



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD, FF

### Introduction

This was an application by the tenants for a monetary order for the return of their security deposit including double the deposit amount. The hearing was conducted by conference call. The tenants and the landlords called in and participated in the hearing.

### Issue(s) to be Decided

Are the tenants entitled to the return of their security deposit including double the amount?

### Background and Evidence

The rental unit is a residential suite. The tenancy began on July 15, 2013 for a one year fixed term. Monthly rent was \$1,595.00 payable on the last day of each month.

The tenants claim that they paid an \$800.00 security deposit June 9, 2013. The landlords dispute the tenants' characterization of the payment as a security deposit. The landlords' position is that the payment was: "a non-refundable hold deposit".

The tenants gave the landlords a Notice to End Tenancy on June 30, 2014. They provided the landlords with their forwarding address. The tenants moved out of the rental unit on July 30, 2014. The landlords acknowledge having received the tenants' forwarding address. They have refused to return the tenants' deposit because it is their position that it is not a security deposit.

The landlords testified that the tenants viewed the rental unit in June and wanted to rent it, but informed the landlords that they would not be able to move in until July 15, 2013. According to the landlords they discussed a hold deposit. The landlords sent the tenants an e-mail dated Jun 9, 2013. In the e-mail they said:

It was a pleasure meeting with you both. (name) and I have discussed and would be happy to have you as tenants. We will require a \$800 non-refundable deposit to hold until July 15 along with 3 letters of reference ( you can get the letters to us by the end of the week)

The tenants thanked the landlord for the e-mail and arranged to meet the landlords to deliver a deposit cheque. The tenants delivered a deposit cheque to the landlords the same day that they received the e-mail. The tenants signed a tenancy agreement form dated June 10, 2013 for a tenancy to commence on July 15, 2013. On the form of agreement the tenants crossed out the stated security deposit amount of \$797.50 and wrote in the sum of \$800.00 and initialled the change.

The landlords submitted that the tenants agreed to the non-refundable deposit. The landlords claimed that they could have easily rented to other prospective tenants if the tenants had ever indicated that they were unhappy with the request. The landlords testified that they did not agree with the tenants' alteration to the security deposit provision in the tenancy agreement although they did not mention their concern to the tenants when the tenancy agreement was returned to them after signing. The landlords said that the tenants failed to pay the required security deposit of \$797.50 and the tenants are therefore not entitled to claim a refund in any amount.

The tenants testified that the landlord failed to mention at any point during the year-long tenancy, that the tenants had not paid a security deposit. The tenants maintained that if the landlord was not happy with the proposed move-in date, then they should not have extended an offer to rent to the tenants.

### Analysis

There are several provisions of the *Residential Tenancy Act* that bear upon the determination of the tenants' claim:

Section 5 of the Act provides:

#### **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 15 of the act provides that:

### **Application and processing fees prohibited**

**15** A landlord must not charge a person anything for

- (a) accepting an application for a tenancy,
- (b) processing the application,
- (c) investigating the applicant's suitability as a tenant, or
- (d) accepting the person as a tenant.

The *Residential Tenancy Act* permits a landlord to require a security deposit in an amount equivalent to one half month's rent, but the Act provides that:

### **Landlord prohibitions respecting deposits**

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

- (a) require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement;
- (b) require or accept more than one security deposit in respect of a tenancy agreement;

Section 7 of the Residential Tenancy Regulation sets out non-refundable fees that may be charged by a landlord; the section provides as follows:

### **Non-refundable fees charged by landlord**

**7** (1) A landlord may charge any of the following non-refundable fees:

- (a) direct cost of replacing keys or other access devices;
- (b) direct cost of additional keys or other access devices requested by the tenant;
- (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
- (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
- (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent

for the tenant moving between rental units within the residential property, if the tenant requested the move;

(f) a move-in or move-out fee charged by a strata corporation to the landlord;

(g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

- (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

The *Residential Tenancy Act* by section 15 prohibits a landlord from charging a fee for accepting a person as tenant. The fees that are permitted are specified by section 7 of the regulation and there is no provision that would allow the landlords to charge a “non-refundable hold deposit”. The landlords argued that the charge was justified in this case because of the significant delay before the tenancy was to begin. It was, however, open to the landlords to refuse to rent to the tenants because of the proposed delay in commencement of the tenancy, or to insist that the tenancy must begin on an earlier date. The landlords also submitted that the tenants agreed to pay the non-refundable deposit and should be bound by that agreement. The *Residential Tenancy Act* provides that landlords and tenants may not avoid or contract out of the Act or the regulations and I find that the landlords have attempted to avoid and contract out of the Act and Regulation by requiring payment of the non-refundable deposit, contrary to the provisions of section 15 of the Act.

The tenants have regarded the deposit as held by the landlord as a security deposit; the landlords solidified the tenants’ perception by making no mention of the tenants’ amendment to the tenancy agreement and by failing to mention or to insist upon payment of a security deposit for more than one year, and then only after the tenants demanded repayment of the deposit amount. I find that the sum of \$800.00 paid by the tenants on June 9, 2013 must be regarded as the payment by the tenants to the landlords of a security deposit under the tenancy agreement signed by the parties and I note that the landlord signed the agreement without any comment after receiving it from the tenants.

Section 38 of the *Residential Tenancy Act* provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later. Section 38(6) provides that a landlord who does not comply with this

provision may not make a claim against the deposit and must pay the tenants double the amount of the security deposit and pet deposit.

I am satisfied that the tenants provided the landlords with their forwarding address in writing, and based upon the acknowledgement of the landlords at the hearing I find that the tenants served the landlord with documents notifying the landlord of this application as required by the *Act*.

The tenants' security deposit was not refunded within 15 days as required by section 38(1) of the *Residential Tenancy Act* and the doubling provision of section 38(6) therefore applies. I grant the tenants' application and award them the sum of \$1,600.00. The tenants are entitled to recover the \$50.00 filing fee for this application for a total claim of \$1,650.00 and I grant the tenants a monetary order against the landlords in the said amount. This order may be registered in the Small Claims Court and enforced 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: May 19, 2015

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Residential Tenancy Branch

