



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNSD MNDC OLC

### Introduction

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

- a monetary order for the cost of a monetary loss pursuant to section 67;
- authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62.

The landlord/respondent did not attend this hearing, although I waited until 1:49 p.m. in order to enable the landlord to connect with this teleconference hearing scheduled for 1:30 p.m. The tenant/applicant attended the hearing and was given a full opportunity to be heard, to present sworn testimony, and to make submissions towards her application.

The tenant provided evidence to show that she served her Application for Dispute Resolution hearing package ("ADR") to the landlord by registered mail on October 21, 2016. She provided the detailed tracking information as well as the Canada Post tracking number for this mailing. The details show that the package was "refused by the recipient" and eventually returned to the tenant when not picked up by the recipient. The tenant sent a second registered mail package to the landlord with both evidence and a second copy of the ADR with notice of this hearing date to the landlord by registered mail on March 22, 2017. The tracking information with tracking number provided for this mailing also indicated that the recipient had refused service and not picked up the package so that the package was eventually returned to the tenant.

I refer to Residential Tenancy Policy Guideline No. 12 with respect to service. That guideline outlines the standard to meet sufficient service in accordance with section 88 through 90 of the Act.

*The Legislation sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received:*

- if given or served by mail (ordinary or Registered Mail), on the fifth day after mailing it...*

*...Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision.*

*... Where Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.*

Given the detailed evidence and testimony with respect to service of all of the tenant's documents and evidence for this hearing, including the ADR with Notice of Hearing, I find that the landlord was deemed served with the ADR on October 26, 2016 and with the tenant's subsequently submitted evidence on March 27, 2017. I find that the landlord was sufficiently served in accordance with the service sections of the Act and therefore, was aware or should have been aware of this hearing date.

#### Issue(s) to be Decided

Is the tenant entitled to a monetary order for monetary loss?

Is the tenant entitled to the return of all or a portion of her security deposit?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*?

#### Background and Evidence

This tenancy began on April 17, 2016 as a one year fixed term. The rental amount of \$1100.00 was payable on the 18<sup>th</sup> of each month. The tenant testified that the landlord continues to hold a portion of her \$500.00 security deposit that she paid to the landlord on March 25, 2016. The tenant sought to recover her security deposit, a monetary order to reflect wage loss for attending this hearing as well as 3 days (September 28 to October 1) rent when she was not allowed access to the residence and compensation for an early end to the tenancy.

In her application for dispute resolution, the tenant wrote that communication with the landlord was very challenging. The tenant testified that the landlord put the rental unit/residence up for sale shortly after she moved into the rental unit. The tenant testified that the landlord and tenant agreed that she would receive 2 months' notice prior to being required to vacate the rental unit and 2 months' compensation after the sale of the property.

The tenant testified that the landlord initially requested that the tenant vacate the rental unit for October 18, 2016. The landlord provided the tenant with 2 months' notice to vacate the rental unit. The tenant testified that, as the date for move-out approached, the landlord pushed the date ahead. The tenant testified that the landlord requested that the tenant vacate the unit October 1, 2016, earlier than originally agreed. As the end of September 2016 approached, the landlord required that the tenant vacate the rental unit on September 28, 2016. The tenant testified that the condition inspection took place that day and that she returned the keys to the landlord. She submitted text correspondence to support that testimony. The tenant sought to recover \$110.00 to reflect the 3 days she paid for rent that she was unable to access the unit.

The tenant testified that on September 28, 2016 at 9.00 a.m. in the morning, the landlord and tenant walked through the residence to inspect its condition. She testified that there was no report prepared by the landlord or provided to her with respect to the condition of the rental unit. The tenant testified that the landlord requested the tenant text her forwarding address to the landlord and that the landlord told the tenant she would be returning the tenant's deposit.

The tenant testified that she provided the landlord her forwarding address by text on September 29, 2016. The tenant submitted text correspondence between the two parties showing that

- the landlord acknowledged receipt of the forwarding address;
- the landlord initially stated she would return the tenant's deposit;
- the landlord later asked the tenant if she could retain a portion of the tenant's deposit; and that
- the landlord only returned \$337.00 of the tenant's \$500.00 security deposit.

The tenant sought to recover the remainder of her \$500.00 security deposit (\$163.00). There was an indication in the tenant's materials that the landlord may have attempted to return the \$163.00 outstanding to the tenant. However, this attempt appears to have been made on October 17, 2016, more than 15 days after the tenant provided her forwarding address, according to her testimony and documentary evidence.

The tenant also sought to recover lost wages for having to attend this hearing to recover her deposit and other funds owed to her by the landlord. With respect to the tenant's request to recover her lost wages, she provided documentary evidence to show her work schedule and the amount of her regular pay.

The tenant referred to the text correspondence to support her claim for what she described as a “lease breaking fee”. The tenant testified that the landlord told her that she would compensate the tenant for the early end to her fixed term tenancy. I note that the correspondence between the landlord and tenant submitted for this application makes several references to this agreement. The landlord’s response to the tenant, even after this application had been filed, indicated that she intended to pay \$1100.00 to the tenant after the sale of her home.

