



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding 9005 SKIER'S REST LANE WEDGEWOODS  
LTD. and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNSD MNDCT FFT

### Introduction

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

- the return of the security deposit pursuant to section 38 of the *Act*;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to sections 51 and 67 of the *Act*; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

The tenant's agent appeared at the date and time set for the hearing of this matter. The landlord did not attend this hearing, although I left the teleconference hearing connection open until 2:04 p.m. in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 p.m. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenant's agent and I were the only ones who had called into this teleconference.

As only the tenant's agent attended the hearing, I asked the tenant's agent to confirm that the landlord had been served with the Notice of Dispute Resolution Proceeding and the tenant's evidence for this hearing. The tenant's agent testified that the landlord was served with the notice of this hearing and the tenant's evidence by Canada Post registered mail on June 3, 2019, sent to the landlord's address for service provided on the tenancy agreement. The tenant's agent referred to a Canada Post registered mail tracking number submitted into documentary evidence as proof of service. I have noted the registered mail tracking number on the cover sheet of this Decision.

The tenant's agent stated that they had checked the Canada Post registered mail tracking information and found that the package had been delivered.

Section 90 of the *Act* 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 on the fifth day after mailing it is served by mail (ordinary or registered mail).

Residential Policy Guideline 12. Service Provisions provides guidance on determining deemed receipt, as follows:

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

Therefore, I find that the landlord was served with the notice of this hearing and the tenant's evidence on June 8, 2019, the fifth day after mailing, in accordance with sections 89 and 90 of the *Act*.

#### Preliminary Issue – Amendment of Tenant's Application

During the hearing, the tenant's agent requested to amend the tenant's claims to clarify that the tenant was seeking the return of the \$12,000.00 security deposit and statutory compensation equivalent to the amount of the security deposit of \$12,000.00 due to the landlord's failure to comply with the *Act*, and the return of the \$4,000.00 signing fee collected by the landlord at the beginning of the tenancy in contravention of the *Act*. Therefore, the tenant's claim for an additional \$6,000.00 was waived by the tenant's agent.

As the tenant sought to amend their claim by reducing the amount of claim sought, I found that the tenant's requested amendment is not prejudicial to the landlord. Therefore, pursuant to my authority under section 64(3)(c) of the *Act*, I amended the tenant's application to reduce the amount of the claim from \$34,000.00 to \$28,000.00.

#### Issue(s) to be Decided

Is the tenant entitled to the return of the security deposit, and if so, is the tenant entitled to a monetary award for compensation for the landlord's failure to address the security deposit in accordance with the *Act*?

Is the tenant entitled to a monetary award for compensation for damage or loss as a result of the landlord's failure to comply with the *Act*, regulations or tenancy agreement?

Is the tenant entitled to recover the cost of the filing fee?

### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

A copy of the written tenancy agreement was submitted into evidence, providing the following terms of the tenancy confirmed by the tenant's agent:

- The tenancy began March 30, 2018 as a month-to-month tenancy.
- Monthly rent, payable on the 20th day of the month, was \$12,000.00.
- The tenant paid a security deposit of \$12,000.00 at the beginning of the tenancy, which continues to be held by the landlord.
- The landlord did not provide the tenant with a written condition inspection report at the beginning or end of the tenancy.

The tenant's agent testified that on or around March 15, 2018, the tenant paid the landlord a "signing fee" in cash of \$4,000.00, together with a cheque for the \$12,000.00 security deposit and \$12,000.00 rent for the month of April 2018.

The tenancy ended on April 30, 2018 when the tenant vacated the rental unit.

The tenant's agent acknowledged that the tenant failed to provide a forwarding address in writing to the landlord in accordance with the requirements of the *Act* at the end of the tenancy, however, the tenant's agent referred to the tenant's prior arbitration decision rendered March 8, 2019 (file number noted on the cover sheet of this Decision) in which the arbitrator found as follows:

*During the hearing, I explicitly confirmed that the forwarding address for the Tenant is his lawyer's office (as listed on the letterhead from July 20, 2018). The Landlord confirmed in the hearing that he now has this forwarding address. I find the Landlord is served with the forwarding address of the Tenant, as of the date of this decision.*

*The Landlord must deal with the deposit pursuant to section 38 of the Act. The Tenant's application for return of the security deposit is premature, and is dismissed with leave to reapply. The Tenant may re-apply if the Landlord does not claim against or return the deposit in full within 15 days of the date of this decision.*

As such, one of the tenant's claims in the current application is a re-application for the return of the security deposit and statutory compensation equivalent to the amount of the security deposit for the landlord's failure to address the deposit in accordance with the *Act*.

The tenant's other claim is for the return of the \$4,000.00 cash signing fee collected by the landlord at the beginning of the tenancy as the tenant's agent contends that the landlord collected this fee in contravention of the *Act*.

