



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNDC, MNSD, FF

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- authorization to obtain a return of double her security deposit pursuant to section 38;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant testified that this tenancy ended on the basis of a May 3, 2012 notice to end tenancy that she sent to the landlord by email in which she advised the landlord that she was ending her tenancy by May 31, 2012. The tenant testified that she sent a copy of her dispute resolution hearing package to the landlord by registered mail on July 27, 2012. She provided copies of the Canada Post Tracking Number and Customer Receipt to confirm this registered mailing. The landlord's agent (the agent) confirmed that the landlord had received this package. I am satisfied that the tenant served the landlord with her dispute resolution hearing package in accordance with the *Act*.

At the commencement of the hearing, I noted that the tenant had submitted written evidence in the form of a monetary Order worksheet in which it appeared that she had attempted to increase the amount of her monetary claim to \$4,800.00. The tenant said that she had not amended her original application. She said that she had subsequently learned that she was not entitled to the further monetary award identified in her monetary Order worksheet. I advised the parties that the \$1,600.00 monetary claim identified in the tenant's application for dispute resolution was the only requested monetary award that was before me.

### Issues(s) to be Decided

Is the tenant entitled to a monetary award for the return of her security deposit? Is the tenant entitled to a monetary award equivalent to the amount of her security deposit as

a result of the landlord's failure to comply with the provisions of section 38 of the *Act*? Is the tenant entitled to recover the filing fee for her application from the landlord?

### Background and Evidence

This one-year fixed term tenancy commenced on August 1, 2011. Monthly rent was set at \$1,600.00, payable in advance on the first of each month, plus utilities. The landlord continues to hold the tenant's \$800.00 security deposit paid on August 1, 2011. The tenant said that she vacated the rental unit on June 1, 2012. The agent testified that the tenant did not yield vacant possession of the premises to the landlord until June 2, 2012.

The tenant gave undisputed oral and written evidence that she sent the landlord her forwarding address by email on June 2, 2012. She entered written evidence that she also sent the landlord her forwarding address in writing by way of a June 27, 2012 registered letter. She provided a copy of the Canada Post Tracking Number and Customer Receipt to confirm this registered mailing. The agent confirmed that the landlord received the tenant's forwarding address by email. She was uncertain if the landlord had received the tenant's registered letter of June 27, 2012.

The landlord entered written evidence that the tenant had signed an addendum to her Residential Tenancy Agreement (the Agreement) in which she agreed that "If tenant withdraw from the agreed length of contract, tenant will forfeit the full amount of security deposit as compensation to landlord." The agent confirmed that the landlord had not obtained the tenant's written authorization at the end of the tenancy to retain any portion of the tenant's security deposit. The agent testified that the tenant:

- did not provide adequate notice of her intention to end this tenancy;
- did not yield vacant possession of the rental unit on May 31, 2012; and
- did not leave the rental unit in reasonably clean and undamaged condition at the end of this tenancy.

She testified that the landlord believed that he was justified in retaining the tenant's security deposit to compensate him for the above issues.

### Analysis

As outlined below, section 20(e) of the *Act* specifically prohibits the type of clause that the landlord created to retain the tenant's security deposit at the end of this tenancy:

#### ***Landlord prohibitions respecting deposits***

**20** *A landlord must not do any of the following:...*

*(e) require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or a part of the security deposit or the pet damage deposit at the end of the tenancy agreement...*

When I noted this prohibition at the hearing, the agent maintained that the tenant was bound by the addendum to the Agreement because the tenant initialed this provision. I advised the agent that section 5 of the *Act*, set out below, prevents parties from contracting out of the *Act*.

***This Act cannot be avoided***

- 5**      (1) *Landlords and tenants may not avoid or contract out of this Act or the regulations.*
- “            (2) *Any attempt to avoid or contract out of this Act or the regulations is of no effect.*

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant’s forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant’s security deposit plus applicable interest and must pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant’s provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if “at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant.”

In this case, I find that the landlord has not returned the tenant’s security deposit in full within 15 days of receiving the tenant’s forwarding address in writing. There is no record that the landlord applied for dispute resolution to obtain authorization to retain any portion of the tenant’s security deposit. The tenant gave undisputed sworn testimony that the landlord has not obtained her written authorization at the end of the tenancy to retain any portion of the tenant’s security deposit.

Whether or not the landlord has grounds for a claim for unpaid rent, loss of rent or damage arising out of this tenancy, the landlord was obligated to follow the provisions of section 38 of the *Act* and did not do so. In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double her security

deposit with interest calculated on the original amount only. No interest is payable over this period.

As the tenant has been successful in this application, I allow her to recover her filing fee from the landlord.

### Conclusion

I issue a monetary Order in the tenant's favour under the following terms which allows the tenant to recover her original security deposit and her filing fee, and to obtain a monetary award for the landlord's failure to comply with the provisions of section 38 of the *Act*.

Item	Amount
Return of Security Deposit	\$800.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	800.00
Filing Fee	50.00
<b>Total Monetary Order</b>	<b>\$1,650.00</b>

The tenant is provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: October 18, 2012

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Residential Tenancy Branch