



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNDC, MNR, MNSD, FF; MNDC, MNSD, FF

### Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit, and 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 tenants' 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 tenants pursuant to section 72.

This also hearing dealt with the tenants' 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 their security deposit pursuant to section 38; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

The tenants attended the hearing. The landlord attended the hearing. The parties admitted service the opposing party's evidence. The landlord admitted receipt of the dispute resolution package.

### Preliminary Issue – Waiver of Section 50 Rights

The tenants did not set out in their application a claim pursuant to section 50 of the Act. At the hearing, I asked the tenants if this was done by inadvertence or was an

intentional waiver of the claim. The tenants informed me that it was done inadvertently because of a misunderstanding of sections 50 and 51 of the Act.

The tenants were given two options:

1. proceed with their application as pleaded and waive any claim pursuant to section 50 of the Act; or
2. change their application to include the claim pursuant to section 50 of the Act by way of an application to amend or withdrawing their claim with leave to refile.

The tenants elected to proceed with their application as pleaded and stated that they understood this irrevocable choice would result in an inability to claim pursuant to section 50 of the Act in the future.

#### Issue(s) to be Decided

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

Are the tenants entitled to a monetary award for the return of a portion of their security deposit? Are the tenants entitled to a monetary award equivalent to the amount of their security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the Act? Are the tenants entitled to compensation pursuant to section 51 of the Act? Are the tenants 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 1 January 2015 and ended 3 August 2015. Monthly rent in the amount of \$950.00 was due before the first of the month. The landlord collected a security deposit in the amount of \$475.00, which he continues to hold. The rental unit is 35 year old.

The landlord provided an email that he contends constitutes a condition inspection report at the beginning of the tenancy. The tenants reject that this email is sufficient to constitute a condition inspection report.

On 30 June 2015, the landlord delivered a notice to end tenancy to the tenant JH. The notice purported to be a 2 Month Notice to End Tenancy for Landlord's Use (the 2 Month Notice); however, it was not in the correct form. The 2 Month Notice set out that the landlord intended to occupy the rental unit. The 2 Month Notice set out an effective date of 1 September 2015.

On 18 July 2015, the tenants delivered a notice to end tenancy pursuant to section 50 of the Act (the 10 Day Notice). The 10 Day Notice was delivered to the landlord through his mail slot. The 10 Day Notice set out an effective date of 3 August 2015.

The tenants' forwarding address was provided to the landlord on 18 July 2015 with the tenants' 10 Day Notice.

On or about 28 July 2015, the tenants paid \$96.00 in prorated rent for August to the landlord.

The landlord testified that the rental unit was last painted nine years ago. The landlord testified that the rental unit was "touched up" prior to the tenancy beginning. The tenants asked the landlord if he would pay for a painter to repaint the tenants' child's room. The landlord rejected this request, but offered to pay for paint for the tenants to repaint the room themselves.

The landlord testified that the tenants did a poor job repainting the child's room. The landlord testified that it was necessary to sand down paint drips and repaint the room. The tenant KM testified that she has experience painting and has painted between fifteen and thirty rooms. The tenant KM testified that the room was well painted and denied that it required repainting. The tenant KM testified that she used a drop cloth when she was painting. The tenant KM testified that she did not observe any drops of paint, but admitted that it was possible that the paint drops existed.

The landlord testified that the carpet was nine years old. The landlord agreed that the carpet was worn when the tenancy began, but denies that it was as bad as the witness MI describes in her statement. The landlord testified that there were paint drop spills in the child's room and a stain on the carpet in the living room. The landlord submitted that it was not possible to replace only part of the carpet because the carpet was in one piece. The landlord testified that he replaced the carpet with a less costly replacement.

The tenants admitted that they caused carpet discolouration. The tenant KM testified that she believes the discolouration resulted from the tenants' attempt to clean a stain. The tenants testified that there was a stain in the same area from a previous occupant of the rental unit. The tenants submitted that the landlord's characterization of the prior stain as wear and tear is inconsistent. The tenants submit that the damage was insignificant.

The landlord submits that the 10 Day Notice was void as a result of the tenants' failure to deliver the prorated rent at the same time. The landlord submits that this failure functions to void the 2 Month Notice and the tenants' right to compensation pursuant to that notice. The landlord submits that the tenants abandoned the rental unit on 3 August 2015.

