



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      **MNSDB-DR, FFT**

### **Introduction**

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

1. An Order for the return of the security and pet damage deposits that the Landlord is holding without cause pursuant to Section 38 of Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord and the Tenants attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Tenants' Notice of Dispute Resolution Proceeding package served by registered mail on March 12, 2022, the Canada Post Tracking number is on the cover sheet of the decision, deemed served on March 17, 2022;
- the Tenants' forwarding address was served by registered mail on January 5, 2022, the Canada Post Tracking number is on the cover sheet of the decision, deemed served on January 10, 2022; and,

- the Landlord's evidence package served by registered mail on March 12, 2022, the Canada Post Tracking number is on the cover sheet of the decision, deemed served on March 17, 2022.

Pursuant to Sections 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

### Issues to be Decided

1. Are the Tenants entitled to an Order for the return of the security and pet damage deposits?
2. Are the Tenants entitled to recovery of the application filing fee?

### Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on January 1, 2022. The fixed term ended on January 31, 2022, then the tenancy was to continue on a month-to-month basis. Monthly rent was \$2,000.00 payable on the first day of each month. A security deposit of \$1,000.00 and a pet damage deposit of \$1,000.00 was collected at the start of the tenancy and are still held by the Landlord.

On January 1, 2022, the Tenants testified that they arrived at the rental unit expecting to do a walk through with the Landlord. They said the upstairs tenants provided them with their keys. The Tenants had not yet paid the rent for January 1, 2022. They asked the Landlord if he was coming to do the walk through, and he was not available and did not come to the rental unit.

The Tenants did a walk through on their own, which they said they were not comfortable doing. This was the Tenants first time viewing the rental unit, and in doing the walk through of the suite, they described the rental unit as not safe. They found the apartment unclean, but there were a lot of health hazards and fire safety hazards. The Tenants reported that there were no baseboards in the rental unit, there were exposed foundational wood structures under the heater in the living room, radiator elements in the bedroom were duct taped to the floor, there was mould on the bathroom ceiling, and the bathroom toilet seat was held together with duct tape (although to me, the tape

looks like packing tape as opposed to silver duct tape). The Tenants uploaded their video of their walk through of the rental unit.

The Tenants applied for a direct request application requesting the return of their security deposit. The direct request process dismissed their claim as it is a requirement that the tenancy agreement be signed by both parties. In this case, only the Tenants had signed the tenancy agreement.

The Tenants testified that they are not aware of the Landlord applying for dispute resolution to retain their deposits. The Tenants confirmed that there is no arbitrator's order that the Landlord can keep the deposits, and they have not provided permission to the Landlord that he can retain the deposits.

The Landlord testified that the male Tenant did a full walk through of the rental unit on November 17 or 18, 2021 with the previous tenants prior to paying the deposits on November 21, 2021. The Tenants also executed the tenancy agreement on that same date. The Landlord called their paying the deposits as a "hold and secure" of the rental unit. The Landlord stated that the Tenants arrived at the rental unit around 12:30 p.m. on January 1, 2022 and he saw them leaving at 1:10 p.m. on outside video camera footage. He said in the meantime that they found a different unit and at 4:53 p.m. he received a message from the Tenants claiming that the rental unit was "unlivable", and they wanted their deposits returned.

The Landlord's understanding was that the male Tenant found a new opportunity in another city and the Tenants moved to that city. He stated that he has heard from other landlords that this behaviour has happened in the past. The Landlord claims that he suffered a loss as the Tenants had not paid rent for the month of January 2022; however, the Landlord has not made a claim for such.

The Tenants stated they had no fall-back rental unit lined up. The forwarding address provided was the male Tenant's parent's address, and they stayed at a hotel after leaving the rental unit. They subsequently found a short term rental, before securing a rental for February 1, 2022. The Tenants incurred their own losses as they had to store all their belongings for the month of January and pay again for a U-Haul when they moved their belongings from storage to their new place.

## Analysis

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. The onus to prove their case is on the person making the claim.

The Act provides definitions of certain aspects of a tenancy:

**"tenancy"** means a tenant's right to possession of a rental unit under a tenancy agreement;

**"tenancy agreement"** an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

**"rent"** means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

**"security deposit"** means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:

- (a) post-dated cheques for rent;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

**"pet damage deposit"** means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for damage to residential property caused by a pet, but does not include

- (a) a security deposit, or
- (b) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

RTB Policy Guideline #9-Tenancy Agreements and Licences to Occupy clarifies factors of whether there is a tenancy agreement in place. The guideline states:

## **B. TENANCY AGREEMENTS**

*Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:*

- *the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and*
- *the tenant pays a fixed amount for rent.*

...

