



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## Corrected Decision

**Dispute Codes:** MNDC, MNSD, FF

### Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for a monetary order for money owed or compensation for damage or loss under the Act and an order for the return of the security deposit retained by the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

### Issue(s) to be Decided

- Is the tenant entitled to the return of the security deposit under section 38 of the Act?
- Is the tenant entitled to monetary compensation under section 67 of the *Act*?

### Background and Evidence

Submitted into evidence was a written statement from the tenant with the details of her claim. Also in evidence was a package from the landlord that the tenant claimed was never received by the tenant. The landlord was permitted to give verbal testimony with respect to the disputed evidence.

The tenancy began in September 2012 as a fixed term that was to end on May 31, 2013. A security deposit of \$575.00 and pet damage deposit of \$575.00 were paid. Rent was \$1,150.00 not including utilities.

The tenant was to pay 25% of the total bill for utilities to the landlord. The tenant testified that, at the start of the tenancy, she was given verbal assurances that the utility bills would not exceed \$70.00.

However, in February, 2013, the parties re-negotiated the tenant's percentage of the utilities and agreed that the tenant would pay 50% of the utilities, because she had added a second occupant.

The tenant testified that the electric utility bills were much higher than expected, particularly since she was aware that her unit was heated by gas. The tenant testified that she discovered that the other unit sharing the building was being heated with electric base board heaters, and alleged that this fact had been purposely concealed by the landlord. The tenant pointed out that electric heat is "*notoriously expensive*" and she would never have agreed to the rental had the landlord been forthcoming in answering her questions about the accurate estimate of costs of utilities and the electric heating system in the other unit sharing the bills.

The tenant feels that she was overcharged for the utilities and is claiming a utility overpayment of \$78.70, which is being claimed in damages.

The tenant acknowledged that she left some outstanding utility bills still owed to the landlord in the amount of \$178.83, which she stated could be deducted from her security deposit refund, if the landlord accepts her request to be compensated for the months that she alleged she was overcharged.

The tenant vacated on April 30, 2013 with the landlord's consent. A forwarding address was given to the landlord and the landlord refunded the tenant's pet damage deposit of \$575.00.

The tenant testified that the landlord failed to refund the tenant's security deposit within 15 days, as required under the Act. The tenant is claiming a refund of double the security deposit in the amount of \$1,150.00.

The landlord testified that the tenant was never given an absolute promise that the utility bills would always be under \$70.00 and they had mutually agreed upon the tenant paying a percentage of 25%. The landlord stated that, in any case, almost all of the monthly utility bills were significantly lower than \$70.00. According to the landlord, when averaged over the year, the monthly cost would be under \$70.00. The landlord pointed out that the tenant had added another person in the unit, which would obviously increase the usage of utilities and the amount of the monthly bills. The landlord also pointed out that the tenant freely agreed to pay 50% of the utilities, which would result in double the amount originally anticipated.

The landlord argued that the tenant's security deposit was not returned within 15 days because the parties were still negotiating the amount owed for the outstanding utility bills with the intention that the arrears could be withheld from the tenant's security

deposit. The landlord testified that the tenant still owes the landlord compensation for the unpaid utility invoices she left.

**The landlord testified that, after the tenant had applied for dispute resolution, which occurred on April 2, 2013, the tenant communicated with the landlord on April 30, 2013 and they sent the tenant a partial refund of the security deposit in the amount of \$236.72. According to the evidence submitted by the landlord, this cheque, dated May 27, 2013, was cashed, without prejudice, by the tenant.**

### **Analysis Claim for Damages**

In respect to an Applicant's right to claim damages from another party, Section 7 of the Act states that, if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, 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.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the Applicant 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 the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the landlord.

The tenant is alleging that the landlord contravened a term in the tenancy agreement that set utility bills to be under \$70.00 per month.

I accept the testimony from the parties that the tenant agreed to be responsible for a 25% portion of the utilities and then in February 2013 agreed to pay 50% of utilities. I

accept that the proportions agreed upon are enforceable terms in the tenancy agreement.

In order to prove that the landlord had placed a maximum cap of \$70.00 per month, I find that this term would have to be documented within the agreement in writing. I find that the tenant should not have relied on this upper limit without having it documented as a term in the tenancy agreement.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if a) the term is not consistent with the Act or Regulations, b) the term is unconscionable, or c) the term is not expressed in a manner that clearly communicates the rights and obligations under it. (My emphasis).

I find that the purported tenancy term that limited the monthly utility charges to under \$70.00, is not enforceable because this is a disputed verbal term, which was therefore not expressed in a manner that clearly communicates the rights and obligations under it.

With respect to the tenant's testimony that the landlord had purposely concealed the fact that the lower suite had electric base board heat, I find that the landlord's failure to disclose this data, is not sufficient proof to establish that he purposely concealed the information. Moreover, even I accept that this did occur, as alleged by the tenant, I would have to find that the landlord did not violate any specific section of the Act or tenancy agreement.

For this reason, I find that the portion of the tenant's claim for monetary compensation for overpaid utilities must be dismissed.

#### Analysis: Security Deposit

In regard to the return of the security deposit and pet damage deposit, I find that section 38 of the Act is clear on this issue. Within 15 days after the later of the day the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit or pet damage deposit to the tenant or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord did refund the tenant's pet damage deposit of \$575.00. However, the landlord retained the \$575.00 security deposit and the 15-day deadline lapsed without the landlord either returning the deposit or making an application for an order to keep it. I find that a portion of the tenant's security deposit, in the amount of \$236.72, was returned to the tenant in a cheque dated May 27, 2013.

The Act states that the landlord can only retain a deposit if the tenant agrees in writing the landlord can keep the deposit to satisfy a liability or obligation of the tenant, or if, after the end of the tenancy, the director orders that the landlord may retain the amount.

I find that the tenant did not give the landlord written permission to keep the deposit, nor did the landlord make application for an order to keep the deposit.

Section 38(6) provides that If a landlord does not comply with the Act by refunding the deposit owed or making application to retain it within 15 days, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the deposit..

I find that the tenant's security deposit was \$575.00 and that the landlord contravened the Act by arbitrarily keeping the security deposit without an order to do so. Accordingly I find that the tenant is entitled to be paid double the security deposit of \$575.00 for compensation in the amount of \$1,150.00. **I accept the evidence confirming that the landlord later repaid \$236.72 to the tenant. After deducting the \$236.72 already refunded, I find that the tenant is entitled to \$913.28.**

Based on the testimony and evidence presented during these proceedings, I find that the tenant is entitled to compensation of ~~\$1,200.00~~, **\$963.28**, comprised of ~~\$1,150.00~~, **\$913.28**, representing double the security deposit **minus the \$236.72 already refunded**, and the \$50.00 cost of the application. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court if not paid.

The remainder of the tenant's application is dismissed without leave.

In regard to the landlord's testimony and evidence alleging that the tenant should be held liable to compensate the landlord for unpaid utilities, I find that I am not able to hear, nor determine, any claims made by the landlord as this hearing was convened on the tenant's application and no application from the landlord is before me. The landlord is at liberty to pursue claims for compensation against the tenant by making their own application for dispute resolution.

### **Conclusion**

The tenant is successful in the application and is granted a monetary order for a refund of double the security deposit **lessthe partial refund**, and for a ~~retro-active rent abatement~~.

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: June 25, 2013  
**Corrected August 7, 2013**

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Residential Tenancy Branch