



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding HOLLYBURN PROPERTIES LIMITED  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNSD, FF; MNDC, MNSD, FF

### Introduction

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

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

This hearing dealt with the tenants' application pursuant to the Act for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

The tenant MS (the tenant) represented both tenants. The landlord was represented by its two agents. The parties 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.

The parties acknowledged service of all documents before me.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy? Is the landlord entitled to a monetary award for loss arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenants?

Are the tenants entitled to a monetary award for the return of a portion of their security deposit? Are the tenants entitled to a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement? Are the tenants entitled to recover their filing fee for their application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and testimony, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenants' claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began 1 February 2015 (the tenants began occupancy at 9 January 2015) and ended 29 November 2015. The tenants paid monthly rent in the amount of \$1,375.00. The landlord continues to hold the tenants' security deposit in the amount of \$687.50 and a parking pass deposit in the amount of \$25.00, which were collected at the beginning of this tenancy.

The parties entered into a written tenancy agreement on 4 January 2015. The tenancy agreement was for an initial term of 1 February 2015 to 31 January 2016. There is a liquidated damages clause at clause 5:

*If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$805.50 as liquidated damages and not a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

The agent RE testified that the tenants signed and initialed the tenancy agreement indicating that they understood the tenancy agreement was for a term of one year and

that liquidated damages would apply in the event that the tenants terminated the agreement early.

The tenants texted the agent RE to ask about subletting or assigning the rental unit. The tenants were told that subletting was not permitted.

The tenants posted the rental unit to an online classified site. The tenant testified that the prospective tenant replied to the posting. The tenant testified that he believed the prospective tenant to be a suitable candidate based on the strong background info provided. The tenant testified that he provided the prospective tenant's contact information to the landlord on or about 29 October 2015.

The agent RE testified that the tenants introduced a proposed new tenant to the landlord. The agent AA testified that the prospective tenant only wanted a six-month term for the tenancy agreement. The agent RE testified that this proposed tenant was not an ideal candidate and had to be convinced to sign a one year fixed term tenancy. The agent RE testified that the landlord was required to perform a credit check on the proposed tenant and to spend time with that person. The agent RE testified that the landlord had to delay entering into the new tenancy agreement by one week because the tenants delayed signing the notice to vacate because of the dispute.

On 18 October 2015 the tenant dropped off the parking pass in the landlord's mailbox. The agents report that they are not aware of the pass's return.

The tenant testified that the tenants were surprised when the landlord asserted that the liquidated damages clause would apply. The tenant testified that the tenants were under the impression that if they found a suitable replacement candidate that they could end their tenancy.

The tenant testified that the landlord told the tenants that they would have to provide one month notice to move. The tenant testified that the tenants intended to move on 15 November 2015. The tenant testified that had the tenants known the landlords would seek liquidated damages they would have left on 15 November 2015. The tenants were under the impression that by providing the one month of notice and providing a new tenant they could end their tenancy. The tenants claim for the rent paid for the second half of November in the amount of \$305.00, which represents the rent discrepancy between their new rental unit and the rental unit.

On 31 October 2015 the tenants provided a mutual agreement to end tenancy on the Residential Tenancy Branch standard form. The effective date of the agreement was

30 November 2015. On 31 October 2015, the tenants provided written notice to vacate the rental unit, which included the tenants' forwarding address. That notice set out an effective date of 30 November 2015. The tenant testified that the landlord refused to accept both of these forms as sufficient to end the tenancy.

On 4 November 2015, the tenants filled out a notice to vacate and again provided their forwarding address.

The agent RE testified that the tenants did not provide their forwarding address at the time of the condition move out inspection. The agent RE submits that the tenants had an obligation to provide their forwarding address on the condition move out inspection report. The agent RE admitted that the tenants provided their address at a later time and in their notice to end tenancy.

The agent AA testified that the average cost of rerental for the corporate landlord is \$805.33. The landlord provided me with a document breaking down the liquidated damages:

Item	Amount
Marketing	\$433.33
Showings x 6	270.00
Qualifying	90.00
Credit Check	12.00
<b>Total Liquidated Damages</b>	<b>\$805.33</b>

The tenant testified that the tenants asked to do a written assignment of the tenancy but was told that the landlord would only do a brand new lease. The tenants submit that the course of events was tantamount to an assignment of the remainder of their tenancy.

