



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNDC, MNSD, O, FF

### Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the *Act*"). The landlord applied for:

- a monetary order for damage pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- authorization to recover the 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, and to make submissions. Both parties confirmed service of the other party's materials submitted for hearing. The tenant submitted that the landlord's most recent submission, an evidence package served to the tenant on approximately June 3, 2015 by registered mail should not be considered given the late service of the materials.

### Preliminary Issue: Late Service of documents

Some documents must be served within a certain time period. The Residential Tenancy Policy Guideline No. 12 provides instructions on service that are reproduced in fact sheets for the general public. Pursuant to the Policy Guideline, landlord evidence should

be served to the landlord within 3 days of an application to the Residential Tenancy Branch being made. In the Dispute Resolution Rules of Procedure, Rule No. 3 provides further clarification that unreasonable delay of the service of documents may result in an arbitrator not considering evidence submitted late. Rule No. 3 also provides that any evidence submitted outside of the normal timeline should be both relevant and new, in that it was previously unavailable for the party to submit.

The evidence submitted late included 14 photographs for evidence. The landlord claims that these photographs were taken contemporaneously with the end of the tenancy. However, she provides no evidence of this assertion. The tenants submitted that, as this material was received less than a week prior to hearing with respect to a dispute resolution application submitted in November 2014 by the tenants, this evidence is absurdly late. The tenants claim that they dispute the photographic evidence but did not have sufficient time to consider and create a response. The landlord testified that she had not filed the material sooner because she's been so busy. Based on the dated nature of this evidence and the fact that the landlord could have served this material much earlier, I find that it is not reasonable to allow this evidence at the hearing. I decline to consider this evidence, taking into consideration the submissions by the tenants that they did not have time to respond to this material.

#### Issue(s) to be Decided

Is the landlord entitled to a monetary award for damage or loss arising out of this tenancy?

Is the landlord entitled to retain all or a portion of the tenant's security deposit towards any monetary award?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary award equivalent to double the value of his 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 this application from the landlord?

#### Background and Evidence

This tenancy began on November 1, 2013. The rental amount was reduced over the course of the tenancy. Both parties agreed that, at the end of the tenancy, the tenants' rental amount was \$800.00 payable on the first of each month. The landlord testified that she continues to hold a \$400.00 security deposit paid by the tenants on October 19, 2013. Both parties testified that, when the monthly rent was reduced, an amount of

\$25.00 was refunded to the tenants, reducing their security deposit from the original amount of \$425.00 to \$400.00.

Both parties agreed that the tenants provided written notice to the landlord on September 24, 2014 to end their tenancy. A copy of that notice was submitted as evidence for this hearing. Both parties conducted a move-out condition inspection on October 31, 2014, the date the tenants vacated the rental unit. Both parties agreed that the new tenant was also present at the tenants' condition inspection at move-out and had already moved items into the residence. Both parties agreed that the landlord was provided with the tenants' forwarding address on that same date, October 31, 2014.

The landlord testified that she did not initiate or conduct a condition inspection at the start of this tenancy. She testified that, when she began to have concerns about the state of the rental unit, she requested that the tenants participate in a condition inspection. That inspection took place August 29, 2014. The condition inspection report for both "move-in" (August 29, 2014) and move-out were submitted into evidence for this hearing. The move-in report reflected a code of 'good' or 'n/a' for all items on the report. The move-out report reflected the same codes but for two different notations:

- "run in carpet" noted in 4 different areas of the unit; and
- "paint lighter than original in repair" noted in 4 different areas of the unit.

Both the move-in and move-out portions of the condition inspection report are signed by both parties as representative of the condition of the rental unit at the time the inspections were completed. The notation, "\$400 to be returned" was written above the signature of Tenant DF.

The landlord testified that, on completion of the condition inspection, she provided the tenants with a \$400.00 cheque. The landlord testified that, the next day when she completed a formal condition inspection move-in report with the new tenant, she stopped payment on the cheque she had provided. She testified that, when inspecting the unit with the new tenant the following day, she discovered a strong smell of cat urine and other damages she had not previously identified.

