guideline #5 specifically refers to betterment, and refers back to Guideline #40.

27. In a similar situation in Ontario, a 2017 order from the Ontario Landlord and Tenant Board, CEL-71015-17 (Re), the Board member stated the following:

> *35. The reason depreciation is calculated in orders is to address the issue of betterment that might arguably apply when compensation is awarded for something new that replaces something damaged. The purpose of compensation is to put landlords in the same position they were before the undue damage occurred and not to make them better off.*

28. In the above cited Order, the Board member rejected that the useful life of replaced carpet was only 10 years (as prescribed by the general regulation per the Ontario Residential Tenancies Act for the purpose of calculating capital expenditures), and found that, had the damage not occurred, the landlords could have waited several more years to replace the existing carpet. The member, therefore, depreciated the replacement cost by 25%.

29. In *Barry v. Navratil*, 2019 ABPC 229, an Alberta Provincial Court decision where the Court considered the issue of betterment in a landlord and tenant situation, the provincial court judge accepted that cigarette burns in the carpet could not be repaired, but stated that replacing the carpet entirely put the landlord in a better position than she would have been had it not been for the burns. The judge found that when dealing with property that is the type that must be periodically replaced, the tenant has to be given credit for bettering the landlord's condition if the item is replaced. The judge concluded that one way to give the tenant credit for the landlord's betterment is to award the depreciated value and stated as follows:

> *Alternatively, the court could award as damages the depreciated value of the carpet, that is, if the carpet had a life expectancy of 15 years and was damaged to the point of requirement of replacement after 5 years, the court could assess the damages as a difference between initial purchase price for the carpet and the residual value of the carpet.*

30. In the above cited decision, as it turned out the carpet was being replaced in any event, so the judge awarded no damages payable. However, the judge did award damages for a replacement countertop, but reduced the award by 25% to "recognize some betterment".

31. In the present appeal before the Commission, the evidence indicates that the laminate flooring was 10 years old at the time the Tenants moved out. The photographs in evidence showed specific portions of the flooring which were damaged well beyond the state of

ordinary wear and tear. The photographs also showed the undamaged portions of the floor which appeared to be in very good condition.

32. The Commission accepts the evidence that the flooring, other than the areas of "undue damage", was in very good condition. Nevertheless, the flooring material was 10 years old and it only stands to reason that replacing that 10-year-old floor with a new floor puts the Landlords in a better position than they would have been with a 10-year-old floor that did not have any undue damage caused to it. As such, the Commission finds it is not appropriate to award the Landlords the full cost of replacement. Given that there was no specific evidence before the Commission on the useful life of the laminate flooring, other than the now obsolete tables from the Old Act submitted by the Tenants' representative, and given that both sides agreed that the flooring was in very good condition, the Commission determines that the replacement cost should be reduced, or depreciated, by ten percent (10%).

33. Accordingly, the Commission orders that the amount awarded to the Landlord for damage to the living room floor shall be $2,084.65 ($2,316.28 less 10% or $231.63). All other components of order LD23-499 shall remain unchanged, with the total award being $2,047.22, broken down as follows:

Item	Amount
Cleaning	**$300.00**
Flooring	**$2,084.65**
Door Trim	**$277.24**
Door Stop/Swaps	**$143.81**
Maritime Electric	**$71.83**
Total Compensation:	**$2,877.53**
Less Security Deposit	**($750.00)**
Less Interest (08/01/13 – 02/16/24)	**($80.31)**
Total Less Amount:	**($830.31)**
Award to Landlords:	**$2,047.22**

5. CONCLUSION

34. The appeal is allowed in part.

IT IS ORDERED THAT

1. **The appeal is allowed in part.**

1. **The Director's Order LD23-499 is varied in respect of the amount awarded for damage to the flooring, which shall now be $2,084.65.**

2. **The Landlord shall retain the security deposit together with interest, calculated to the date of this Order, in the amount of $830.31.**

3. **The Tenants shall pay the Landlords the sum of $2,047.22 as compensation for damage to the property. This sum shall be paid forthwith.**

4. **All other components of order LD23-499 shall remain unchanged.**

DATED at Charlottetown, Prince Edward Island, February, 16, 2024.

BY THE COMMISSION:

(sgd. Kerri Carpenter)
Kerri Carpenter, Commissioner and Panel Chair

(sgd. M. Douglas Clow)
M. Douglas Clow, Vice-Chair

NOTICE

Subsections 89 (9), (10) and (11) of the *Residential Tenancy Act* provides as follows:

89. (9) A landlord or tenant may, within 15 days of the decision of the Commission, appeal to the Court of Appeal in accordance with the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11, on a question of law only.

(10) Where the Commission has confirmed, reversed or varied an order of the Director, the landlord or tenant may file the order with the Supreme Court.

(11) Where an order is filed under subsection (10), it may be enforced as if it were an order of the Supreme Court.