



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes

MNDLS MNRLS FFL MNDCT MNSD FFT

### Introduction

This hearing dealt with applications from both the landlords and the tenants under the *Residential Tenancy Act* (the *Act*).

The landlords applied for:

- a monetary order for unpaid rent and for damages and loss pursuant to section 67; and
- recovery of the filing fee from the tenants pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- recovery of the filing fee from the landlords pursuant to section 72.

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. The landlord was assisted by counsel. The tenant SA (the “tenant”) primarily spoke on behalf of both co-tenants.

As both parties were present service of documents was confirmed. The parties confirmed receipt of one another’s materials. Based on the undisputed evidence, in accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the respective applications and evidence.

At the outset of the hearing, the landlord made an application requesting to amend the monetary amount of the claim sought. The landlord indicated that since the application was filed they have received more accurate receipts and recalculated the arrears. Pursuant to section

64(3)(c) of the *Act* and Rule 4.2 of the Rules of Procedure, as a more accurate figure becoming known upon recalculation is reasonably foreseeable, I amend the landlords' Application to increase the landlords' monetary claim from \$8,600.00 to \$9,337.50

Issue(s) to be Decided

Is either party entitled to a monetary award as claimed?

Are the tenants entitled to recover the security deposit for this tenancy?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the parties' respective claims and my findings around each are set out below.

The parties agreed on the following facts. This tenancy began in May, 2016. The written tenancy agreement provides that it is a fixed-term tenancy which ends on April 30, 2017 at which time the tenant must vacate the unit. The monthly rent was \$4,200.00. A security deposit of \$2,100.00 was paid at the start of the tenancy and is still held by the landlords.

The rent was raised to \$4,350.00 as of May, 2017 and the tenancy continued on a month-to-month basis thereafter. There was no documentation of the new rent amount but the tenant paid the full amount each month for the duration of the tenancy. The tenants submit that this was a rent increase which exceeded the amount allowed and they simply accepted it at the time as they were undergoing personal issues. The landlord submits that the new rent amount was agreed to by the parties at the time.

The landlords submit that the tenants gave them written notice to end the tenancy on October 31, 2017. The notice provides that the tenant would vacate the rental unit by December 15, 2017. The tenants later provided another email to the landlords on November 4, 2017 stating they would vacate by December 2, 2017. The landlord submits that the tenants actually moved out on December 4, 2017. The tenants submit that they moved out on December 1, 2017 and only returned on December 4, 2017 to conduct a move-out condition inspection.

The landlords seek a monetary award of \$4,350.00 for the December, 2017 rent. The landlord submits that they took efforts to re-rent the suite but due to the tenants' overholding were unable to recoup their losses.

The landlords submit that the driveway of the rental unit suffered damages due to the tenants. The landlords submitted into documentary evidence an estimate for driveway repair dated June 12, 2018 for the amount of \$4,987.50.

The tenants submit that the landlord did not complete a condition inspection report at the start of the tenancy in accordance with the Act. The copy of the condition inspection report submitted into evidence is not signed by either party. The tenants testified that they did not provide the landlord with written authorization that they may retain any portion of the security deposit. The tenants gave undisputed evidence that they provided a forwarding address in writing to the landlords on December 8, 2017. The tenants now seek a monetary award in the amount of double the security deposit.

The tenants say that the increase of the rent to \$4,350.00 exceeds the amount allowable under the Act. The tenants submit that they were undergoing personal issues at the time and were not in a position to dispute the rent increase earlier. The tenants seek a monetary award of \$1,050, the equivalent of 7 months of overpayment of \$150.00.

### Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's 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 tenant's forwarding address in writing. If that does not occur, the landlord must 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 permission to keep all or a portion of the security deposit as per section 38(4)(a).

Additionally, section 24 of the *Act* provides that if the landlord does not complete a condition inspection report in accordance with the guidelines, they extinguish their right to claim against the security deposit. Residential Tenancy Regulation 18 provides that a landlord must give the tenant a copy of the signed condition inspection report.

I find that the copy of the condition inspection report submitted into evidence does not meet the requirements of the legislation as it is not signed by either the landlord or the tenant. Accordingly, I find that the landlords have waived their right to claim against the security deposit for damage to the residential property.

