



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNDC, MNSD, FF

### Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for a monetary order for damage to the unit, site or property; for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit; and to recover the filing fee from the tenant for the cost of this application.

An agent for the landlord company and the tenant attended the conference call hearing. Both parties provided affirmed testimony and were given the opportunity to cross examine each other on the evidence, and to give submissions at the conclusion of testimony. The landlord also provided evidence in advance of the hearing, although some evidence was provided after the time provided for in the Rules of Procedure. The documentation was not provided to the tenant, and the landlord's agent was unaware that the evidence had been sent to the Residential Tenancy Branch. Upon further discussion of that evidence, it was determined that the evidence is not relevant to these proceedings, was sent in error, and is therefore not considered in this Decision. All other evidence and the testimony of the parties have been reviewed and are considered in this Decision.

### Issue(s) to be Decided

- Is the landlord entitled to a monetary order for damage to the unit, site or property?
- Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement?
- Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

### Background and Evidence

The parties agree that this tenancy began as a fixed term tenancy on June 1, 2006 to expire on May 31, 2007, and then reverted to a month-to-month tenancy. The tenancy ultimately ended on November 30, 2011. Rent in the amount of \$770.00 per month was payable in advance on the 1<sup>st</sup> day of each month and there are no rental arrears. On May 15, 2006 the landlord collected a security deposit from the tenant in the amount of \$345.00 and no pet damage deposit was collected.

The landlord's agent testified that the rental unit is one of 108 suites within an apartment complex. A written tenancy agreement was signed by the parties on May 13, 2006, a copy of which was provided for this hearing. A move-in condition inspection report was completed with the tenant present on May 31, 2006, and the same form was used to complete the move-out condition inspection report which was completed on November 30, 2011, which is signed by the landlord's agent and the tenant. A copy of the report was provided by the landlord prior to the commencement of the hearing. The notation made on the report at move-out states: "Heavily smoked stained walls + ceiling + carpets," and shows that the tenant agreed the report fairly represents the condition of the rental unit. The landlord's agent stated that the tenancy agreement is silent with respect to smoking inside the rental unit but the tenant smoked heavily and when the landlord's agent entered the rental unit, a smell of smoke from cigarettes and possibly marihuana was very strong. The agent was also present after the painter had applied the primer, and stated that the smoke remnants bled through the primer, thus requiring 2 coats of paint. When asked if TSP would solve that issue, the landlord's agent testified that TSP was used, but it did not prevent the smoke remnants from bleeding through the primer.

The landlord's agent further testified that the rental unit had probably been painted in May, 2006, but could not swear to that because that information was not readily available for this hearing. The landlord would have had the rental unit re-painted in any event because the tenant resided in the rental unit for in excess of 5 years, but the landlord has a contractor who would have charged \$189.00 to paint the unit, in addition to another \$75.00 for painting the ceilings, which was a requirement in this rental unit. Later during testimony, the landlord's agent testified that the painting, including ceilings would be \$250.00, but no evidence of that was provided for this hearing. A copy of the invoice was provided for this hearing, and the cost is \$459.20. The invoice also states: "Heavy nicotine suite," and shows that November 30 to December 2, "Full 100% prime of 1 bed suite + 2 coats finish due to 5 yrs of heavy nicotine usage." The cost was \$410.00 plus \$49.20 for HST.

The landlord's agent also testified that the carpets had to be cleaned, and the landlord claims \$134.40, although no receipt for that amount has been provided.

The landlord's agent also testified that the tenant was a good tenant and the landlord was sorry to see the tenant move out.

The tenant testified that there is nothing in the tenancy agreement that prohibits smoking inside the rental unit. If the tenant had been advised verbally or in writing that smoking was not permitted, the tenant would not have smoked in the rental unit. The rental unit is still a smoking building today.

The tenant spoke to personnel at the Residential Tenancy Branch who advised that the landlord was required to paint the inside of a rental unit in any event after 5 to 7 years and the tenant resided in the rental unit for 5 ½ years. The tenant stated that the required painting is normal wear and tear.

The tenant also testified that even though the painting invoice shows repairs and painting, there were no repairs to make inside the rental unit when the tenant vacated.