The tenant's agent acknowledged that in May 2018 the landlord sent the tenant a cheque for \$4,944.23, however, the tenant's agent testified that the tenant did not cash the cheque as they wanted to wait until the matter was addressed through arbitration. The tenant's agent stated that the cheque is now stale-dated and non-negotiable and that therefore it should not be considered in any set-off to the tenant's claim.

### Analysis

The tenant's dispute consists of two heads of claim, which are addressed separately below.

#### 1) Return of Security of Deposit

The *Act* contains comprehensive provisions on dealing with security and pet damage deposits. Under section 38 of the *Act*, the landlord is required to handle the security and pet damage deposits 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.

...

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) 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, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

...

(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.

At no time does the landlord have the ability to simply keep all or a portion of the security deposit because they feel they are entitled to it due to damages caused by the tenant. If the landlord and the tenant are unable to agree to the repayment of the security deposit or to deductions to be made to it, the landlord must file an Application for Dispute Resolution within 15 days of the end of the tenancy or receipt of the forwarding address, whichever is later.

In this matter, the tenancy ended on April 30, 2018, however, the landlord was not deemed to have received the tenant's forwarding address until clarified in the March 8, 2019 arbitration decision. Therefore, the landlord had 15 days from March 8, 2019, which is the later date, to address the security deposit in accordance with the *Act*.

The tenant's agent testified that the tenant had not been served with any application for dispute by the landlord and as such, was re-applying to claim for the return of double the security deposit.

The tenant's agent also confirmed that the tenant did not provide the landlord with any authorization, in writing, for the landlord to retain any portion of the security deposit.

I further note that the landlord extinguished the right to claim against the security deposit by failing to provide the tenant with a written copy of the condition inspection report of the rental unit at both the beginning and end of the tenancy. This extinguishment is explained in sections 24(2) and 36(2) of the *Act*, as follows:

- 24 (2) The right of a 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 23 (3) [*2 opportunities for inspection*]
  - (b) having complied with section 23 (3), does not participate on either occasion, or
  - (c) does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.
  
- 36 (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.

The landlord may only keep all or a portion of the security and pet damage deposit through the authority of the *Act*, such as an order from an Arbitrator, or with the written agreement of the tenant. In this matter, I find that the landlord did not have any authority under the *Act* to keep any portion of the security deposit.

Based on the above legislative provisions and the unchallenged evidence of the tenant, on a balance of probabilities, I find that the landlord failed to address the security deposit in compliance with the *Act*.

As such, in accordance with section 38(6) of the *Act*, I find that the tenant is entitled to a monetary award of \$24,000.00, which is equivalent to double the value of the security

deposit paid by the tenant at the beginning of the tenancy. No interest is payable for this period.

## 2) Return of the Signing Fee

Section 67 of the *Act* provides that, where an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement, an arbitrator may determine the amount of that damage or loss and order compensation to the claimant.

The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred. Therefore, the claimant bears the burden of proof to provide sufficient evidence to establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; **and**
4. The claimant has done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the *Act*.

The tenant has applied for the return of the signing fee paid to the landlord at the beginning of the tenancy on the grounds that the signing fee was collected in contravention of section 15 of the *Act*, which provides as follows:

- 15 A landlord must not charge a person anything for
- (a) accepting an application for a tenancy,
  - (b) processing the application,
  - (c) investigating the applicant's suitability as a tenant, or
  - (d) accepting the person as a tenant.

In this matter, based on the above legislative provisions, the unchallenged testimony and evidence presented by the tenant's agent, and on a balance of probabilities, I find that the tenant has provided sufficient evidence to establish that a \$4,000.00 signing fee was collected by the landlord in contravention of section 15 of the *Act*, as I find that the landlord received the signing fee at the same time the landlord accepted the "person as a tenant" as the tenant's agent testified that the signing fee was provided by the tenant to the landlord with the security deposit payment.

As such, in accordance with section 67 of the *Act*, I find that the tenant is entitled to a monetary award of \$4,000.00, which is equivalent to the return of the signing fee paid by the tenant.

### **Summary**

The tenant has also requested to recover the costs of the filing fee for their Application for Dispute Resolution. As the tenant was successful in their application, in accordance with section 72 of the *Act*, I find that the tenant is entitled to recover the cost of the filing fee in the amount of \$100.00.

In summary, I grant a Monetary Order in the tenant's favour in the amount of \$28,100.00 in full satisfaction of the monetary awards for compensation pursuant to sections 38 and 67 of the *Act* and the recovery of the filing fee paid for this application pursuant to section 72 of the *Act*.

### **Conclusion**

I grant a Monetary Order in favour of the tenant in the amount of \$28,100.00.

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: September 13, 2019

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Residential Tenancy Branch