



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDCL, FFL

### Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- a monetary order for loss under the Act, the regulation or tenancy agreement, pursuant to section 67 of the Act; and
- an authorization to recover the filing fee for this application, pursuant to section 72 of the Act.

Both parties attended the hearing. The tenant was assisted by advocate SL (the tenant) and translator SE. The landlord was assisted by advocate TH. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the *Act*.

### Preliminary Issue – moot application to recover the filing fee

At the outset of the hearing the landlord affirmed the filing fee for this application was waived.

The application for an authorization to recover the filing fee is moot since the filing fee was never paid. Section 62(4)(b) of the Act states an application should be dismissed if the application or part of an application for dispute resolution does not disclose a dispute that may be determined under the Act. I exercise my authority under section

62(4)(b) of the Act to dismiss the application for an authorization to recover the filing fee.

### Issue to be Decided

Is the landlord entitled to a monetary order for loss under the Act, the regulation or tenancy agreement?

### Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submissions and arguments are reproduced here. The relevant and important aspects of the claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is their obligation to present the evidence to substantiate their applications.

Both parties agreed the fixed term tenancy started on August 01, 2019 and ended on December 07, 2019. The agreed end date of the fixed term tenancy was July 31, 2020. Monthly rent was \$2,500.00, due on the first day of the month. At the outset of the tenancy the landlord collected a security deposit of \$1,250.00. The tenancy agreement addendum states:

- Tenant agrees to pay first month AND last month of rent prior to August 01, 2019
- 3) Liquidated damages: if the Tenant end the fixed term tenancy before the original term as set out in the tenancy agreement, the Landlord may treat this agreement as being at an end. In such an event, an equivalent of one month's rent will be paid by the Tenant to the Landlord as liquidated damages, and not as penalty, to cover the Landlords cost of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental property.

The landlord affirmed the tenant authorized him to withhold the deposit in the move-out inspection form. The tenant stated she did not understand English and was not aware she was authorizing the landlord to withhold the deposit. The tenant also said the landlord was intimidating and agitated during the move out inspection.

The landlord stated the tenant informed him on November 10, 2019 she would move-out, but did not specify when this would happen. The landlord explained to the tenant on the same date she would be responsible for rent until the end of the fixed term tenancy:

I understand your situation. However, what you are suggesting would be considered a breach of contract as our tenancy agreement is valid until July 31st, 2020. If you choose to move out prior to this date you are still responsible for all of the rent due until July 31st, 2020.

On November 17, 2019 the tenant wrote again to the landlord:

I had a lot of discussions with relatives who will come to Canada from Korea soon and came to the same conclusion that we should move to a big house next month. The decision was not easy and it took me a long time to reply to you again.

As you suggested, even though the house we are living now will be left empty for an undetermined period, we will pay a full rental fee to you every month until the new tenant moves into the empty house. Perhaps I may be faced with the worst situation of continuing to pay the rental fee for the empty house until the rent expires. But that too I will take.

However, I've been informed that there are a lot of families in Korea who plan to come to coquitlm [SIC] to study in coming January and I will introduce them to you hoping the empty house would be rented by a new tenant soon.

Anyway, Because of my poor English, My friend Brian, on behalf of me, will call you tomorrow [SIC] for a more detailed discussion with you.

The tenant explained because of her poor English she did not understand what she was referring to in the email above referenced. Furthermore, she just moved to Canada and does not understand the local tenancy regulations. The landlord affirmed the tenant visited the rental unit prior to sign the tenancy agreement with a local agent that translated and explained her every aspect of the rental negotiation.

On November 26, 2019 the tenant informed she would move out on December 07, 2019. On December 03, 2019 the landlord posted an advertising for the rental unit. A proof of advertising was submitted into evidence. The landlord kept the advertising active until July 2020, always asking for monthly rent in the amount of \$2,500.00.

The landlord submitted into evidence a document with directions between the rental unit and the tenant's forwarding address indicating her new address is only 2.3 kilometers away and a 5 minute-drive from the rental unit.

The landlord submitted into evidence a list with 24 dates and times of showings between December 08, 2019 and July 11, 2020, as well as the names of potential new tenants. Email communications with the 24 potential new tenants were also submitted into evidence. The landlord affirmed that he told all of them the price was negotiable, a similar unit on the same block was rented for the same amount and only two

applications were submitted. The first application was not accepted because the applicant had an hourly salary of \$15.00 and would not be able to afford the rent. The second application was approved, and the tenancy started on August 01, 2020. However, the new tenant was authorized to move in on July 15, 2020 and not pay rent until July 31, 2020 as an incentive to sign the tenancy agreement. The new tenant is paying \$2,400.00 per month.

The tenant affirmed the rental unit had maintenance problems and the landlord failed to provide repairs. The rental unit's temperature was 13°C. because the heating did not operate properly, the cabinet doors in the bathroom did not open and the refrigerator was leaking.

The landlord said the heat was perfectly fine and the tenant's children liked to sleep on the floor by the window, thus they felt colder. The cabinet door and the refrigerator were repaired.

The tenant stated that similar 3-bedroom units were rented in the neighbourhood by "a couple of hundred dollars less" and the landlord did not try his best to re-rent the unit. The tenant introduced two families that had interest in renting this rental unit and the landlord refused to rent to them. The landlord rebutted and stated only one family was introduced by the tenant, and they did not submit an application.

