



## **DECISION**

Dispute Codes      FF MNSD MND MNDC

### Introduction

This hearing was convened in response to applications by both parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The tenants requested:

- double the return of their damage deposit pursuant to section 38 of the *Act*; and
- a return of their filing fee pursuant to section 72 of the *Act*.

The landlord requested:

- authorization to retain the security deposit pursuant to section 72 of the *Act*;
- authorization to recover their filing fee for this application from the tenants pursuant to section 72 of the *Act*; and
- a Monetary Order for damage to the rental unit pursuant to section 67 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. At the outset of the hearing, the landlord stated that he would prefer his wife, KK to appear on his behalf at the hearing as his advocate. The tenants were represented at the hearing by male tenant, JA.

Both parties confirmed receipt of each other’s evidentiary and application for dispute resolution hearing package (“Applications”). The landlord confirmed individual dispute resolution packages had been sent to both named tenants. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenants were duly served with the evidentiary packages and applications.

### Issue(s) to be Decided

Are the tenants entitled to a return of double their security deposit? If not, is the landlord entitled to retain it as compensation for damage to the rental unit?

Is the landlord entitled to a Monetary Order for damage to the rental unit?

Is either party entitled to a return of their filing fee?

### Background and Evidence

Testimony was provided by both parties that this tenancy began approximately on August 25, 2015 and ended on November 30, 2016. Rent was \$800.00 per month and a security deposit of \$400.00 continues to be held by the landlord.

It was very difficult to establish the background and evidence in this matter. Both parties accused the other of being dishonest and both parties produced evidence that contradicted the other. The only issues on which these parties agreed were the amount of rent due and the amount retained for security deposit.

KK explained that the landlord required a Monetary Order of \$170.00 for the following items and an Order to retain the \$400.00 security deposit due to damage that had been done to the rental unit over the course of the tenancy.

Item	Amount
Kitchen Cabinet and Labour	\$370.00
Living Room Wall painting	200.00
Less Security Deposit	(-400.00)
Total =	\$170.00

Specifically cited were a missing cupboard door that needed to be replaced and scuffs along the wall that required repainting. KK testified that these marks were not present during a condition inspection performed at the start of the tenancy. KK claimed that the tenants did not attend a condition inspection following the conclusion of the tenancy, which he performed on November 30, 2016. Receipts were produced for the hearing, demonstrating that the landlord had to pay a contractor to replace the cupboard and a painter to touch up the scuffs to the wall.

The tenants maintained that no condition inspections were performed either at the outset or the conclusion of the tenancy. The tenants stated that the suite was unfinished when they took possession of it and the paint was unfinished and cupboards were broken. The tenant submitted pictures allegedly taken at the start of the tenancy showing mismatched paint on walls and a cupboard that appears to be slightly ajar. JA testified that he was told on August 25, 2015 that the damage present at the beginning of this tenancy “would be fixed later.” The tenants are seeking double the amount of their damage deposit, as the landlord has not returned it to them.

During the course of the hearing, KK, produced evidence that efforts had been made on the part of the landlord to perform Condition Inspection reports. Evidence was produced at the hearing showing that a move in Condition Inspection Report was signed by the male tenant. The male tenant maintained that he merely signed the clause stating there was to be “no smoking and no pets” and did not actually agree to the clause citing damage. He alleged that the landlord had included these remarks after he had signed the report.

KK produced evidence that she had taken time off of work to attend the Condition Inspection Report at the conclusion of the tenancy which the tenants did not attend.

### Analysis – Security Deposit

Section 38 of the *Act* requires the landlord to either return the tenants’ security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy, or upon receipt of the tenants’ provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant’s written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy as per section 38(4)(a) of the *Act*.

In order for section 38 of the *Act* to be triggered, we must examine sections 35 and 36 of the *Act*.

Section 35 notes:

- 35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
- (a) on or after the day the tenant ceases to occupy the rental unit, or
  - (b) on another mutually agreed day.
- (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.

Section 36 states:

- 36** (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*], and
- (b) the tenant has not participated on either occasion.

At the hearing, it was revealed that the tenants were only given one opportunity to schedule a Condition Inspection of the rental suite at the conclusion of the tenancy.

No evidence was produced that the landlord provided 2 opportunities for inspection; therefore, the tenants' right to a return of a security deposit is not extinguished.

Since the landlord failed to provide 2 opportunities for inspection, the tenants' application for a return of the security deposit is therefore successful.

Based on the undisputed evidence before me, I find that the landlords have neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. The tenants gave sworn oral testimony that they have not waived their rights to obtain a payment pursuant to section 38 of the *Act* owing as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I find that the tenants are entitled to an \$800.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

#### Analysis – Monetary Order

The landlord is seeking a Monetary Order of \$570.00 to recover costs for a damaged cupboard and paint work. Conflicting evidence and testimony were presented at the hearing concerning condition inspection reports performed prior to, and following the tenancy.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove their entitlement to their claim for a monetary award.

The burden of proof related to this matter requires demonstrating that the proposition is more likely true than not true. I am satisfied that the landlord has met the burden of proof that all of the damage alleged to have been carried out by the tenants was not present prior to the tenants taking possession of the rental unit.

While the tenants produced dated photos showing the suite contained walls that had mismatched paint when they moved in on August 25, 2015, no evidence and no explanation was produced concerning a large mark that was left on the living room wall.

Photographic evidence produced by the tenants dated September 14, 2016 demonstrates that the cupboards are in place.

The landlord is not seeking repayment for paint works of the entire suite. He is merely looking to recoup the costs of the one living room wall that was damaged by things unknown. Photographic evidence from the tenants dated December 1, 2016 demonstrates that a large black mark is present on the wall. No evidence was produced at the hearing by the tenants to refute that this mark was not present at the outset of the tenancy. The tenants merely maintained that the suite remained unpainted.

It is for this reason that I am allowing the landlord's application for a Monetary Order. I am awarding the landlord the entire sum of his Monetary Order of \$570.00.

As both parties were successful in aspects of their application, neither party may recoup the \$100.00 filing fee from the other.

### Conclusion

The tenants' application for double the return of the security deposit is successful.

The landlord's application for a Monetary Order is successful.

As both parties were successful in their applications, these awards will partially offset one another.

I issue a Monetary Order in the tenants favour in the amount of \$230.00 against the landlord. 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.

Item	Amount
Return of Security Deposit x 2	\$800.00
Less Damages awarded to Landlord	-570.00
Total =	\$230.00

Both parties must bear the cost of their own filing fee.

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: February 20, 2017

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Residential Tenancy Branch