



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      **MNDCT PSF RP**

### **Introduction**

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order requiring the landlord to provide services or facilities as required by the tenancy agreement or the *Act* pursuant to section 62;
- An order requiring the landlord to carry out repairs pursuant to section 32;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*.

The tenant WS attended the hearing on behalf of both tenants and was assisted by the translator WY ('the tenant'). The tenant was given the opportunity to make submissions as well as present affirmed testimony and written evidence. The hearing process was explained, and an opportunity was given to ask questions about the hearing process.

The landlord did not appear at the hearing. I kept the teleconference line open from the scheduled time for the hearing for an additional thirty minutes to allow the landlord the opportunity to call. The teleconference system indicated only the tenant and I had called into the hearing. I confirmed the correct call-in number and participant code for the landlord had been provided.

The tenant provided affirmed testimony that they served the landlord with the Notice of Hearing and Application for Dispute Resolution by registered mail sent on November 21, 2019 to the landlord at the landlord's residential address; the documents are deemed received by the landlord under section 90 of the *Act* five days later, that is, on November 26, 2019.

The tenant provided the Canada Post Tracking Number in support of service to which I refer on the cover page. Pursuant to sections 89 and 90, I find the tenant served the

landlord with the Notice of Hearing and Application for Dispute Resolution on November 26, 2019.

*Preliminary Issue – Withdrawal of claims*

The tenant stated that as they had vacated the unit, they withdrew their claims under sections 32 and 62. Accordingly, the tenant's claims were amended, and these claims are dismissed without leave to reapply.

*Preliminary Issue – Addition of claim for security deposit*

The tenant requested authorization to add a request for reimbursement of the security deposit of \$390.00 which the tenant paid at the beginning of the tenancy. The tenant testified the landlord holds the security deposit and the tenant has not provided authority to the landlord to retain it.

Section 64(3)(c) and Rule 4 of the *Rules of Procedure* allow for an amendment of an application at the hearing. Rule 4 states the amendment may be allowed in circumstances that can reasonably be anticipated; if sought at the hearing, such an amendment need not be submitted or served.

Further to Rule 4, I find the landlord could reasonably have anticipated that the tenant would claim return of the tenant's security deposit. I find the correction is not prejudicial to either party.

I accordingly allow the tenant to amend the application.

The tenant's application is therefore amended to allow for the tenant to apply for the return of the security deposit pursuant to section 38.

I informed the tenant of section 38 requiring the doubling of the security deposit if not returned by the landlord within 15 days of the later of the end of the tenancy or the provision of the tenant's forwarding address in writing.

Issue(s) to be Decided

Is the tenant entitled to a monetary order for damages under section 67 and a return of double the security deposit under section 38?

Background and Evidence

The tenant provided uncontradicted evidence as the landlord did not attend the hearing.

The tenant submitted a copy of the tenancy agreement which indicated that the tenancy began on April 1, 2019. The agreement was for a fixed term intended to end on December 1, 2019. Rent was \$780.00 monthly and the tenant provided a security

deposit of \$390.00 at the beginning of the tenancy. The unit was a basement suite and the landlord lived upstairs. The tenant occupied the unit with his wife and child.

The tenant testified that on the evening of July 29, 2019, the tenant returned to the unit to find the floor covered with smelly water which contained sewage. The tenant and his wife cleaned up the water. The tenant immediately notified the landlord who attended at the unit the next day. The tenant submitted photographs of the water stains on the ceiling and a picture of the tenant cleaning. The landlord refused the tenant's request to clean the unit.

The tenant stated that many of his possessions were damaged by the water. He listed several electrical items which would not start and were ruined. The tenant also stated that anything on the floor, such as books, toys or clothes, was also ruined.

The tenant paid rent for August 2019 but vacated on August 3, 2019 because the landlord refused to clean the unit. The tenant believed the unit was unhygienic and unsafe to continue to occupy. The landlord told the tenant to move out if he wanted to.

The tenant testified that he provided his forwarding address in writing to the landlord in mid-August 2019. The landlord has not returned the tenant's rent for August 2019, the tenant's security deposit or reimbursed the tenant for his lost items.

