



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Columbia Property Management Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNR, MNSD, FF

### Introduction

This was a hearing with respect to the landlord's application for a monetary order and an order to retain the security deposit. The hearing was conducted by conference call. The landlord's representative and the named tenants called in and participated in the hearing. One of the tenants was assisted by her mother who attended as a witness and a representative.

### Issue(s) to be Decided

Is the landlord entitled to a monetary award for loss of rental income and if so in what amount?

### Background and Evidence

The rental unit is an apartment in Kamloops. The tenancy began on August 1, 2013 for a fixed term ending on July 31, 2014. The monthly rent was \$1,050.00, payable on the first of each month. The tenants paid a security deposit of \$525.00 on July 10, 2013. When one of the original co-tenants of the rental unit was forced to move, the remaining tenants found themselves unable to afford to rent the unit. They gave notice of the intention to move out at the end of January, 2014. The tenants placed advertisements and sought to obtain new tenants for the rental unit. The tenants cheque in the amount of \$525.00 in partial payment of rent for January was returned marked "NSF".

The landlord's representative testified that the landlord was unsuccessful in finding suitable tenants until it was re-rented effective May 1, 2014. The landlord has claimed payment of the sum of \$4,348.22 made up of the following:

- Balance of Jan rent of \$525 plus \$25 NSF charge: \$550.00
- Unpaid rent Feb/Mar/Apr: \$3,150.00

• Hydro charges Feb 18 – Apr 30:	\$351.17
• Lease break Fee:	\$300.00
• Less credit on rental account:	-\$2.95

Total: \$4,348.22

The “Lease Break Fee” claimed in the application was in fact an amount specified as liquidated damages in the tenancy agreement. The agreement provided as follows:

If the Tenant ends the fixed term tenancy before the end of the original term, the Landlord may, at the Landlord’s option, treat his Tenancy Agreement as being at an end. In such event, the sum of **\$300.00** shall be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the administrative costs of re-renting the said premises. The Landlord and Tenant acknowledge and agree that the payment of liquidated damages shall not preclude the Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the premises and damages as a result of lost rental income due to the Tenant’s breach of the terms of this agreement.

The tenant said that she moved out in early January and endeavoured to find other tenants to rent the house. She said that there were people to whom the landlord could have rented who were prepared to move in before May.

At the hearing it was established that the actual amount due for utilities should be reduced to a claim of \$139.72 for the period from April 3<sup>rd</sup> to April 30<sup>th</sup> and \$59.80 for the prior period, for a total of \$199.52.

The landlord’s representative testified that the landlord advertised the rental unit extensively and there were people who applied to rent the unit who were not satisfactory tenants or were not credit worthy. The landlord’s representative said that the landlord used its best efforts to find new tenants and did so commencing May 1<sup>st</sup>.

### Analysis

The landlord claimed loss of rental income for a period after the tenants moved out of the rental unit as well as liquidated damages as provided by the tenancy agreement. The tenancy agreement is a contract of adhesion drawn by the landlord. If the tenants wished to rent from the landlord they were obliged to accept the terms of the agreement without modification. The liquidated damage clause must therefore be interpreted having regard to the *Contra Proferentem* doctrine: simply put, this means that any

ambiguity in the clause in question must be resolved in the manner most favourable to the tenants.

Although the landlord states in this clause that the payment of liquidated damages will not preclude the landlord from pursuing another remedy available in law, including loss of rental income, this provision ignores the fact that payment of the liquidated damage amount is triggered by the landlord's election to treat the agreement as being at an end, as opposed to its election to affirm the contract and the tenants' obligation to pay rent thereunder despite the tenants' breach of the agreement. The liquidated damage clause requires the landlord to make a choice; if the landlord chooses to claim the liquidated damage amount it must elect to treat the contract as being at an end. This choice is incompatible with a claim for future loss of rent because the tenants' obligation to pay rent is dependent upon the landlord's affirmation of the contract. In order to hold the tenant accountable for future rent, subject only to the landlord's obligation to mitigate its loss, the landlord must in essence say to the tenants: "I expect you to continue to abide by your agreement to pay rent until the end of the term." I find that the landlord may not end the agreement on the one hand and at the same time demand that the tenants abide by the agreement. Having ended the agreement, there is no longer a remedy available in law or in equity for the payment of future loss of rental income.

At the hearing the landlord's representative elected to affirm the tenancy agreement and abandoned any claim for liquidated damages. I therefore allow the claim for unpaid rent and loss of revenue for February, March and April and dismiss as abandoned the claim for liquidated damages.

I am satisfied that the landlord acted reasonably in its efforts to mitigate its damages by finding new tenants to rent the unit. The landlord was not obliged to accept as a tenant any person who applied; it was entitled to conduct a reference check and credit check before agreeing to rent to a prospective tenant. The landlord is entitled to recover unpaid rent for January in the amount of \$525.00 plus a \$25.00 NSF charge. I award the landlord loss of revenue in the amount of \$3,150.00 and \$199.52 for utilities. Taking into account the ledger credit of \$2.95.00 there is due to the landlord the sum of \$3,896.57.

### Conclusion

I have allowed the landlord's claim in the amount of \$3,896.57. The landlord is entitled to recover the \$100.00 filing fee for a total award of \$3,996.57. I order that the landlord retain the \$525.00 security deposit that it holds, in partial satisfaction of this award and I

grant the landlord an order under section 67 for the balance of \$3,471.57. This order may be registered in the Small Claims 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: June 06, 2014

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Residential Tenancy Branch

