



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, MDC, MNSD, O, OLC, FF

### Introduction

The tenant, represented at this hearing by her daughter, applies to cancel a notice to end tenancy, however, the tenant has moved out and so the request is redundant. She also seeks to recover a security deposit and a portion of the money she gave the landlord for utility costs during her occupancy.

The landlord filed material in support of a counterclaim for cleaning and repair of the premises, for utility costs, out of pocket expenses and for aggravated damages. He has not filed his own application for dispute resolution. The dispute resolution system under the *Residential Tenancy Act* (the “Act”) does not contemplate counterclaims. To pursue his claim the landlord must make a formal application. He is free to do so following this hearing. The claims raised in his materials will not be dealt with at this hearing, as he was informed at the start of the hearing.

The listed parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

### Issue(s) to be Decided

Is the tenant entitled to return of her deposit? Is she entitled to recover any of her utility payments back?

### Background and Evidence

The rental unit is a two bedroom suite in the lower portion of a house. The tenancy started in September 2016 for a fixed term to August 31, 2017. The monthly rent was \$1400.00, due on the first of each month, in advance. The landlord received and still holds a \$700.00 security deposit.

The written tenancy agreement does not include the provision of electricity or heat in the rent. There is no separate meter recording the usage in the rental unit from the rest of the house. During the tenancy the landlord presented the tenant with requests (and possibly bills) for the utilities, asking she pay a portion, apparently calculated on the number of people living in the house. The tenant paid without complaint.

The tenant gave a form of notice and vacated the premises at the end of April or early May. She paid rent to the end of May.

The parties had completed a move-in inspection and signed a report. The landlord indicates he offered the tenant two opportunities to attend for a move-out inspection but she failed to attend either one.

The tenant's daughter testifies that the landlord did not conduct a move-out inspection with the tenant because the landlord wanted to check the rental unit alone, slowly.

The tenant's daughter says that a forwarding address in writing was provided on May 16 and produces a text to the landlord as corroboration. The landlord denies it.

### Analysis

#### The Utility Payments

The tenancy agreement indicates that heat and electricity are not included in rent but is silent on how the tenant was expected to pay her fair share. The fact that the landlord proposed an amount and the tenant accepted and paid it, is evidence that they agreed. There is no evidence to indicate the tenant was the victim of a fraud or was misled. In these circumstances I find that she bound by her tacit agreement, though she now thinks it was not a fair one.

#### Security Deposit

By s. 36 of the *Act*, if a tenant fails to attend a move-out inspection though given two opportunities to do so, she loses the right to recover her deposit. Section 17 of the Residential Tenancy Regulation provides:

#### **Two opportunities for inspection**

**17** (1) A landlord must offer to a tenant a first opportunity to schedule the condition inspection by proposing one or more dates and times.

(2) If the tenant is not available at a time offered under subsection (1),

(a) the tenant may propose an alternative time to the landlord, who must consider this time prior to acting under paragraph (b), and

(b) the landlord must propose a second opportunity, different from the opportunity described in subsection (1), to the tenant by providing the tenant with a notice in the approved form.

(3) When providing each other with an opportunity to schedule a condition inspection, the landlord and tenant must consider any reasonable time limitations of the other party that are known and that affect that party's availability to attend the inspection.

In this case the landlord testifies through his translator that he did verbally give the tenant two opportunities to attend for a move-out inspection. On the other hand the tenant's daughter denies it, saying the landlord wanted to be alone during his inspection. There is none of the expected evidence such as a written notice, email or text to corroborate either version of events.

The burden of proof of the giving of notice is on the party who alleges it; the landlord in this case. I find the landlord has not satisfied the burden of proof on a balance of probabilities that he gave the tenant two opportunities to attend a move-out inspection. The tenant has not lost her right to claim recovery of the security deposit.

The tenancy has ended and the landlord has received the tenant's forwarding address, whether in the text of May 16 or by receipt of the tenant's application for dispute resolution made May 23, 2017 and which contains an address at which the deposit could be sent.

Section 38 of the *Act* provides that once a tenancy has ended and once the landlord has received his tenant's forwarding address in writing, he must, within 15 days, either repay the deposit or make application to keep all or a portion of it.

The landlord has not, as of yet, made his own application and so he is obliged to pay the deposit back to the tenant.

Section 38 also provides that if a landlord fails to either repay the deposit or make application within the 15 day period, he must pay the tenant double the deposit. The tenant has not requested the doubling penalty in her application. Residential Tenancy Policy Guideline 17, "Security Deposit and Set off [*sic*]" directs that an arbitrator is to award the doubling even when not requested in the application, unless the tenant

specifically declines it. The question was put to the tenant's daughter and she requested the doubling.

I therefore award the tenant return of her \$700.00 security deposit doubled to \$1400.00 plus recovery of the \$100.00 filing fee for this application.

The tenant has also claimed the cost of registered mail in her Monetary Order Worksheet. That is an out of pocket expense considered related to the hearing process and an arbitrator's power is limited to awarding recover of the filing fee only.

### Conclusion

The tenant's application is allowed. She will have a monetary order against the landlord in the amount of \$1500.00.

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: November 08, 2017

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Residential Tenancy Branch