The tenant requested reimbursement of the following expenses:

ITEM	AMOUNT
Television – 2 years old	\$900.00
Cell phone	\$600.00
laptop	\$2,100
Vacuum cleaner	\$300.00
Cordless tool	\$300.00
Books, clothing, children's toys	\$600.00
<b>TOTAL</b>	<b>\$4,800.00</b>

The tenant submitted no documentary evidence in support of the claim such as purchase receipts, replacement receipts, age of items, or evidence of attempts to repair items.

The tenant requested a monetary order as follows:

ITEM	AMOUNT
Compensation (above)	\$4,800.00
August rent	\$790.00
Security deposit	\$390.00
Security deposit - doubled	\$390.00
<b>TOTAL CLAIM</b>	<b>\$6,370.00</b>

### Analysis

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of the landlord's submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

I have considered all the submissions and evidence presented. I will only refer to certain aspects of the submissions and evidence in my findings.

- Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. 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 enough 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*.

In this case, the onus is on each party to prove entitlement to a claim for a monetary award. The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

I will consider the issue of the frustration of the contract first.

### *Frustration*

Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event. This event must have drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned cannot be carried out.

*Residential Tenancy Act Policy Guideline 34: Frustration* provides guidance on when contracts are frustrated and the liabilities of each party thereafter. The Guideline states in part as follows:

*The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.*

The tenant submitted photographs in support of his evidence that they considered the unit uninhabitable because of the water damage and the concern of fecal contamination. The tenant testified that he repeatedly asked the landlord to clean up the unit to which the landlord negatively replied, telling the tenant to move out. I accept the uncontradicted version by the tenant of the events.

The tenant has submitted no evidence that the landlord is responsible for the water damage. The tenant has failed to establish responsibility of the landlord damage to the tenant's possessions, as required under the four-part test above. I have found that the agreement was frustrated due to an event (water damage) that was not caused by either party. As the landlord is not responsible for the damage to the unit making it uninhabitable, I therefore dismiss the tenant's claims for compensation for the damaged possessions without leave to reapply.

### *Rent*

Based on the testimony and evidence before me, on a balance of probabilities, I find that the tenancy agreement between the landlord and the tenant to be frustrated on July 29, 2019, and as such, the parties to the tenancy agreement are discharged from fulfilling their obligations under the tenancy agreement after that date. I find that the water damage was an unforeseeable event. I find there is no evidence before me that either the landlord or the tenant is at fault regarding the water damage. I find this event drastically changed the circumstances of the tenancy. As a result, the tenancy agreement as planned could not be carried out after this day and to unit was, to all intents and purposes, uninhabitable, although the tenant's possessions remained in the unit until August 3, 2019.

As the contract was frustrated, I find the tenant has met the burden of proof on a balance of probabilities that the tenant is entitled to reimbursement of rent paid for the month of August 2019 in the amount of \$780.00. I do not award the landlord any rent for the two days in August prior to the tenant leaving because of the description by the tenant that the unit smelled, required cleaning, and they vacated as quickly as possible.

#### *Security deposit*

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 tenants' written permission to keep all or a portion of the security deposit pursuant to Section 38(4)(a).

I find that at no time has the landlord brought an application for dispute resolution claiming against the security deposit for any damage to the rental unit pursuant to section 38(1)(d) of the *Act*.

I accept the tenant's uncontradicted evidence they have not waived their right to obtain a payment pursuant to section 38 of the *Act*. I accept the tenant's evidence that the tenants gave the landlord written notice of their forwarding address mid-August 2019.

Under these circumstances and in accordance with sections 38(6) and 72 of the *Act*, I find that the tenants are entitled to a monetary order of **double the security deposit**. The tenant did not claim reimbursement of the filing fee.

I accordingly award the tenant a monetary order of **\$1,570.00** as follows:

ITEM	AMOUNT
August rent – reimbursement	\$790.00
Security deposit	\$390.00
Security deposit - doubled	\$390.00
<b>TOTAL Monetary Award</b>	<b>\$1,570.00</b>

### Conclusion

I grant the tenant a monetary order pursuant to section 38 in the amount of **\$1,570.00** as described above.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) to be 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: January 17, 2020

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Residential Tenancy Branch