DECISION

<u>Dispute Codes</u>   MNSD

<u>Introduction</u>

This hearing dealt with an Application for Dispute Resolution by the Tenant to obtain a Monetary Order for the return of the balance of her security deposit.

Service of the hearing documents, by the Tenant to the Landlord, was done in accordance with section 89 of the *Act*, sent via registered mail on April 21, 2009. Mail receipt numbers were provided in the Tenant's documentary evidence. The Landlord was deemed to be served the hearing documents on April 26, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

The Landlord, Building Manager, Tenant, and the Tenant's Translator appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

<u>Issues(s) to be Decided</u>

Is the Tenant entitled to a Monetary Order under Sections 38 and 67 of the *Residential Tenancy Act*?

<u>Background and Evidence</u>

The month to month tenancy began on May 15, 2006 with rent payable on the first of each month in the amount of $760.00. The Tenant paid a security deposit on May 1, 2006 in the amount of $380.00. No move-in or move-out inspection report was completed by the Landlord.

The Landlord and Building Manager stated that the tenancy ended on November 3, 2008.

The Tenant advised that the tenancy ended either in October or November 2008. The Tenant later confirmed that the tenancy ended in October 2008.

The Property Manager advised that the Landlord's records are currently held in the Landlord's previous home with the Landlord's wife and that the Landlord is currently living at the rental unit and does not have access to his previous home.

The Landlord testified that he returned $109.00 of the Tenant's security deposit, directly to the Tenant at the rental unit and that the rest of the security deposit was kept by the Landlord for reasons listed on the Security Deposit Statement.

The Property Manager was referring to an unsigned copy of the Security Deposit Statement.

The Tenant provided a copy of the Security Deposit Statement that was given to her by the Landlord, in her documentary evidence.

The Tenant testified that she had requested the balance her security deposit on several occasions and that on January 30, 2009 she wrote a letter to the Landlord asking for her security deposit and providing the Landlord with written notification of her new address. The Tenant stated that she delivered this letter to the Landlord by handing it to the Landlord's Wife, who passed it to their son, who then passed it to the Landlord, while they were all attending church.

The Tenant argued that after issuing the above mentioned letter to the Landlord she met with the Landlord in February 2009 to request again that her security deposit be refunded, and when the Landlord refused, the Tenant later applied for Dispute Resolution.

The Landlord claims that the Tenant requested her security deposit on several occasions over the telephone and that the Landlord never received the Tenant's written

request for the return of her security deposit and that the Landlord never met with the Tenant in February 2009.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Tenant would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Tenant, bears the burden of proof and the evidence furnished by the Applicant Tenant must satisfy each component of the test below:

> Test For Damage and Loss Claims
> 1. Proof that the damage or loss exists
> 2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
> 3. Verification of the Actual amount required to compensate for loss or to rectify the damage
> 4. Proof that the claimant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage

In regards to the Tenant's right to claim damage or loss from the Landlord, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

A significant factor in my decision is determining the credibility of the Landlord's testimony. When determining credibility I am guided by the following:

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In the circumstances before me, I find the version of events provided by the Tenant to be highly probable given the conditions that existed at the time. Considered in its totality, I favour the evidence of the Tenant over the Landlord.

Based on the testimony and evidence before me, I find that the tenancy ended on September 30, 2008 and that the Landlord withheld $271.00 of the Tenant's security deposit and did not refund the interest owed to the Tenant, without the Tenant's written consent and without an Order from the *Residential Tenancy Branch*, authorizing him to do so.

I also find that the Tenant provided the Landlord with written notification of her forwarding address in the January 30, 2009 letter.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit to the tenant with interest or make application for dispute resolution claiming against the security deposit or pet damage.

Based on the above, I find that the landlord has failed to comply with Section 38(1) of the *Act* and that the landlord is subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security and pet deposit and the landlord must pay the tenant double the amount of the security and pet deposit. I find that the Tenant has succeeded in proving the test for damage or loss as listed above and approve her claim for the return of double the security deposit plus interest.

Monetary Order – I find that the Tenant is entitled to a monetary claim as follows:

Interest owed on Security Deposit $380.00 from May 1, 2006 to October 3, 2008	$11.40
Interest owed on Balance of Security Deposit ($380.00 – 109.00) $271.00 from Oct. 4, 2008 to July 21, 2009	$0.99
Refund Double – balance of Security Deposit $271.00 x 2	542.00
TOTAL AMOUNT DUE TO THE TENANT	**$554.39**

Conclusion

I HEREBY FIND in favor of the Tenant's monetary claim. A copy of the Tenant's decision will be accompanied by a Monetary Order for $554.39. The order must be served on the respondent Landlord and is enforceable through the Provincial Court 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: July 21, 2009.

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Dispute Resolution Officer