I was provided with a copy of the Parking Stall License Agreement (For Residents) (the Parking Agreement). Clause 4 of that agreement sets out:

*The licensee shall pay a sum of \$75.00 on [intentionally blank] as deposit on each garage access instrument. Plus \$25.00...as a deposit on each parking tag. At the end of the Parking Stall License Agreement and upon return of the garage access instrument, the deposit shall be returned in full within 15 days, without interest. ...*

The landlord claims for \$855.33:

Item	Amount
Liquidated Damages	\$805.33

Filing Fee	50.00
<b>Total Monetary Order Sought</b>	<b>\$855.33</b>

The tenants claim for \$1,117.50:

<b>Item</b>	<b>Amount</b>
Security Deposit	\$687.50
Parking Tag Deposit	25.00
Damages	305.00
Filing Fee	100.00
<b>Total Monetary Order Sought</b>	<b>\$1,117.50</b>

### Analysis

#### *Landlord's Application*

The landlord seeks liquidated damages in accordance with clause 5 of the tenancy agreement. The liquidated damages term is intended to compensate the landlord for its cost of rental where the tenant breaches the tenancy agreement.

Assignment is defined in *Residential Tenancy Policy Guideline*, "19. Assignment and Sublet":

Assignment is the act of transferring all or part of a tenant's interest in or rights under a lease or tenancy agreement to a third party, who becomes the tenant of the original landlord..

In this case, I find that the landlord's conduct in approving the new tenant (introduced by the tenants) to enter into a tenancy for the rental unit constituted an assignment in fact. On this basis, I find that the remainder of the tenants' obligations under the fixed-term tenancy agreement were transferred to the new tenant. On this basis, the tenants did not breach their tenancy agreement. The landlord is not entitled to liquidated damages as there was no breach.

In the alternative, the amount agreed to as liquidated damages must be a genuine pre-estimate of the loss at the time the contract is entered into otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. The costs associated with rental when the tenant performs all the marketing and showings, by the landlord's estimates, amount to no more than \$102.00. The liquidated damages amount of \$805.33 is grossly disproportionate to the genuine pre-estimate and as such constitutes a penalty.

As the landlord has been unsuccessful in its application, it is not entitled to recover its filing fee from the tenants.

### *Tenant's Application*

The tenants apply for return of their deposits as well as damages.

The tenants' claim for damages is premised on the landlord's delay in accepting the new tenant.

Section 34 of the Act governs assignments and sublets:

- (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.
- (2) If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).
- (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

As there was less than six months remaining on the fixed-term tenancy, the landlord was entitled to unreasonably withhold consent to sublet or assign the rental unit. While unreasonably withholding consent may act to shield the tenant from damages otherwise payable under the Act, it cannot act as a claim in itself. As the landlord did not breach the Act, regulations or tenancy agreement by delaying the acceptance of the new tenant, the tenants are not entitled to any compensation on the basis of this delay.

Section 38 of the Act sets out relevant rules dealing with security deposits:

- (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;

As I informed the agents at the hearing, there is no obligation that the tenants provide a forwarding address at the condition move out inspection. The obligation is only to

provide a forwarding address in writing. I find that the tenants provided their forwarding address in writing to the landlord on 4 November 2015. The tenancy ended 29 November 2015. There is no evidence before me that indicates that the tenants' right to their security deposit is extinguished. There are no other applications filed by the landlord. Accordingly, the tenants are entitled to return of their security deposit.

The tenants seek recovery of their deposit paid for the parking pass. This deposit was paid pursuant to the Parking Agreement.

Tenancy agreement is a defined term under the Act:

**"tenancy agreement"** means 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;

I find that the Parking Agreement is an agreement for facilities between the landlord and tenants and accordingly forms part of the tenancy agreement. The Parking Agreement provides that the parking deposit amount will be refunded within fifteen days of the pass's return and the end of that agreement. On the basis of the evidence before me, I find that the tenant returned the parking pass on or about 19 October 2015 after he ceased to act under the Parking Agreement. I found the evidence provided by the tenant regarding the pass to be highly credible: In particular, the details surrounding its return and the internal consistency of the tenant's claim. On this basis the tenants are entitled to return of \$25.00.

As the tenants have been successful in their application, the tenants are entitled to recover the filing fee paid from the landlord.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$525.00 under the following terms:

<b>Item</b>	<b>Amount</b>
Return of Security Deposit	\$400.00
Return of Parking Pass Deposit	25.00
Recovery of Filing Fee for this Application	100.00
<b>Total Monetary Order</b>	<b>\$525.00</b>

The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) 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 subsection 9.1(1) of the Act.

Dated: April 22, 2016

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Residential Tenancy Branch