



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC, MNSD, FF

### Introduction

This was a hearing with respect to the tenants' application for a monetary award and for the return of their security deposit, including double the amount. The hearing was conducted by conference call. The tenants attended and were represented by their advocate. The landlord attended and was represented by legal counsel. The tenants provided documents and written submissions. The landlord submitted documentary evidence, including an affidavit. The tenants received the landlord's evidence. The evidence was sent to the Residential Tenancy Branch by mail, but it was apparently lost or mislaid because it was not on the file and could not be located. At the hearing I invited the landlord and her counsel to provide the necessary evidence by oral submissions. At the hearing landlord's counsel advised that the necessary information in support of the landlord's position had been presented and it would not be necessary to re-submit the landlord's evidence package.

### Issue(s) to be Decided

Are the tenants entitled to compensation in an amount equivalent to one month's rent under the tenancy agreement pursuant to section 51(10) of the *Residential Tenancy Act*?

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

### Background and Evidence

The rental unit is a strata title apartment in Surrey. The tenancy began on November 1, 2013 for a fixed term ending October 31, 2014. The monthly rent was \$1,000.00, payable on the first of each month. The tenants paid a security deposit of \$500.00 on

September 28, 2013. The tenancy agreement contained the notation that the deposit: “will be half the last month’s rent”.

The tenancy agreement did not provide that the tenancy would continue on a month to month basis or for another fixed length of time after the term ended. It also did not provide that the tenants must move out at the end of the fixed term. Instead the standard form tenancy agreement contained a handwritten term that stated:

iii) Option Tenants have first right of refusal on successive yearly rentals and first right of refusal on purchase of the home

The landlord served the tenants with a 2 month Notice to End Tenancy for landlord’s use of property. The Notice to End Tenancy was dated July 17, 2014 and it required the tenants to move out of the rental unit on October 31, 2014. The Notice was given in the approved form provided by the Residential Tenancy Branch, but it was amended to state that the landlord was giving the tenants three months’ notice rather than two months’ notice to move out of the rental unit. The reason for the Notice was that the rental unit would be occupied by the landlord, or the landlord’s spouse or a close family member of the landlord.

After the tenants received the Notice to End Tenancy they sent several letters to the landlord. The first, dated September 16, 2014, stated that the tenants would vacate the rental unit on October 30, 2014. The tenants then sent a corrected letter that stated that the tenants would move out on September 30, 2014. In the letter the tenants requested payment of compensation in the amount of \$1,000.00 and requested the refund of their \$500.00 security deposit. They asked that the payment be sent to their forwarding address, which was the address of their advocate in these proceedings.

The tenants moved out on September 30, 2014. They paid rent for the month of September, but did not pay rent for October and stopped payment of a post-dated cheque in the amount of \$500.00 intended as payment for a portion of October’s rent; presumably the security deposit was intended to serve as the balance, according to the tenancy agreement.

The tenants have not received a payment from the landlord. On October 29, 2014 they filed their application to claim payment of compensation pursuant to section 51(1) of the *Residential Tenancy Act* and for the refund of their security deposit, including payment of double the amount.

At the hearing the tenant’s advocate submitted that the tenants acted upon the landlord’s two month Notice to End Tenancy, by notifying the landlord that they would move out two months after the notice was given rather than three months afterwards.

The tenant's advocate argued that the Notice to End Tenancy should have been effective on September 30<sup>th</sup> and the tenants were entitled to treat it as effective on that day, to move out and to claim the compensation required by section 51(1) of the *Residential Tenancy Act*, namely: the sum of \$1,000.000, being an amount equivalent to one month's rent under the tenancy agreement. The tenant's advocate submitted that the Notice to End Tenancy should be considered to have "autocorrected" so as to end the tenancy on September 30<sup>th</sup> because the form was a "2 month" Notice; she submitted that it could not be amended to provide for a longer period of notice, as the landlord had purported to do.

Counsel for the landlord noted that section 49 (2) of the *Residential Tenancy Act* permits a landlord to give a Notice to End Tenancy for landlord's use effective on a date that must be not earlier than 2 months after the date that the tenant receives the Notice and, if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy. He submitted that the provisions of the Act do not prohibit the landlord from giving a period of notice that is greater than two months and he submitted that the Act does not allow a landlord to end a fixed term tenancy before the end of the fixed term..

The landlord further submitted that because the Notice ended the tenancy at the conclusion of the fixed term, there was no entitlement to compensation pursuant to section 51 of the Act.

The landlord has taken the position that the security deposit was intended to be applied towards the last month's rent and the tenants have not been excused from their obligation to pay rent for October and therefore the landlord was entitled to retain the deposit on account of October rent. The landlord has not filed an application for dispute resolution to claim the security deposit.

### Analysis

The tenancy agreement between the parties was for a fixed term ending October 31, 2014. The standard form of tenancy agreement provided for use by the Residential Tenancy Branch has provisions that allow the parties to select whether the tenancy will be a periodic or month to month tenancy, or whether it will be for a fixed term. If the tenancy agreement is for a fixed term then the parties must choose whether, at the end of the fixed term, the tenancy will continue on a month to month basis or for another fixed length of time, or whether the tenants must move out at the end of the term.

The parties created their own option, stated above and the agreement did not provide that the tenants must move out at the end of the fixed term. Section 44(1) of the

*Residential Tenancy Act* specifies how a tenancy ends; it provides by section 44(1) (b) that the tenancy will end if:

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

The *Act* provides by section 44(3) as follows:

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Because the tenancy agreement did not require the tenants to move out of the rental unit at the end of the fixed term, but instead contemplated a further term, I find that if the landlord wanted to end the tenancy at the end of the fixed term, she was required to give a Notice to End Tenancy for landlord's use to end the tenancy not earlier than October 31, 2014 and she was required to pay the compensation required under section 51(1).

The tenants decided to move out on September 30, 2014, but the *Residential Tenancy Act* does not permit the tenants to end the fixed term tenancy before the end of the fixed term. Section 50(1) of the *Act* only permits a tenant to give the landlord a notice to end the tenancy on an earlier date than the effective date of the Notice to End Tenancy if it is a periodic tenancy and not a fixed term tenancy.

Section 51(1.1) provides that a tenant may withhold payment of the last month's rent instead of receiving an equivalent payment from the landlord. The tenants moved out September 30<sup>th</sup> and paid no rent for October. I find, pursuant to section 51(1.1) that by withholding payment of October rent they have thereby received the compensation required to be given under section 51(1) and the landlord has no claim against the tenants for payment of rent for October. It follows that the landlord had no right to retain the tenants' \$500.00 security deposit on account of October's rent and she did not have the tenants' written authorization to keep the deposit.

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

I find that the tenancy ended effective October 31, 2014. The tenants' security deposit was not refunded within 15 days of the end of tenancy on 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 \$1,000.00. The tenants are entitled to recover the \$50.00 filing fee for this application for a total claim of \$1,050.00 and I grant the tenants a monetary order against the landlord in the said amount. This order may be registered in the Small Claims Court and enforced as an order of that Court.

### Conclusion

The tenants have been awarded the sum of \$1,050.00. Their claim for compensation pursuant to section 51(1) is dismissed without leave to reapply.

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 24, 2015

---

Residential Tenancy Branch