### **Other factors**

*Other factors that may distinguish a tenancy agreement from a licence to occupy include:*

- *payment of a security deposit;*
- *the parties have a family or personal relationship, and occupancy is given because of generosity rather than business considerations.*

*An arbitrator will weigh all the factors for and against finding that a tenancy exists.*

The Tenants paid the security deposit for the rental unit in November 2021 after the male Tenant did a cursory look through the suite. The Tenants also agreed with the Landlord that they would pay rent on the first of the month. The Tenants came to the rental unit on January 1, 2022 hoping to do a move-in condition inspection at the start of their tenancy. The upstairs tenants provided them with the keys so they could gain access to the unit. After not being satisfied with the state of the rental unit, they left and later called the Landlord saying the rental unit was unlivable.

I find that the parties had a valid tenancy agreement. The upstairs tenants provided the rental unit's keys to the Tenants, and I find they would not have done this without instruction from the Landlord. Although this was the first month of occupation, both parties had obligations as specified in the tenancy agreement. One of those obligations was the payment of rent.

Section 26(1) of the Act specifies the rules about payment of rent. It states, a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord

complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The Landlord has not applied for dispute resolution to claim a monetary order for repayment of January 2022's rent, or to keep any of the deposit monies to address the loss he has suffered. I cannot make this order due to the lack of an application seeking this.

For the benefit of the Landlord, the Landlord may wish to discuss with an Information Officer at the RTB the options available to him to properly seek redress for his rental loss. An Information Officer can be reached at:

5021 Kingsway  
Burnaby, BC  
Phone: 250-387-1602 / 1-800-665-8779  
Website: <https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies>

Section 38 of the Act sets out the obligations of a landlord in relation to a security and pet damage deposit held at the end of a tenancy.

Section 38(1) states:

***Return of security deposit and pet damage deposit***

- 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.*

There are exceptions to Section 38(1) noted in Sections 38(2) to 38(4) of the Act.

I accept the testimony of both parties and based on this, as well as the documentary evidence submitted, I find the following:

- The tenancy ended January 1, 2022.
- The Tenant's forwarding address was provided to the Landlord in writing and the Landlord was deemed served with this on January 10, 2022.

January 10, 2022 is the relevant date for the purposes of Section 38(1) of the Act. The Landlord had 15 days from January 10, 2022 to repay the deposits in full or file a claim with the RTB against the deposits.

The Landlord did not repay the deposits or file a claim with the RTB against the deposits within 15 days of January 10, 2022. Therefore, the Landlord failed to comply with Section 38(1) of the Act.

Sections 38(2) to 38(4) of the Act state:

38 ...

- (2) *Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].*
- (3) *A landlord may retain from a security deposit or a pet damage deposit an amount that*
  - (a) *the director has previously ordered the tenant to pay to the landlord, and*
  - (b) *at the end of the tenancy remains unpaid.*
- (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...*

The Tenants were expecting to participate in a move-in condition inspection on January 1, 2022 with the Landlord but the Landlord was not present at their move-in and did not arrange for an agent to assist him in that process. I find the Tenants have not extinguished their rights in relation to the deposits. Section 38(2) of the Act does not apply.

The Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy. Section 38(3) of the Act does not apply.

The Tenants did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the security deposit. Section 38(4) of the Act does not apply.

Given the above, I find the Landlord failed to comply with Section 38(1) of the Act in relation to the deposits and that none of the exceptions outlined in Sections 38(2) to 38(4) of the Act apply. Therefore, the Landlord is not permitted to claim against the deposits and must return double the deposits to the Tenants pursuant to Section 38(6) of the Act.

The Landlord must return \$4,000.00 to the Tenants. There is no interest owed on the deposits as the amount of interest owed has been 0% since 2009.

As the Tenants were successful in their application, I award the Tenants reimbursement for the \$100.00 filing fee pursuant to Section 72(1) of the Act.

In total, the Tenants are entitled to \$4,100.00 and I issue the Tenants a Monetary Order for this amount.

### Conclusion

The Tenants are issued a Monetary Order for \$4,100.00. This Order must be served on the Landlord as soon as possible. If the Landlord fails to comply with the Order, the



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 Act.

Dated: November 04, 2022

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Residential Tenancy Branch