The landlord is also claiming for \$39.43 for the *pro rata* electricity bill. The tenant agreed to pay this amount during the hearing.

The landlord affirmed the July 2020 rent, which was paid when the tenancy started, was used to pay for the liquidated damages mentioned on the clause 3 of the tenancy agreement addendum. Thus, he is seeking for seven months of loss of rental income.

The landlord submitted into evidenced a monetary order worksheet mentioning three items: electrical bill (\$39.43), seven months of loss of rental income (\$17,500.00) and filing fee (\$100.00).

### Analysis

Section 7 of the Act states:

Liability for not complying with this Act or a tenancy agreement

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

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.

#### Loss of rental income

Based on the parties undisputed testimony, I find there was a fixed term tenancy agreement until July 31, 2020, the tenant left the rental unit on December 07, 2019 and did not pay rent from January to June 2020, monthly rent was \$2,500.00 and the rental unit was not re-rented until August 01, 2020.

The month of July 2020 (last month of the agreed fixed term tenancy) was paid in advance. For the purpose of educating the landlord, I note that under section 19(1) of the Act, a landlord is not permitted to accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. Asking the tenant to pay for the first and last month in advance is not allowed by the Act.

The landlord did not apply for liquidated damages. The landlord can not use the last month rent which was illegally required to be paid at the outset of the tenancy for liquidated damages.

Section 45(2) and (3) of the Act state:

(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.

(3)If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Based on both the landlord's coherent testimony and the emails dated November 10 and 17, 2019, I find the landlord did not fail to comply with a material term of the tenancy agreement and moved out because she wanted to move to a bigger rental unit. Thus, I find the tenant ended a fixed term tenancy without complying with section 45(2) and (3) of the Act.

Based on both parties testimony and the tenancy agreement, I find that as a consequence of the tenant ending the tenancy contrary to the Act the landlord suffered a loss of rental income for the months of January to July 2020 in the total amount of \$17,500.00 (7 times in the amount of \$2,500.00) and holds a credit of \$2,500.00.

Residential Tenancy Branch Policy Guideline 3 sets conditions for loss of rental income claims. It states:

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant while the tenant remains in possession of the premises is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's

whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement.

[...]

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement.

Based on the November 10 and 17, 2019 emails, I find that the landlord clearly put the tenant on notice that she would be liable for the loss of rental income and the tenant clearly understood this.

The tenant's statement that she did not understand what she was referring to in the November 10 and 17, 2019 emails lacks an air of credibility. The emails are written in almost perfect English and an agent represented her when she was negotiating the tenancy agreement.

The parties offered conflicting testimony regarding whether or not the tenant introduced two potential new tenants and if the landlord was creating difficulties to accept potential new tenants. Based on the 24 emails with communication with potential new tenants and the landlord's coherent testimony, I find the landlord was trying to re-rent the rental unit and did not reject potential new tenants that were able to prove they can afford the rent payment.

Further to that, Policy Guideline 5 states:

**When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:**

- 1. re-rent the rental unit at a rent that is reasonable for the unit or site; and**
- 2. re-rent the unit as soon as possible.**

For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. **Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.**

If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

**(emphasis added)**

Based on the landlord's testimony, proof of advertising, 24 emails with potential new tenants, and incentive of 15 days of free rent, I find the landlord acted to minimize his losses. However, per section 7(2) of the Act and Residential Tenancy Branch Policy Guidelines 5 and 16 the landlord should have taken additional steps to minimize his loss of rental income, such as lowering the amount asked for rent and advertised on other rental platforms. The landlord should have reduced the asking price in accordance with the following table:

<b>Period</b>	<b>Rent reduction (% over the full rent amount)</b>	<b>Rent after reduction</b>
From January 01 to 31, 2020	Full rent amount	\$2,500.00
From February 01 to 29, 2020	Reduction of 5%	\$2,375.00
From March 01 to 31, 2020	Reduction of an extra 5%	\$2,250.00
From April 01 to 30, 2020	Reduction of an extra 5%	\$2,125.00
From May 01 to 31, 2020	Reduction of an extra 5%	\$2,000.00
From June 01 to 30, 2020	Reduction of an extra 5%	\$1,875.00
From July 01 to 31, 2020	Reduction of an extra 5%	\$1,750.00
Total loss:		\$14,875.00
(minus credit of \$2,500.00)		(-\$2,500.00)
Total:		\$12,375.00

Because the landlord did not hire an agent to further advertise the rental unit or posted advertising on other rental platforms, per section 7(2) of the Act and Residential Tenancy Branch Policy Guidelines 5 and 16 I further reduce the loss of rental income by an extra 20%. As such, the total amount to be paid by the tenant for loss of rental income is \$9,900.00 (12,375.00-20%).

Thus, in accordance with sections 7 and 67 of the Act, I order the tenant to pay the landlord an amount of \$9,900.00 for the loss of rental income for the months of January to June 2020.

Electricity payment

Both parties agreed the tenant will pay the landlord the amount of \$39.43 for the electricity bill from November 26 to December 07, 2019.



In summary:

Loss of Rent (January to June 2020)	\$9,900.00
Electricity payment	\$39.43
<b>Total</b>	<b>\$9,939.43</b>

Conclusion

Pursuant to section 67 of the Act, I grant the landlord a monetary order in the amount of \$9,939.43.

The landlord is provided with this order in the above terms and the tenant must be served with this order as soon as possible. Should the tenant 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: November 03, 2020

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Residential Tenancy Branch