



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNRL-S, FFL

### Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- a monetary order pursuant to ss. 38 and 67 for unpaid rent by claiming against the security deposit; and
- return of their filing fee pursuant to s. 72.

G.L. appeared as agent for the Landlord. T.T.P. appeared as the Tenant. The Tenant called Y.C.T. as a witness.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord’s agent advised that the Notice of Dispute Resolution had been served on the Tenant but that the Landlord served no evidence. The Tenant acknowledged receipt of the Notice of Dispute Resolution without objection. Based on its acknowledged receipt, I find that pursuant to s. 71(2) of the *Act* that the Notice of Dispute Resolution was sufficiently served on the Tenant.

### Preliminary Issue – Tenant’s Evidence

The Tenant advised having served her evidence on the Landlord by way of registered mail sent on November 23, 2022. The Landlord’s agent denied receipt of the Tenant’s evidence. The Tenant advised the address in which the registered mail was sent, which the agent confirmed was the Landlord’s address.

I have been provided with a tracking receipt by the Tenant as proof of service. Review of the tracking information confirms the package was sent on November 23, 2022 and that it was delivered on November 25, 2022. However, the tracking information does not indicate that a recipient had signed for the package.

Section 89(1) of the *Act* sets out the applicable service methods for dispute resolution proceedings in applications such as the Landlord's. It permits service via registered mail. Policy Guideline #12 provides guidance with respect to the service provisions of the *Act* and states the following with respect to service via registered mail:

Registered Mail includes any method of mail delivery provided by Canada Post for which confirmation of delivery to a named person is available. This includes Express post, if the signature option is used. Parties using Registered Mail or Express Post should obtain a copy of the proof of delivery from Canada Post and submit that document as proof of service. This can be obtained from Canada Post's website. A screen shot or picture of the information is sufficient.

(Emphasis Added)

Presently, the Tenant has provided proof of delivery, but not receipt. The Policy Guideline is clear that service must use include confirmation of delivery by use of the signature option. The reason this is the case is because it must be confirmed that a party has received the documents in question and that it is not simply left in a mailbox. The other service methods set out under s. 89(1) of the *Act* pertain to personal delivery of documents on a party. In other words, s. 89(1) contemplates methods of service in which receipt can be confirmed. This is in contrast to s. 88 of the *Act*, which is the general service provision of the *Act*, where service via regular mail is permitted, though regular mail is specifically excluded from s. 89(1).

I am unable to find that the Tenant served her evidence in accordance with s. 89(1) of the *Act* as the method chosen did not include a signature option. It is insufficient to serve documents by way of express mail where no signature option is included. As the documents were not served in an approved method, I find that it would be inappropriate to make use of the deemed receipt provision set out under s. 90 of the *Act*.

As the Tenant's evidence was not properly served or received, I find that it would be procedurally unfair to include and consider it. Accordingly, the Tenant's documentary evidence is excluded from consideration.

The matter shall be determined solely upon the oral submissions and evidence provided by the parties.

### Issues to be Decided

- 1) Is the Landlord entitled to claim against the security deposit?
- 2) Is the Landlord entitled to an order for unpaid rent?
- 3) Is the Landlord entitled to the return of their filing fee?

### Background and Evidence

The parties were given an opportunity to present evidence and make submissions. However, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on August 1, 2020.
- The Tenant moved out of the rental unit on March 27, 2022 and the move-out inspection was conducted on April 1, 2022.
- Rent of \$2,400.00 was due on the first day of each month.
- A security deposit of \$1,200.00 was paid by the Tenant.

The Landlord's agent testified that the Tenant provided notice to vacate the rental unit on March 20, 2022 and that the Landlord is seeking to retain the security deposit in full due to the short notice given. The agent confirmed the Landlord is not seeking \$2,400.00, only to retain the security deposit in full. I am advised by the Landlord's agent that the rental unit was re-rented to new tenants on May 1, 2022.

The Tenant confirms that she provided notice to vacate on March 20, 2022, though provides further context with respect to the end of the tenancy. I am advised by the Tenant that there was a water leak in the rental unit in January 2022 which required remediation work. The Tenant testified that drying equipment was brought in and operated, in her words, 24/7 such that it was hard for her to work and sleep within the rental unit.

In the Tenant's telling, she at first asked whether she could vacate the rental unit early due to the ongoing repairs. The Tenant says that she understood the Landlord to

consent to her leaving early, after which point she searched for alternate accommodations. The Tenant testifies that she found a new place on March 25, 2022, that she moved out on March 27, 2022, and that she finished cleaning the rental unit on March 30, 2022. The Tenant says that the move-out inspection was scheduled for March 31, 2022 but was rescheduled by the Landlord to April 1, 2022.

The Landlord's agent denies that the Landlord consented to the Tenant ending the tenancy on March 31, 2022. I am advised by the Landlord's agent that when the water leak first presented itself in January 2022 the Landlord had offered to the Tenant that she could leave early and that the security deposit would be returned but that the Tenant did not take the Landlord up on the offer.