The landlord testified that on 3 August 2015 the landlord and tenants completed a walk through together. The landlord testified that the place looked clean but that he was in a hurry. The landlord testified that he did not notice the carpet stains or the paint. The landlord testified that on 4 August 2015 he did a better inspection of the rental unit. The landlord submits that he provided the tenants with additional opportunities to attend at the rental unit to examine the deficiencies of which the landlord complained. The tenants did not attend to re-inspect the rental unit. The tenants submit that the deficiencies should have been raised at the end of tenancy inspection. The tenants submit that the landlord has failed to provide photographs or reports regarding the deficiencies. The tenant JH stated that he found the landlord's discoveries to be conveniently timed.

The landlord claims for \$3,605.99:

<b>Item</b>	<b>Amount</b>
August Rent	\$854.00
Paint	95.96
Painting Labour	200.00
Carpet	2,256.03
Carpet Labour	100.00
Filing Fee	100.00
<b>Total Monetary Order Sought</b>	<b>\$3,605.99</b>

The tenants claim for \$1,950.00:

<b>Item</b>	<b>Amount</b>
Return of Security Deposit	\$475.00

Subsection 38(6) Compensation	475.00
Section 51 Compensation	950.00
Filing Fee	50.00
<b>Total Monetary Order Sought</b>	<b>\$1,950.00</b>

## Analysis

### ***Tenants' Application***

#### *Section 51 Compensation*

The landlord provided a 2 Month Notice to the tenants pursuant to section 49 of the Act. Although the landlord did not comply with section 52 of the Act, the tenants were entitled to rely on this notice. Pursuant to subsection 51(1) of the Act a tenant who receives a notice pursuant to section 49 is entitled to receive from the landlord on or before the effective date of the landlord's notice and amount that is the equivalent of one month's rent.

The landlord submits that the tenants' "invalid" 10 Day Notice negates his requirement to pay compensation pursuant to subsection 51(1) of the Act. I disagree.

The Act does not provide for any way by which the tenants lose their entitlement to this compensation. Further, the tenants' 10 Day Notice was entirely in compliance with the Act.

Pursuant to section 50 a tenant may end a tenancy with ten days' notice where they receive a notice pursuant to section 49 of the Act:

- (1) If a landlord gives a tenant notice to end a periodic tenancy under section 49 *[landlord's use of property]* or 49.1 *[landlord's notice: tenant ceases to qualify]*, the tenant may end the tenancy early by
  - (a) giving the landlord at least 10 days' written notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice, and
  - (b) paying the landlord, on the date the tenant's notice is given, the proportion of the rent due to the effective date of the tenant's notice, unless subsection (2) applies.
- (2) If the tenant paid rent before giving a notice under subsection (1), on receiving the tenant's notice, the landlord must refund any rent paid for a period after the effective date of the tenant's notice.

- (3) A notice under this section does not affect the tenant's right to compensation under section 51 [*tenant's compensation: section 49 notice*].

[emphasis added]

I find that the tenants issued a valid ten-day notice pursuant to section 50 of the Act. At the time the tenants provided their notice to end tenancy there was no rent due under the tenancy agreement. The tenants' rent was due 1 August 2015. Furthermore, pursuant to subsection 51(1.1) the tenants were entitled to withhold rent due 1 August 2015 and that amount would have been deemed paid.

In this case the tenants would have actually been entitled to withhold rent for August (\$950.00) and to a refund for the deemed rent paid for August (\$854.00) pursuant to sections 50 and 51 of the Act. The tenants have elected to waive their right to recovery of their deemed rent paid pursuant to section 50 of the Act. On this basis, I award the tenants \$950.00 in compensation pursuant to section 51.

*Security Deposit and Compensation: \$950.00*

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.

The tenancy ended 3 August 2015. The tenants provided their forwarding address in writing on 18 July 2015. In accordance with subsection 38(1) of the Act the landlord had until 18 August 2015 to either file for dispute resolution or return the tenants' security deposit to them. The landlord did not file his application until 22 January 2016.

On this basis, the tenants are entitled to return of their security deposit as well as compensation equivalent to the amount of their security deposit for the landlord's failure to comply with section 38 of the Act.

### *Filing Fee*

As the tenants have been entirely successful in their application, they are entitled to recover their filing fee from the landlord.

### ***Landlord's Application***

#### *Rent*

The landlord claims for rent for the remainder of August 2015. As set out above, pursuant to subsection 51(1) of the Act the tenants were entitled not to pay rent for all of August. The landlord is not entitled to any rent. The landlord's application for rent for August is dismissed.

#### *Paint*

The landlord claims \$295.00 for the cost of repainting a room.