The tenant testified that the landlord did not serve her with a formal notice to end tenancy: there was no formal written agreement, no mutual agreement to end tenancy form and no concrete agreement within the text correspondence itself. However, the tenant referred to the correspondence between the parties in support of her claim. The text correspondence between the parties shows that there was a discussion that the tenant may receive 2 months’ rent when the landlord sold the residence.

### Analysis

With respect to the tenant’s claim for lost wages, I find that this is not a claim that falls within the scope of section 67 of the Residential Tenancy Act. Residential Tenancy Guideline No. 16 provides further guidance with respect to damage or loss compensable under the Act. Damage does not refer solely to physical property damage only but is limited to damage that has been caused by the other party. In the case of the dispute resolution process, the compensation available to the applicant is the recovery of a filing fee for the application. The principles of fairness, integral to the dispute resolution process, are not met by allowing wage recovery in these circumstances. Therefore, **I dismiss the tenant’s claim for wage loss to prepare for and attend this hearing.**

With respect to the tenant’s claim for 3 days rent when she was asked to vacate but not refunded the portion of her rent to cover those 3 days has been proven by the tenant. I accept the tenant’s testimony that, based on the landlord’s in person and message requests, she was pressured to vacate the rental unit by September 28, 2016. The tenant provided undisputed documented testimony that she paid the entire rental amount for September 2016 but vacated the rental unit, at the request of the landlord 3 days’ early, **I find that the tenant is entitled to 3 days’ rent in the amount of \$110.00 (\$36.66 per day).**

With respect to the lease breaking fee agreement described by the tenant, I find that the tenant has provided sufficient documentary evidence to support her testimony. She testified, in detail with respect to her agreement with the landlord to be paid 2 months’

rent in compensation for her move-out. The tenant was candid and thorough in her testimony and referred repeatedly to the documentary evidence she submitted, including text correspondence. The documentary evidence submitted by the tenant shows the landlord refer repeatedly to the money that will be given to the tenant when she sells her property.

I accept the testimony of the tenant and the supporting documentary evidence submitted for this hearing that the tenant is owed \$110.00 by the landlord based on their mutual, oral agreement at the end of tenancy. While a written mutual agreement to end tenancy, a 2 Month Notice or another written agreement with respect to the end of tenancy would have been the best evidence to support the tenant's testimony, I find that she has met her burden of proof in providing evidence to show, on a balance of probabilities that the landlord agreed to pay her to end her one year tenancy early. Therefore, **I find the tenant is entitled to \$1100.00** – the amount agreed to be paid by the landlord for an early end to this tenancy.

With respect to the tenant's application for the return of the remainder of her security deposit, section 38 is applicable. 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 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*).

The triggering event for the landlord's return of a security deposit is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, the landlord was informed of the forwarding address by text message on September 29, 2016. The tenant submitted copies of the text message correspondence which proved that she provided the address at this time. The correspondence also proved that the landlord received the forwarding address and used it to return a portion of her security deposit.

Given the requirement for *written* notice to the landlord, text correspondence would not necessarily meet the requirements for delivery of the forwarding address. However, I note that the tenant also provided the landlord's response confirming receipt of the address and that the tenant acknowledged a portion of her security deposit had been returned to her. Based on the evidence submitted by the tenant, I find that the landlord had 15 days after September 29, 2016 to take one of the actions outlined above.

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.” The tenant testified that she did not agree to allow the landlord to retain any portion of her security deposit and I find there is no other evidence that the tenant gave the landlord any authorization at the end of this tenancy to retain any portion of her deposit. Section 38(4)(a) is not applicable.

The landlord did not apply to the Residential Tenancy Branch to retain the tenant’s deposit and she did not attend the hearing. However, I find there is sufficient proof that the landlord was sufficiently served with the Notice of Hearing and other hearing documents in accordance with the *Act*. Therefore, **I find that the tenant is entitled to a monetary order including \$163.00 for the return of the remainder of her security deposit.**

The following provisions of Policy Guideline 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 not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant’s forwarding address is received in writing;*
- *If the landlord has claimed against the deposit for damage to the rental unit and the landlord’s right to make such a claim has been extinguished under the Act;*
- *If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration process;*
- *If the landlord has obtained the tenant’s written agreement to deduct from the security deposit for damage to the rental unit after the landlord’s right to obtain such agreement has been extinguished under the Act;*
- *whether or not the landlord may have a valid monetary claim.*

Based on the undisputed evidence of the tenant before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant’s security deposit in full within the required 15 days. I find that the tenant has not waived her right 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 tenant is therefore entitled to a monetary order including an amount equal to the value of her security deposit**

**(\$500.00) with any interest calculated on the original amount only. No interest is payable for this period.**

I issue a monetary order to the tenant as follows,

Item	Amount
Return of Security Deposit Remainder	\$163.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	500.00
3 days' Rent	110.00
1 months' Rent equivalent	1100.00
<b>Total Monetary Order</b>	<b>\$1873.00</b>

### Conclusion

I dismiss the tenant's claim for wage loss.

I grant the tenant's application in part and issue a monetary order to the tenant in the amount of \$1873.00.

The tenant is provided with this 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 25, 2017

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Residential Tenancy Branch