



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

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

## **DECISION**

**Dispute Codes:** FFL MNDCL-S MNRL-S

### **Introduction**

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

- a monetary order for unpaid rent, pursuant to section 67;
- a monetary order for money owed or compensation monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

CM ('landlord') appeared and testified on behalf of the landlord in this hearing. Both parties attended the hearing and 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.

Both parties confirmed at the beginning of the hearing that LV is not a party to this dispute as originally named in the landlord's application. As neither party was opposed, the application was amended to remove LV as a tenant in this dispute.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the tenants were duly served with the landlord's application and evidence. The tenant did not submit any written evidence for this hearing.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for unpaid rent and losses?

Is the landlord entitled to recover the filing fee for this application from the tenant?

### **Background and Evidence**

This fixed-term tenancy began on March 1, 2018, and was to end on February 28, 2019. Monthly rent was set at \$1,650.00. The landlord collected a security deposit of \$825.00, which the landlord still holds. The tenant testified that he had moved out on August 24, 2018, while the landlord's agent testified that this tenancy ended on September 1, 2018 when the landlord received a text message from the tenant.

The landlord is requesting monetary compensation as follows:

Unpaid Rent for September 2018	\$1,650.00
Cleaning & Fees for unreturned keys and remotes	380.00
Liquidated Damages	805.33
<b>Total Monetary Award Requested</b>	<b>\$2,835.33</b>

The tenant was served with a 10 Day Notice for unpaid utilities on August 14, 2018 with an effective date of August 24, 2018. The 10 Day Notice was later cancelled by the landlord. The tenant testified that on August 16, 2018 he secured a new place to live, and moved out on August 24, 2018 on the effective date of the 10 Day Notice.

The landlord's agent testified that they had notified the tenant that the 10 Day Notice was cancelled, and the tenant moved out on September 1, 2018 with no notice other than a text message on September 1, 2018 requesting a move out inspection.

The landlord's agent testified that despite the fact that the tenant did not comply with the *Act* in moving out before the end of this fixed-term tenancy, they mitigated their losses by advertising the unit for rent as soon as possible, and were able to re-rent the unit for October 1, 2018 for the same monthly rent. The landlord is seeking liquidated damages in the amount of \$805.33 as set out in the tenancy agreement. The landlord submitted a copy of the tenancy agreement which indicates a \$805.33 "liquidated damages" clause. The landlord's agent testified that this amount covers the cost of marketing and staffing required to re-rent the unit, and is a part of all tenancy agreements the landlord signs.

In addition to the loss of rent for September 2018 and the liquidated damages, the landlord is also seeking a monetary order for the tenant's failure to clean the unit, and

return the keys and remote. The tenant does not dispute the fact that he was still in possession of the keys as he was waiting for the move out inspection.

The tenant does not dispute the fact that he had moved out before the end of the fixed-term agreement, but that he did so in order to comply with the 10 Day Notice served to him. The tenant testified that he secured a new place to live as soon as possible, and was under the assumption the landlord knew that he would be moving. The tenant disputes the fact that he was notified that the 10 Day Notice was cancelled..

### **Analysis**

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss

Section 44 of the *Residential Tenancy Act* reads in part as follows:

**44** (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
  - (i) section 45 [*tenant's notice*];
  - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
  - (ii) section 46 [*landlord's notice: non-payment of rent*];
  - (iii) section 47 [*landlord's notice: cause*];
  - (iv) section 48 [*landlord's notice: end of employment*];
  - (v) section 49 [*landlord's notice: landlord's use of property*];
  - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
  - (vii) section 50 [*tenant may end tenancy early*];

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

**45** (2) *A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

*(a) is not earlier than one month after the date the landlord receives the notice,*

*(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*

*(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

I find that it was undisputed by both parties that the tenant was served with a 10 Day Notice on August 14, 2018, which was later cancelled by the landlord. I am not satisfied that the landlord provided sufficient evidence to support that the tenant was notified of the cancellation, and that he knew that he was not required to move out pursuant to that 10 Day Notice. The landlord provided a copy of the 10 Day Notice in their evidence that states that it was 'VOID', but I find that the landlord failed to provide sufficient evidence to show how and when the tenant was informed of the cancellation. I find that the confusion surrounding the issuance and cancellation of the 10 Day Notice resulted in the early termination of this tenancy, rather than the tenant's actions, and therefore I dismiss the landlord's application for loss of rent without leave to reapply.

Although the tenant testified that he moved out by the effective date of the 10 Day Notice, I find that it was undisputed that he was still in possession of the keys as of September 1, 2018. I find the landlord's evidence shows that the tenant did not inform the landlord that the unit was vacant until September 1, 2018, and therefore I find that the landlord has the right under section 57(3) of the *Act* to receive compensation for one day's rent against the tenant for over holding. Accordingly I find that the landlord is entitled to recover \$55.00 for September 2018 rent.

The landlord drafted the tenancy agreement calling for payment of \$805.33 as liquidated damages in the event that the tenant ended the fixed term tenancy before the end of the term, or if the tenant breached a material term of the agreement or the *Act* that resulted in the early termination of this tenancy. As stated above, I am not satisfied that the early termination of this fixed term tenancy was due to the tenant's breach of *Act* or tenancy agreement. I find that the error in the issuance of the 10 Day Notice, which was later cancelled by the landlord, resulted in the end of this tenancy, and therefore I dismiss the landlord's application for liquidated damages without leave to reapply.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged condition except for reasonable wear and tear. I have reviewed the landlord's monetary claim for losses, and have taken in consideration of the evidential materials submitted by the landlord, as well as the sworn testimony of both parties.

I find that the landlord provided sufficient evidence to support that the tenant failed to leave the rental unit in reasonably clean condition, and accordingly I allow the landlord a monetary claim of \$180.00 for cleaning. I also find that undisputed that the tenant failed to return the keys and remotes to the landlord when he had moved out, and there I allow the landlord's monetary claim in the amount of \$200.00.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the landlord was only partially successful in their application, I find that the landlord is entitled to recover half of the \$100.00 filing fee paid for this application.

The landlord continues to hold the tenant's security deposit of \$825.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain a portion the tenant's security deposit in satisfaction of the monetary claim.

### **Conclusion**

I allow the landlord a monetary award in the amount of \$485.00 as set out in the table below. The remaining portion of the landlord's monetary claim is dismissed without leave to reapply.

Over holding for September 2018	\$55.00
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Cleaning	180.00
Keys & Remotes	200.00
Recovery of the Filing Fee	50.00
Less Security Deposit	-825.00
<b>Total Monetary Order to Tenant</b>	<b>\$340.00</b>

In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain a portion the tenant's security deposit in satisfaction of the monetary claim. I issue a Monetary Order in the amount of \$340.00 in favour of the tenant for the return of the remaining portion of his security deosit.

The tenant is provided with this Order in the above terms and the landlord must be served with a copy of 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: February 15, 2019

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Residential Tenancy Branch