



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC MNSD O FF

### Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* ("the Act"). The landlord applied for: a monetary order for damage to the unit 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 the filing fee for this application from the tenant pursuant to section 72.

The tenant applied pursuant to the Act for: authorization to obtain a return of all or a portion of her security deposit pursuant to section 38; and authorization to recover the 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, and to make submissions. Both parties confirmed receipt of the other's application for dispute resolution package with evidentiary submissions for this hearing.

### Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage to the unit?

Is the landlord entitled to retain all or a portion of the tenant's security deposit?

Or is the tenant entitled to obtain the return of all or a portion of her security deposit?

Is either party entitled to recover the filing fee for this application from the other party?

### Background and Evidence

This tenancy was set to begin on April 1, 2017. Prior to the outset of the tenancy, the tenant paid the landlord a security deposit in the amount of \$1100.00. Although the tenant did not move in to the rental unit, the landlord continues to retain the security deposit and seeks authority to retain the deposit towards a monetary amount reflecting his loss and damage when the tenant did not move into the rental unit. The tenant seeks the return of her security deposit from the landlord.

The landlord testified that he placed an advertisement for his rental unit online. He testified that he held two showings of the rental unit and that the tenant attended both. He provided undisputed testimony that, on the second showing date, the tenant advised him that she was interested in renting the unit. The landlord testified that he checked the tenant's references and, on March 21, 2017, the two parties met and signed a residential tenancy agreement. The agreement indicated that rent would be \$2200.00 each month plus the cost of utilities.

The parties agreed that the next day, March 22, 2017, the landlord contacted the tenant via email to advise her that the utilities were in his name, that they would be split 30/70 with the landlord paying 70% and that he wondered if she would like to agree to a monthly amount that would then be reconciled at the end of the year. The tenant testified that, after considering the landlord's proposal, the rental and utilities arrangement would not be acceptable to her. The landlord testified that he then advised the tenant that he would work to accommodate her by any arrangement she felt was fair.

On March 23, 2017 without any further discussion, the tenant provided the landlord with a notice to terminate the tenancy. She wrote to the landlord requesting the return of her security deposit. The landlord testified that he attempted to re-rent the unit immediately. He testified that he contacted other prospective tenants who had expressed interest at the showings. He testified that he re-posted his advertisement for the rental unit online. He submitted emails of correspondence with different perspective tenants where the other parties indicated that they had already found other accommodations. The landlord testified that he re-rented the unit on June 1, 2017 however he ultimately arranged to have the new tenants move in one week early to mitigate his loss and any amount owed by the tenant.

### Analysis

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.

I find that the landlord incurred financial loss as a result of the tenant's last minute decision to retract her agreement to rent the unit. I find that the landlord did not collect April 2017 monthly rent as a result of the actions of the tenant in reneging on her agreement to move into the rental unit for April 1, 2017. I accept the landlord's testimony that he was unable to re-rent the unit for April 1, 2017. I accept the landlord's documentary evidence to support his position that he made significant attempts to re-rent the unit as soon as possible. Therefore, I find that the landlord has attempted to mitigate the loss as a result of the tenant's actions as best he could and the tenant is responsible for the loss incurred by the landlord as a result of her failure to act in accordance with the signed tenancy agreement.

With respect to the tenant's application for return of the security deposit, 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 deposits, and the landlord must return the tenant's security deposit 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 event that triggers a landlord's obligation to return or apply to retain the security deposit is the latter of the end of the tenancy or the tenant's provision of the forwarding address. In this case, I cannot consider the provision of a forwarding address as the tenant did not move from her previous address and therefore had no forwarding address to provide: the address remained that same as her address at the start of the communication with the landlord. Further, I cannot rely on the vacate date as the tenant never moved in to the rental unit. In this unique circumstance, I rely for a triggering event on the date that the landlord received clear communication that this tenancy would not come to fruition.

In this case, the landlord was informed by the tenant that she would not move in to the rental unit by March 23, 2017. The tenant made her application for the return of her security deposit on April 20, 2017. However, the landlord did not make his application to retain the deposit until June 15, 2017 – two and a half months after he became aware that the tenant did not intend to move in and several weeks after he had re-rented the unit. I find that the landlord did not apply to retain the tenant's security deposit within 15 days of any of the dates above that might be relevant to the end of the tenancy and the triggering of his obligations with respect to the tenant's deposit.

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. As there is no evidence that the tenant has given the landlord written authorization at the end of this tenancy to retain any portion of her deposits, section 38(4)(a) of the *Act* does not apply to the tenant’s security deposit.

The tenant seeks return of both her security deposit. While the landlord applied to the Residential Tenancy Branch to retain the tenant’s deposit, he did not do so within 15 days of the end of the tenancy (as discussed above). I find that the tenant is entitled to a monetary order including \$1100.00 for the return of the full amount 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.*

Most of the evidence provided by both parties at this hearing was agreed upon. The landlord agreed that the tenant advised him she would not move in to the rental unit on March 23, 2017. The tenant confirmed that she did agree and sign a tenancy agreement prior to changing her mind. Based on the evidence of the parties at this hearing, 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. The tenant testified that she 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 total monetary order amounting to double the value of her security deposit (\$1100.00) with any interest calculated on the original amount only. No interest is payable for this period.

Given that both parties were both partly successful in their own applications, I find that they are not entitled to recover the cost of their applications from each other: each party will pay their own filing fees.

### Conclusion

I issue a monetary Order in favour of the landlord as follows:

<b>Item</b>	<b>Amount</b>
7 weeks Rental Loss owed to LL	\$3850.00
Return of Security Deposit	-1100.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	-1100.00
<b>Total Monetary Order</b>	<b>\$1650.00</b>

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: September 25, 2017

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Residential Tenancy Branch