Based on the undisputed evidence before me, I find that the landlord had extinguished their right to apply to retain the security deposit for this tenancy and has failed to return the tenant's security deposit in full. I accept the undisputed evidence that the tenants provided a forwarding address in writing on December 7, 2017. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* 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 entitled to a \$4,200.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. 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 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. The claimant also has a duty to take reasonable steps to mitigate their loss.

I find that there was a valid oral tenancy agreement where the parties agreed to a monthly rent of \$4,350.00 from May, 2017 onwards. I find that this new agreement is not an instance of a rental increase but the parties entering into a new agreement and setting a new monthly rental amount.

There was no obligation on either party to enter the new agreement of May, 2017. If the parties could not agree on the terms the tenancy would have ended in accordance with the *Act*. I do not find the tenant's submission that they were forced into the agreement to be persuasive. The evidence submitted is that the tenants paid the new rental amount without question or delay for the duration of the tenancy. Based on the circumstances and evidence I find that the parties intended to enter into a periodic tenancy with a new monthly rent amount. I find that there is insufficient evidence that this was a rent increase contrary to either the express terms of the *Act* or its intended spirit.

As I find that there has been no rental increase in contravention of the *Act*, I find that there is no basis to issue a monetary award to allow the tenants to recover the rent paid for this tenancy. Accordingly, I dismiss this portion of the tenants' application.

I find there is insufficient evidence in support of the landlords' application for a monetary award for damages or loss. I find an unsigned condition inspection report to be of little probative value in determining the condition of the driveway at the start of the tenancy. I further note that the tenancy ended in December, 2017 and the estimate submitted is dated June 12, 2018. Given the half –year time that elapsed since the tenancy ended I find there is little evidence that the damage to the rental unit was caused by the tenants. On a balance of probabilities, I find that the landlords have not established that there have been damages or loss which stem as a result of the tenants actions or negligence. Consequently, I dismiss this portion of the landlords' claim.

Section 45 of the *Act* provides that a tenant may end a periodic tenancy by giving a notice which will be effective on the day before the date in the month when the rent is payable under the tenancy agreement.

In the present circumstances the tenants first gave notice to the landlord on October 31, 2017 that they intended to end the tenancy on December 15, 2017. The tenants later served the landlords with another written notice on November 4, 2017 amending their move out date to December 2, 2017. The tenants testified that they ultimately vacated the rental unit by the end of the day on December 1, 2017 and completed cleaning on December 2, 2017.

Pursuant to section 26 of the *Act*, I find that the tenants were obligated to pay the December rent in the amount of \$4,350.00 on December 1, 2017 as set out in the tenancy agreement.

Residential Tenancy Policy Guideline 5 states that while it is not necessary that the party making a claim do everything possible to minimize the loss, some reasonable efforts must be taken. I accept the evidence that despite their efforts the landlords suffered some loss of rental income for December, 2017 as the tenants failed to pay rent and remained in the tenancy past the first of the month.

I accept the evidence of the parties that the landlords took some action to mitigate their losses by seeking new tenants to occupy the rental unit for December 1, 2017. However, the landlords provided little evidence of the steps they took to mitigate their losses. I am not satisfied that the landlords took reasonable steps in seeking out and finding a new occupant for the rental unit. The landlords gave little evidence of how they sought a new tenant, the number of showings they may have done, or when a new tenant was ultimately able to occupy the rental unit. I find that there is insufficient evidence that the losses suffered by the landlords were entirely as a result of the tenants and not partially attributable to the landlords' failure to mitigate.

Under the circumstances, I find that a monetary award in the amount of \$2,175.00 half of the monthly rent to be appropriate.

As both parties were partially successful in their respective applications I decline to issue an order awarding the recovery of the filing fees.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlords to recover their monetary award from the security deposit for this tenancy.

### Conclusion

I issue a monetary Order in the tenants' favour under the following terms:

Item	Amount
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Return of Double Security Deposit as per section 38 of the Act ( $\$2,100.00 \times 2 = \$4,200.00$ )	\$4,200.00
Less Monetary Award to Landlords for Unpaid Rent Dec, 2017	-2,175.00
<b>Total Monetary Order</b>	<b>\$2,025.00</b>

The landlords must be served with this Order as soon as possible. Should the landlords 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: July 27, 2018

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Residential Tenancy Branch