The Tenant testifies that it was during the move-out inspection that the Landlord's agent told her she would not be responsible for paying April's rent but that the Landlord would be keeping the security deposit. The Tenant further advises that she received \$300.00 from the Landlord's agent at that time. The Tenant's witness, who was at the rental unit during the inspection, confirmed the Tenant's narrative.

The Landlord's agent largely confirmed the Tenant's narrative, though clarified that the \$300.00 was given by him personally as the Tenant had been a good tenant and had left the rental unit in a clean and undamaged state.

The Tenant testifies that she provided the Landlord with her forwarding address on April 1, 2022 by way of text message and again by way of email on April 4, 2022. The Landlord's agent confirms receipt of the Tenant's forwarding address on April 4, 2022.

### Analysis

The Landlord seeks an order for unpaid rent by claiming against the security deposit.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38. Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

I need not consider the question of extinguishment as the Landlord is not claiming for damages to the rental unit. Policy Guideline #17, which provides guidance with respect to security deposits and set offs, states the following on page 2:

9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
- to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
  - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
  - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
  - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

This guidance is consistent with the language used in ss. 24(2) and 36(2) of the *Act* both of which make specific reference to a landlord's right to claim against the security deposit "for damage to residential property". In other words, as the Landlord is claiming against the security deposit for unpaid rent, not damage to the residential property, extinguishment is not relevant.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the filed their application on April 5, 2022. Regardless of whether provided her forwarding address on April 1, 2022 or April 4, 2022, the Landlord filed their application within the 15 day time limit imposed by s. 38(1) of the *Act*. Accordingly, I find that the doubling provision under s. 38(6) does not apply.

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.

4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Under the present circumstances, the Landlord both claims for unpaid rent as part of its application though also acknowledges that they told the Tenant she would not be responsible for April 2022 rent but that the Landlord would keep the security deposit. This is somewhat confirmed by review of the pleadings, which lists the Landlord's claim as being \$2,400.00, though the agent revised the claim to make clear the Landlord was only seeking to hold the security deposit of \$1,200.00 and did not seek \$2,400.00.

There is a peculiar aspect to present claim. Notionally, a claim for damages for improper notice from a tenant is based on a landlord's lost rental income due to the improper notice. In other words, in these claims a landlord seeks compensation for lost rental income to which they would have been entitled had the tenant given proper notice or, in the case of a fixed term tenancy, until the landlord re-rents the rental unit upon consideration of their duty to mitigate their damages. Here, however, the Landlord's agent largely does not dispute that the Tenant was told they would not be responsible for April 2022 rent but that the Landlord would retain the security deposit. I view the Landlord as having taken an unprincipled position here, given that they claim the security deposit without tying it to lost rental income.

I am also left with the Tenant's testimony that she asked the Landlord if she could leave early and only taking steps to find alternate accommodation after getting the OK. Also, the Landlord's agent added that the Landlord had offered in January 2022 for the Tenant to leave sooner and take the security deposit in full but that the Tenant had not accepted the offer by moving out. I found the Tenant to be honest and forthright in her testimony. Indeed, there was little discrepancy in the parties' evidence except with respect to whether the Landlord consented to the Tenant leaving early.

In the context of the present circumstances, I find that the Tenant on March 20, 2022 confirmed whether the offer to move out sooner was still on the table by asking whether she could move out by the end of the month. Upon receiving confirmation this was acceptable, the Tenant searched for alternate accommodations, securing them on March 25, 2022. The Landlord represented through its agent that the Tenant would not be responsible for April's rent when the move-out condition occurred on April 1, 2022, though took the position that the Landlord would retain the security deposit. Both upon the context of the March 20, 2022 exchange as informed by the offer to end the tenancy

early and the representation of April 1, 2022 that the Tenant would not be responsible for April 1, 2022 rent, I find that the Landlord waived whatever claim they might have had to claim for April's rent. Accordingly, I find that the Landlord is not entitled to unpaid rent. Their claim is dismissed without leave to reapply.

Policy Guideline #17 states the following with respect to the retention or the return of the security deposit through dispute resolution:

1. 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.

Presently, the Landlord's agent says he gave the Tenant \$300.00 at the end of the tenancy in his personal capacity. It is highly unusual for an agent representing another in a professional capacity would do so, particularly in the context of a move-out inspection. I treat the \$300.00 as a partial return of the security deposit, such that I order the Landlord return the \$900.00 balance to the Tenant.

### Conclusion

The Landlord's claim for unpaid rent is dismissed without leave to reapply.

Pursuant to ss. 38 and 67 of the *Act*, I order that the Landlord pay \$900.00 to the Tenant as return of the balance of the security deposit.

The Landlord was unsuccessful in its application. I find they are not entitled to their filing fee. Accordingly, their claim under s. 72 of the *Act* is dismissed without leave to reapply.

It is the Tenant's obligation to serve the monetary order on the Landlord. If the Landlord does not comply with the monetary order, it may be filed by the Tenant with 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: December 08, 2022

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Residential Tenancy Branch