



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      MNSD FFT

### Introduction

This hearing dealt with an application pursuant to the *Residential Tenancy Act* (the “Act”) for:

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

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.

The landlord confirmed receipt of the tenant’s application and evidence. Based on the undisputed testimony I find the landlord duly served with all materials in accordance with sections 88 and 89 of the *Act*.

The tenant disputes that they were served with the landlord's evidence. The landlord claimed they served their evidence on the tenant but failed to state when or how they served the tenant despite being given multiple opportunities to respond. I asked the landlord repeatedly on what date they served the tenant and in what manner. The landlord refused to answer the direct question instead talking about previous correspondence with the tenant in January 2022, prior to the filing of the application, and asking why they would serve the evidence on the tenant.

Based on the steadfast refusal of the landlord to provide any cogent information supporting their claim that they served the tenant, I am unable to find that the tenant was served in a manner consistent with the *Act* or at all.

However, much of the landlord's evidence consists of materials that were received by the tenant on prior occasions or are would not be prejudicial. In accordance with the guidance provided by Rule 3.17, I have considered those pieces of evidence included in the landlord's package which the tenant confirmed having received on prior occasions or which would otherwise not result in a breach of the principles of procedural fairness.

#### Issue(s) to be Decided

Is the applicant entitled to any of the relief sought?

#### 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 arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This periodic tenancy began on August 1, 2020. Monthly rent at the start of the tenancy was \$750.00 payable on the first of each month. A security deposit of \$375.00 was collected and is still held by the landlord. There was no written tenancy agreement. No condition inspection report was prepared at any time for this tenancy. The monthly rent was raised by the landlord to \$1,125.00 as of October 1, 2021. No written notice of rent increase was ever issued.

The rental unit is a bedroom and ensuite bathroom in a detached house with four additional occupants. The kitchen facilities were shared with the other occupants of the building. The landlord resided in the rental building from November 1, 2021 to December 14, 2021 and shared the kitchen facilities with the tenant and other

occupants. The landlord testified that they are the owner of the rental property. The tenant testified that they are unaware of who is the owner of the property. No documentary evidence was submitted showing the registered owners of the property.

The parties agree that the tenancy ended on December 31, 2020 and the tenant gave the landlord their forwarding address in writing on January 3, 2021. The landlord confirmed receipt of the tenant's forwarding address on that date but disbelieved the address provided was genuine. The landlord confirmed they have not returned the security deposit for this tenancy to the tenant. The landlord submits that the tenant caused damage to the rental property and are thus not entitled to a return of the deposit. The tenant testified that they have not authorized the landlord to retain any portion of the deposit.

### Analysis

Section 4(c) of the *Act* sets out living accommodations to which the *Act* does not apply. It 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 onus to demonstrate, on a balance of probabilities, that the *Act* does not apply to a living accommodation lies with the party claiming exemption from the *Act*.

In the present case it is undisputed that the kitchen facilities are shared by the tenant and the four other occupants of the property as well as the landlord during the time they occupied the property from November 1, 2021 to December 14, 2021.

The landlord states that they are the owner of the accommodation but have provided little documentary evidence to support their claim. The landlord did not provide a Land Title Search, contract of purchase and sale of the property, tax assessment or any document showing they are the registered owner of the rental property. No compelling reason was given why the landlord did not provide any documentary evidence in support of their position.

The presumption is that a matter falls within the jurisdiction of the *Act* and this Branch unless the contrary is demonstrated on a balance of probabilities. This is not a

circumstance where the parties are adducing conflicting evidence but where the landlord has failed to meet their evidentiary onus on a balance of probabilities. While the undisputed evidence shows that parties shared kitchen facilities, I am not satisfied with the paucity of the evidence that the landlord is the owner of the accommodation as they claim. Consequently, I am unable to find that the *Act* does not apply to the present living accommodation.

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).

I accept the evidence of the parties that this tenancy ended on December 31, 2020 and the tenant gave the landlord the forwarding address in writing on January 3, 2021. I find the landlord's claim that they did not believe the address provided by the tenant to be genuine to have no merit and be of no excuse for withholding the deposit. It is clear that the address provided by the tenant is a civic mailing address including a postal code. There is sufficient information so that the landlord could have mailed the return of the deposit or served the tenant with an application for dispute resolution if they intended to retain the deposit. The landlord did neither. The landlord did not return the security deposit to the tenant nor did they file an application for dispute resolution for authorization to retain the deposit within 15 days of January 3, 2021 as provided under the *Act*.

I find the landlord's submissions about damage to the rental unit to be wholly irrelevant to the matter at hand. If the landlord had concerns about the condition of the property and sought to retain the deposit they were required to file an application for dispute resolution in accordance with the *Act*. A landlord cannot simply withhold the security deposit for a tenancy without following the appropriate legislative steps. I find that the landlord has failed to return the security deposit for this tenancy to the tenant without authorization or filing an application to claim against the deposit.

Furthermore, the parties gave evidence that no condition inspection report was prepared at any time during the tenancy. 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 comply

with the requirements of section 23 in offering the tenant 2 opportunities for an inspection and completing a condition inspection report.

Based on the undisputed evidence before me, I find that the landlord has neither applied for dispute resolution nor returned the tenant's security deposit in full within the required 15 days. 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 an \$750.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

As the tenant was successful in their application, they are also entitled to recover the filing fee from the landlord.

I note parenthetically that the parties gave evidence that monthly rent was increased from \$750.00 to \$1,125.00 without written notice on October 1, 2020. I note that the amount of the increase far exceeds the amount allowable under the legislation. As the tenant has not made an application seeking recovery of overpaid rent or disputing the rental increase I decline to make any finding on this issue.

### Conclusion

I issue a monetary order in the tenant's favour in the amount of \$850.00 representing the return of double the deposit for this tenancy and the filing fee. 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 23, 2022

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Residential Tenancy Branch