



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      **MNDL-S, FFL, OLRD**

### **Introduction**

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

- a monetary order for damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties were represented at the hearing and were given an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by an agent (the "landlord"). In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given an opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

Preliminary Issue – Service

In the Review Consideration Decision of March 28, 2022 the arbitrator found that:

...the tenants were not properly served with the landlord's Application for Dispute Resolution, evidence and Notice of Hearing as required under the Act and therefore, find they were unable to attend the hearing on the landlord's application because of circumstances that were not anticipated and beyond their control.

Based on their finding that the tenants were not served a review hearing was ordered. The arbitrator writes:

Since the Tenant did not receive the original hearing documents and evidence of the Landlord, I order the Landlord to serve each Tenant with their application for dispute resolution and evidence within 3 days of the date on which the Tenant serves them with the notice of hearing. At the new hearing, the landlord will be required to demonstrate how these documents have been served to the tenants.

The tenants submit that they have not been served with any of the landlord's materials including their Application for Dispute Resolution or any evidence at any time.

The landlord testified that they did not serve the tenants with any of their materials as ordered in the Review Consideration Decision. The landlord testified that they believe they served the tenants with their materials prior to the original hearing by registered mail but were unable to provide a valid Canada Post tracking number or receipt.

Sections 88 and 89 of the *Act* provide the manners by which documents may be served by a party on another party to a proceeding. The onus lies with the party claiming service to establish on a balance of probabilities. As outlined in Policy Guideline 12:

Failure to prove service may result in the matter being dismissed, with or without leave to reapply

In the present case, I find insufficient evidence that the landlord served the tenants with their materials at any time. I find the landlord's vague, disputed testimony, without any documentary evidence such as a valid Canada Post tracking receipt and bereft of pertinent details such as a tracking number is insufficient to meet their evidentiary

burden. Accordingly, I am unable to find that the tenants were served with the landlord's materials prior to the original hearing.

The landlord gave undisputed testimony that they have not served the tenants with any materials after being served the Review Consideration Decision and Notice of Hearing.

I find the Review Consideration Decision to be unambiguous in its instructions to the landlord of their requirement to serve the tenants. I find no cogent explanation was provided by the landlord about why they chose to disregard the Order of the branch and decline to serve the tenants.

I accept the undisputed evidence that the landlord, despite clear instructions outlining their requirement to serve the other party, failed to serve the tenants in accordance with the Act or at all.

Based on the evidence before me I find that the landlord has failed to serve the tenants with their materials in a manner consistent with the Act or at all, at any time. Consequently, I dismiss the landlord's application in its entirety without leave to reapply.

### Background and Evidence

The parties agree on the following facts. This tenancy began in 2018 and ended on July 5, 2021. The monthly rent was \$2,500.00 payable on the first of each month. A security deposit of \$1,250.00 was collected at the start of the tenancy and is still held by the landlord. No condition inspection report was prepared at any time during the tenancy. The tenants provided a forwarding address in writing on or about August 13, 2021. The tenants did not provide written authorization that the landlord may retain any portion of the deposit.

### Analysis

Section 24(2) of the Act provides that the right of a landlord to claim against a security deposit is extinguished if they do not prepare a condition inspection report in accordance with the Act and regulations.

Section 38 of the Act requires the landlord to either return all of a tenant's security deposit or file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in

writing. If that does not occur, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to the value of the security deposit.

Policy Guideline 17 provides that:

The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit; or
- a tenant's application for the return of the deposit.

unless the tenant's right to the return of the deposit has been extinguished under the Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

In the present case I accept the undisputed evidence of the parties that no condition inspection report was prepared at any time for this tenancy. Accordingly, I find that the landlord has extinguished their right to claim against the deposit.

I accept the undisputed evidence of the parties that the tenant provided their forwarding address in writing on August 13, 2021. I accept that the landlord filed the present application for authorization to retain the deposit on September 7, 2021, outside of the 15 day period provided under section 38.

I therefore find that the tenant is entitled to a monetary award in the amount of \$2,500.00, double the value of the security deposit for this tenancy. No interest is payable over this period.

Conclusion

I find it appropriate to replace the decision and order of March 15, 2022 with the following decision and order.

The landlord's application is dismissed in its entirety without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of \$2,500.00. 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: July 15, 2022

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Residential Tenancy Branch