



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding FERNIE REAL ESTATE - PROPERTY MANAGEMENT DIVISION  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNSD, FF

### Introduction

This hearing dealt with an Application by the Tenants for a monetary order for return of double the security deposit paid to the Landlord and for the return of the filing fee for the Application, under the Residential Tenancy Act (the “Act”).

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

The parties had exchanged evidence prior to the hearing and no issues were raised in regard to the service of evidence.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

### Issue(s) to be Decided

Has there been a breach of section 38 of the Act by the Landlord?

### Background and Evidence

The parties entered into a written tenancy agreement on or about July 25, 2016, for a tenancy to start on August 1, 2016. The tenancy was for a fixed term of nine months to April 30, 2017, and then was to continue on a month to month basis. The monthly rent

was \$1,700.00. The Tenants paid the Landlord a security deposit of \$850.00 on or about July 25, 2016.

The Tenants vacated the premises on April 30, 2017.

The Tenants provided the Landlord with the keys to the unit and a written notice of the forwarding address to return the security deposit to, by dropping these off in an envelope at the Landlord's office. In evidence the Tenants provided a copy of the letter, dated April 30, 2017. In that letter the Tenants inform the Landlord that since no move out condition inspection report was performed they expect the entire deposit to be returned to them within 15 days, in accordance with the Residential Tenancy Act.

The Tenants did not sign over a portion of the security deposit.

The Tenants testified that the Landlord did perform an incoming condition inspection report. The Tenants further testified that the Landlord did not arrange for an outgoing condition inspection report.

The Agent for the Landlord testified that when the incoming condition inspection report was completed the Tenants agreed to pay for steam cleaning of the carpets at the end of the tenancy. There is no amount noted on the report for the cost of this. The Agent conducting the incoming report waived the outgoing cleaning fee.

The Agent testified these were excellent Tenants, who did not cause any damage to the rental unit.

The Agent testified that she phoned the Tenants and left a message on May 1, 2017, wanting to set up a time to do the outgoing condition inspection report.

The Tenants testified that they called the Agent back and just got her voice mail. They left a message but the Agent did not call back.

The Agent testified they did not give the Tenants a second opportunity in writing or otherwise to set up a time for the outgoing condition inspection report.

The Agent thought the Tenants agreed to a deduction for steam cleaning. The Agent deducted \$63.00 from the security deposit held and returned \$787.00 of the deposit to the Tenants on May 17, 2017, by electronic funds transfer.

### Analysis

The Act contains comprehensive provisions on dealing with security and pet damage deposits. Under section 38 to the Act, the Landlord is required to handle the security deposit as follows:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

...

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

[Reproduced as written.]

I note that paragraph 4 of the tenancy agreement used by the parties expresses this portion of the Act as well.

Under section 35 of the Act, the Landlord must provide the Tenants with a second opportunity in writing to meet for the outgoing condition inspection report, as follows:

**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.

(3) The landlord must complete a condition inspection report in accordance with the regulations.

(4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

(5) The landlord may make the inspection and complete and sign the report without the tenant if

(a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or

(b) the tenant has abandoned the rental unit.

The consequences to the Landlord for failing to do this are explained in section 36(2):

(2) Unless the tenant has abandoned the rental unit, the right of the landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord

(a) does not comply with section 35 (2) [*2 opportunities for inspection*],

(b) having complied with section 35 (2), does not participate on either occasion, or

(c) having made an inspection with the tenant, does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

In this circumstance I find the Landlord failed to provide the Tenants with a second opportunity in writing, as prescribed by the regulations, to conduct an outgoing condition inspection report. In fact, I find the Agent did not even provide a first opportunity to the Tenants to meet for an outgoing condition inspection report. The Agent did not return the Tenants' calls, and simply went ahead and did a condition inspection report without them. I find this extinguished the right to keep any portion of the security deposit or to claim against it.

Therefore, I find that the Landlord is in breach of the Act.

The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to Residential Tenancies.

The security deposit is held in trust for the Tenants by the Landlord. At no time does the Landlord have the ability to simply keep the security deposit or a portion of it because they feel they are entitled to it or are justified to keep it.

Furthermore, the Act precludes the parties from agreeing to deductions from the security deposit before the end of the tenancy. While the Tenants may have agreed to steam cleaning the carpet, no certain amount could have been agreed to at the beginning of the tenancy. The Agent or the Landlord was not able to simply deduct funds from the security deposit at the end of the tenancy without some authority under the Act to do so. I find the Agent and Landlord had no authority to make a deduction from the security deposit under the Act.

The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenants. Here the Landlord did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

I note that the Landlord submitted evidence about the condition of the rental unit after the Tenants left; however, the Landlord is unable to make a monetary claim through the Tenants' application to offset unproven claims. The Landlord has to file their own Application to keep the deposit with the 15 days of certain events, as explained above.

The Landlord may still file an application for alleged cleaning costs; however, the issue of the security deposit has now been conclusively dealt with in this hearing.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenants the sum of **\$1,013.00**, comprised of double the security deposit ( $2 \times \$850.00 = \$1,700.00$ ) plus the \$100.00 fee for filing this Application, *less the \$787.00 already returned*.

### Conclusion

The Landlord breached the Act and tenancy agreement pertaining to the security deposit. The Tenants are entitled to return of double the security deposit and the filing fee, less the funds already returned by the Landlord.

The Tenants are given a formal Order in the above terms and the Landlord must be served with a copy of this Order as soon as possible. Should the Landlord fail to

comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and 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: November 3, 2017

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Residential Tenancy Branch