



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD, MNDC, FF; MNSD, MNDC, FF

### Introduction

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

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act 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 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 call witnesses. The landlord's agent appeared for part of the hearing, but had issues maintaining a connection to the teleconference hearing. After multiple disconnections, the hearing continued in her absence.

### Preliminary Issue - Tenant's Evidence

The landlord stated that he did not receive the 16 photographs the tenant submitted as evidence. The tenant did not recall serving the landlord with the photographs. As such,

I cannot consider this evidence as it has not been provided to the landlord. The tenant's photographs are excluded.

### Issue(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary award for the return of all or a portion 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 this application from the landlord?

### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began 8 July 2014. The parties entered into a written tenancy agreement on that date. I was provided with a copy of this agreement. Monthly rent of \$750.00 was payable on the first. The landlord continues to hold the tenant's security deposit in the amount of \$375.00, which was collected 8 July 2014. The tenancy ended in late October 2014 when the tenant vacated the rental unit.

The tenancy agreement sets out that it was for an initial fixed term of one year. The tenant testified that there was a problem with mice in the rental unit. The tenant admitted that she never provided written notice of this issue to the landlord in advance of providing her notice to end tenancy.

The landlord denied that there were any issues with rodents in the building. The landlord testified that a new tenancy began in respect of the rental unit for 1 December 2014. The landlord testified that he and the agent advertised the rental unit both online and with a sign in front of the building.

The tenant testified that, on 30 September 2014, she provided notice to the landlord that she intended to vacate the rental unit on or before 31 October 2014. The tenant testified that she personally delivered the notice to the agent's live-in partner. The tenant testified that she asked for the agent, but the partner informed the tenant that the agent was not home. The tenant testified that she has dropped off her rent cheques to the agent's live in partner before and had not had issues with the landlord receiving payments this way. The tenant testified that her notice also included her forwarding address.

The agent testified that she did not receive the tenant's forwarding address. The landlord testified that he did not receive the tenant's forwarding address until the tenant sent a photograph of the letter by text message on 13 November 2014.

The agent testified that she completed a move in inspection and move out inspection with the tenant. The agent testified that she completed the move-in inspection on 8 July 2014 and the move out inspection in late October. The tenant testified that to the best of her knowledge she did not complete a move-in or move-out inspection report for this tenancy. The tenant testified that she is familiar with the Residential Tenancy Branch form for these reports, but only recalls completing this report in her existing tenancy. No reports were provided as evidence by either party. The agent disconnected from the hearing and did not reconnect. I was unable to have her clarify which report, if any, she used to complete the inspections.

I confirmed with the landlord that he was electing to limit his claimed loss for November to \$375.00, the amount of the tenant's security deposit.

The tenant seeks a total monetary order in the amount of \$750.00.

### Analysis

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

Subsection 45(3) of the Act allows a tenant to end a tenancy for breach of a material term:

45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a

reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

The tenant admits that she did not give notice of the failure in advance of providing the notice. As such the tenant cannot rely on subsection 45(3) of the Act.

I find that the landlord and tenant entered into a fixed term tenancy for the period 1 July 2014 to 30 June 2015.

Subsection 45(2) of the Act sets out how a tenant may end a fixed term tenancy:

A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

This means that a tenant cannot give notice to end the tenancy before the end of the fixed term. In this case, the tenant vacated the rental unit before the completion of the fixed term. The tenant has breached the Act and as a result the landlord experienced a loss.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

In this case the tenant has not complied with the Act and as a result the landlord experienced a loss. I accept the landlord's testimony that he was unable to find a new tenant until 1 December 2014 and thus had a rental loss for November 2014 in the amount of \$750.00. I find that by advertising the rental unit both outside the property and online the landlord attempted to mitigate his losses. Accordingly, the landlord has established an entitlement to a rental loss for November. The landlord has elected to

limit his rental loss to \$375.00, thus the landlord is entitled to recover \$375.00 from the tenant.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to subsection 38(6) of the Act equivalent to the value of the security deposit.

I find that by accepting rent payments on behalf of the landlord the agent's partner was acting as an agent for the landlord. The landlord did not elect to call the agent's partner as a witness to contradict the tenant's evidence. The agent is not in the best position to contradict the tenant's evidence as the agent was not present when the alleged interaction occurred. Accordingly, I find, on balance of probabilities, that the tenant delivered her forwarding address in writing to the landlord by leaving the notice with an agent of the landlord pursuant to paragraph 88(b) of the Act. I find that this service occurred on 30 September 2014.

I was not provided copies of condition move-in or move-out inspection reports. The tenant testified that to the best of her knowledge no such reports were completed. The agent testified that there were condition move-in and move-out inspections completed but disconnected before I could establish whether reports were completed. I prefer the complete evidence of the tenant to the incomplete evidence of the agent. Accordingly I find that the landlord did not complete a condition move-in or move-out inspection with the tenant. Accordingly, his right to claim against the security deposit was extinguished by this failure pursuant to both subsection 24(2) and 36(2).

As the landlord had no right to claim against the tenant's security deposit he could not file against it. As such, by failing to return the security deposit within fifteen days of the later of the end of the tenancy and the date he received the tenant's forwarding address in writing (that is 31 October 2014), the landlord has breached section 38 of the Act. As such, the tenant is entitled to both the return of her security deposit and an award equivalent to the amount of her security deposit: \$750.00.

The tenant's and landlord's awards will be offset.

As both parties have been successful in their applications, the parties shall bear their own cost of their filing fees.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$375.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Recover Security Deposit	\$375.00
Subsection 38(6) Compensation	375.00
Offset Landlord's Award	-375.00
<b>Total Monetary Order</b>	<b>\$375.00</b>

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) 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 subsection 9.1(1) of the Act

Dated: July 03, 2015

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Residential Tenancy Branch