### Analysis

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 security deposit in full 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. In this case, the landlord had 15 days after October 31, 2014 to take one of the actions outlined above. In this case, the landlord initially returned the deposit to the tenants by providing a check. However, the following day, she placed a stop payment on the check and, within the 15 day timeframe, applied to retain the security deposit.

Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security 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, the condition inspection report provides evidence that the tenants did not give the landlord written authorization at the end of this tenancy to retain any portion of their security deposit. To the contrary, the landlord had agreed to the return of the deposit. Section 38(4)(a) of the *Act* does not apply to the tenant's security deposit.

The landlord seeks to retain the deposit in partial satisfaction of their claim for loss of rent for damages at the end of tenancy. The evidence provided by the landlord is that she was required to clean the carpets and do further painting. To support her claim, she submitted a carpet cleaning receipt only. The landlord bears the burden of proof when seeking damages at the end of a tenancy. I find that the landlord has not shown on a balance of probabilities that the rental unit was left in damaged or dirty condition beyond some reasonable wear and tear during the course of the tenancy.

As well, I find that the landlord did not take sufficient steps to ensure that the condition inspection was done in compliance with the standards of the *Residential Tenancy Act*. I note that the new tenant was present for the inspection and the new tenant had already moved belongings into the rental unit.

Both tenants and landlords have obligations at the end of the tenancy. A tenant must ensure their unit is neat and clean in consideration of the age of the rental unit and reasonable wear and tear. The landlord must conduct an inspection with opportunity for the tenant to attend. The condition agreement is heavily weighted evidence. It is relied upon by landlords in certain circumstances to show that a tenant has acknowledged damage or agreed to a deduction to their deposit. In this case, the condition inspection report shows evidence that the landlord agreed to return the tenants' security deposit.

Given all of these factors listed above and given the lack of evidence to support the landlord's position, I find that the landlord is not entitled to a monetary order with respect to damage or cleaning costs at the end of this tenancy. As I find the landlord is not entitled to a monetary award, she cannot retain the security deposit.

The following provisions of Policy Guideline No. 17 of the Residential Tenancy Branch's Policy Guidelines would seem to be of relevance to the consideration of this application:

*Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit:*

- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process...*

While the landlord applied to retain the tenants' security deposit within the appropriate timeline, I do not find that her application was in accordance with the requirements of the *Act* or in accordance with the intention of the *Act* and its guidelines. I find that, on a balance of probabilities and considering the landlord advised the tenants both verbally and in writing, including on the condition inspection report itself, that the tenants would receive their full deposit and that the next day, she put a stop to the check she had issued, there is some level of frivolousness to the landlord's claim. It is incumbent upon the landlord to exercise due diligence when participating in a condition inspection. Her failure to do so, combined with her providing a check and then cancelling same warrant an award for the tenants in accordance with Policy Guideline No. 17.

The tenants also applied for compensation with respect to mileage to drive to make this application and postage to mail and serve the application. I do not find the administrative costs related to the tenants' application are appropriate costs to compensate. However, the tenants are entitled to a return of the remainder of their security deposit and a further monetary amount equivalent to the original security deposit.

Having been successful in this application, I find further that the tenants are entitled to recover the \$50.00 filing fee paid for this application.

### Conclusion

I dismiss the landlord's application in its entirety.

I issue a monetary order in favour of the tenants as follows;

Item	Amount
Return of Double Security Deposit as per section 38 of the <i>Act</i> (\$400.00 x 2 = \$800.00)	\$800.00
Recovery of Filing Fee for this Application	50.00
<b>Total Monetary Order</b>	<b>\$850.00</b>

The tenants are provided with these Orders in the above terms and the landlord must be served with this Order 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: June 22, 2015

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Residential Tenancy Branch