The tenants were given permission to repaint the bedroom. The bedroom had last been repainted nine years prior. The tenants submit that the room did not require repainting. The landlord submits that the tenants did a poor job of painting the room and that it required repainting. I was not provided with any photographs to document the condition of the paint job. There were no condition inspection reports created for this tenancy at either the beginning or end of tenancy. Nothing was noted at the walk through at the end of the tenancy.

Subsection 32(3) of the Act requires a tenant to repair damage to the rental unit or common areas that was caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant. Caused means that the actions of the tenant or his visitor logically led to the damage of which the landlord complains.

In this case, the landlord has not provided sufficient evidence to show that the quality of the paint job in the bedroom constituted damage within the meaning of section 32(3) of the Act. Further, the landlord has testified that the paint in the rental unit was nine years old. *Residential Tenancy Policy Guideline* "40. Useful Life of Building Elements" (Guideline 40) provides me with direction in determining damage to capital property. This guideline sets out that the useful life expectancy of interior paint is four years. As such, the capital value of the interior paint had fully depreciated and has no value. On this basis, I find that the landlord is not entitled to recover the cost of repainting.

### *Carpet*

The landlord seeks \$2,356.03 in compensation for replacement of the carpeting.

Subsection 32(3) of the Act requires a tenant to repair damage to the rental unit or common areas that was caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

The landlord testified that the tenants caused small paint drops in the bedroom as well as a stain in the living room. The landlord submits that it was necessary to replace the entire carpet as the carpet was a single piece and thus impossible to repair in part. The carpet was nine years old.

The tenants admit that it is possible that there were paint drops but do not recall every seeing any. The tenants admit that their child caused a stain on the living room carpet and that the tenants' attempts to clean this stain resulted in discolouration of that area. The tenants submit that they should not be responsible for replacing the entire carpet as the stain was near to a similar stain from a previous tenancy that the landlord had characterised as "wear and tear". The tenants submit that the landlord's characterization is inconsistent.

I have not been provided with any photographs of the discoloured area. There were no condition inspection reports created for this tenancy at the beginning or end of tenancy. Nothing was noted at the walk through at the end of the tenancy.

On the basis of this evidence, I find that the landlord has failed to show on a balance of probabilities that the tenants caused damage to the carpet in the bedroom area as a result of paint drops. The landlord has shown that the tenants caused the discolouration in the living room area. I disagree with the tenant's submission that this stain constitutes wear and tear. I find that the tenants breached section 32(3) of the Act by causing damage to the carpet in the living room.

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.

The landlord has provided receipts for costs totalling \$2,356.03

Guideline 40 sets out that the useful life expectancy of carpet is ten years. The landlord testified that the carpet was 9 years old. As such, the capital value of the carpet had depreciated by 90%. The maximum value that the landlord could recover for the carpet was \$235.60. Additionally, the carpet had a pre-existing damage of a similar nature so was even further devalued.

*Residential Tenancy Policy Guideline*, "5. Duty to Minimize Loss" (Guideline 5) elaborates on a claimant's duty to minimise his or her loss:

Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act o..., the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss<sup>1</sup>. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The landlord has not provided evidence that is sufficient to show that he had to replace the entire carpet in the rental unit and not just the affected area. On this basis, the landlord has failed to show that he has mitigated his loss as he incurred expenses greater than was reasonable in the circumstances.

Guideline 5 establishes the effect of a finding of failure to mitigate:

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved.

I have no basis for determining an alternate amount; however, where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. I award the landlord nominal damages of \$100.00 for the tenants' discolouration of the living room carpet.

*Filing Fee*

The landlord claimed compensation of over \$3,500.00 from the tenant. Further, the landlord's refused to comply with the Act in the course of return the tenants' security deposit and in relation to the 2 Month Notice and end to tenancy. This refusal appears to be predicated on fundamental misunderstandings of his obligation as landlord.

As the landlord has been largely unsuccessful in his claim, and the tenants have been successful in their claim, I decline to award the landlord recovery of his filing fee.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$1,850.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Return of Security Deposit	\$475.00
Subsection 38(6) Compensation	475.00
Section 51 Compensation	950.00
Filing Fee	50.00
Less Landlord's Award	-100.00
<b>Total Monetary Order</b>	<b>\$1,850.00</b>

The tenants are provided with a monetary order in the above terms and the landlord must be served with this order as soon as possible. Should the landlord fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial 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 subsection 9.1(1) of the Act.

Dated: March 02, 2016

---

Residential Tenancy Branch

