



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      MNSD-DR

### **Introduction**

This hearing, adjourned from a Direct Request process in which a decision is made based solely on the written evidence submitted by the landlord, dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("Act") for:

- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38.

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. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act*.

### **Preliminary Matter: Does the Residential Tenancy Branch have jurisdiction to hear the dispute between the parties?**

The landlord argued that this tenancy is not governed by the Act as the landlord retained the right to use the kitchen and bathroom in the home, which was shared by the landlord and the other tenants in the home. The tenant rented a room from the landlord for \$600.00 per month, and was referred to as a "roommate" in the tenancy agreement. The landlord testified that the landlord also paid a share of the utilities. The landlord confirmed that they did not live at the home full-time, and that they had another

home in another city. The landlord testified that they retained a room in the rental house, which has 6 rooms, 1 kitchen, and 3 bathrooms.

The tenant testified that they had never observed the landlord present at the home an entire day, nor had the tenant observed the landlord ever using the kitchen or bathroom.

### **Analysis**

Section 4(c) of the *Act* reads in part as follows:

- 4      *This Act does not apply to...*  
         *(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,...*

The evidence of the landlord is that they shared the use of bathroom and kitchen with the tenants, and therefore the tenancy is excluded from the *Act*. Despite the testimony of the landlord, I do not find the landlord's submissions to be convincing or persuasive, especially considering the fact that the landlord has their own home elsewhere.

Although the landlord may have retained access to the kitchen and bathrooms, and although the landlord may pay a portion of the utility bills, I find that this is not sufficient to support the shared use of these facilities. I find that the landlord's ability or right to access the bathroom or kitchen does not necessarily prove the shared usage of these facilities, and in this case I am not satisfied that the evidence provided sufficiently supports the landlord's actual use of the bathroom or kitchen facilities.

Although the written agreement references the tenant as a "roommate, I find that this does not extinguish the tenant's rights under the *Act*. The landlord may not avoid or contract out of the *Act*, including the use of wording or clauses in an effort to qualify the tenancy as an excluded accommodation under section 4 of the *Act*.

As noted in section 5 of The *Residential Tenancy Act*:

### **This Act cannot be avoided**

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

- (3) A term of a tenancy agreement is not enforceable if
  - (a) the term is inconsistent with this Act or the regulations,
  - (b) the term is unconscionable, or
  - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Based on the evidence provided to me by the parties, I am not satisfied that the landlord shared the kitchen or bathroom facilities with the tenant. I find that the specific wording in the tenancy agreement, as well as the landlord's testimony and evidence provided for this hearing, is an attempt to deny the tenant's rights under the *Act*. I, therefore, find that this application and tenancy falls under the jurisdiction of the *Act*, and I will consider the tenant's application.

**Issues(s) to be Decided**

Is the tenant entitled to a monetary award for the return of their security deposit pursuant to section 38 of the *Act*?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony provided in the hearing, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on November 21, 2020, and ended on December 28, 2020. Monthly rent was set at \$600.00, payable on the last day of the month. The landlord collected, and still holds, a security deposit of \$300.00. Both parties confirmed that the tenant provided their forwarding address on December 28, 2020.

The landlord testified that they kept the security deposit to cover the money owed for this tenancy. The landlord testified that the tenant had consented for the landlord to retain part of the deposit to cover the utilities owed. The landlord testified that they did not file an application to retain the deposit as they believed that the matter did not fall under the jurisdiction of the RTB.

The tenant testified that they did not give written authorization to allow the landlord to retain any portion of the security deposit, and is requesting the return of their deposit.

### **Analysis**

Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the deposit or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus applicable interest and must pay the tenants a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenant's provision of the forwarding address. Section 38(4)(a) of the *Act* also allows a landlord to retain an amount from a security or pet damage deposit if "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."

In this case, I find that the landlord had not returned the tenant's security deposit in full within 15 days of receipt of the tenant's forwarding address in writing. I am not satisfied that the tenant had provided written permission for the landlord to retain any portion of the security deposit.

In accordance with section 38 of the *Act*, I find that the tenant is therefore entitled to a monetary order amounting to double the original security deposit.

### **Conclusion**

I issue a Monetary Order in the tenant's favour under the following terms which allows the tenant to recover the portion of the security deposit retained by the landlord, plus a monetary award equivalent to the value of their security deposit as a result of the landlord's failure to comply with the provisions of section 38 of the *Act*:

<b>Item</b>	<b>Amount</b>
Return of Security Deposit	\$300.00
Monetary Award for Landlords' Failure to Comply with s. 38 of the <i>Act</i>	300.00
<b>Total Monetary Order</b>	<b>\$600.00</b>

The tenant is provided with this 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, 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 20, 2021

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Residential Tenancy Branch