The tenant also testified that the landlord's application has an arithmetic error, in that the landlord claims \$459.20 for painting, \$134.40 for carpet cleaning, \$50.00 for the filing fee, and the reduction of the \$345.00 security deposit does not equate to the landlord's claim of an additional \$287.03.

The tenant does not dispute the cost for carpet cleaning.

### Analysis

The *Residential Tenancy Act* states that a tenant is required to leave a rental unit reasonably clean and undamaged except for normal wear and tear. I accept the testimony of the parties that the tenancy agreement is silent with respect to smoking inside the rental unit.

I refer to Residential Tenancy Policy Guideline 37 which sets out a table of the "Useful Life of Work Done or Thing Purchased," and states that the table is intended as a general guide. The table states that the useful life of interior painting in a rental unit is 4 years. I don't believe there is any argument by the landlord that the rental unit was required to be painted before another tenant moved in, but the landlord's position is that the cost associated with painting was higher than it ought to have been because of the fact that the tenant smoked in the rental unit.

In order to be successful in a claim for damages, the onus is on the claiming party to satisfy the 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the opposing party's failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the claiming party made to reduce, or mitigate such damage or loss.

In this case, the landlord has provided evidence of the cost for repainting the rental unit by way of an invoice from the painter. The invoice also states that: "Heavy nicotine suite," and shows that November 30 to December 2, "Full 100% prime of 1 bed suite + 2 coats finish due to 5 yrs of heavy nicotine usage." Firstly, I question how the painter could know that the tenant heavily smoked in the rental unit for 5 years. Perhaps it was one year, or perhaps it was 5 years of light smoking. Regardless, I find it reasonable to assume that the painter noticed the smell of smoke, and I accept the testimony of the landlord's agent that the agent was in the rental unit before the painting was completed and witnessed the smoke bleed through the primer. Therefore, I find that the landlord has established element 1.

However, because the tenancy agreement says nothing about permitting smoking within the rental unit, I cannot find that the tenant breached the tenancy agreement. Further, a tenant is required under the *Act* to leave a rental unit reasonably clean and undamaged except for normal wear and tear. The parties both testified that the rental unit had no other damages at the end of the tenancy. It is also important to consider the fact that any financial award made in favour of the landlord must not put the landlord in a better financial situation than the landlord would be in if the damage or loss had not existed. In other words, the landlord is required to provide and maintain rental property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and make the rental unit suitable for occupation by a tenant. The useful life of paint inside a rental unit is 4 years, and there is no evidence to suggest that this rental unit has been painted within the last 5 ½ years.

With respect to the amount of such damage or loss, the landlord's agent testified that the normal painting in the unit would have cost \$189.00 plus \$75.00 for ceilings, and then stated that the cost would have been \$250.00. In completing the arithmetic,  $\$189.00 + \$75.00 = \$264.00$ . The invoice is for \$410.00 plus HST in the amount of \$49.20, for a total of \$459.20. The landlord's agent did not indicate whether or not HST would be included in the \$264.00 or the \$250.00, nor did the landlord provide any evidence to support the testimony that the charge would have been less than the amount of the invoice if the tenant had not smoked in the rental unit. If the landlord had

provided that supporting evidence, I may have found that the tenant was responsible for the difference. However, in the absence of such supporting evidence, and due to the fact that the landlord's agent was not able to provide clear testimony with respect to the amounts, I find that the landlord has failed to establish that the smoking in the rental unit has caused the landlord to be out-of-pocket more than the landlord would have been if the tenant had not smoked in the rental unit.

The tenant has not disputed the landlord's expense for carpet cleaning, and I find that the landlord is entitled to recovery of \$134.40. Since the landlord has been partially successful with the application, the landlord is entitled to recovery of the \$50.00 filing fee for the cost of this application. Therefore, I order the landlord to keep \$184.40 from the security deposit and to return the balance of the security deposit, together with interest in the amount of \$11.56 to the tenant.

### Conclusion

For the reasons set out above, I order the landlord to keep \$184.40 from the security deposit and to return the balance of \$172.16, which includes interest, to the tenant.

This Decision is final and binding on the parties.

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 29, 2012.

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Residential Tenancy Branch