

### 3. Claims for Rent and Damages for Loss of Rent

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*This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.*

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This guideline deals with situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement.

Section 44 of the *Residential Tenancy Act* and section 37 of the *Manufactured Home Park Tenancy Act* set out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended pursuant to these provision, however if a tenant remains in possession of the premises (overholds), the tenant will be liable to pay occupation rent on a *per diem* basis until the landlord recovers possession of the premises. In certain circumstances, a tenant may be liable to compensate a landlord for loss of rent.

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

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. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

The damages awarded are an amount sufficient to put the landlord in the same position

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as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of \$1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at \$50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the \$50.00 difference over the remaining 10 months of the original term. In a month to month tenancy, if the tenancy is ended by the landlord for non-payment of rent, the landlord may recover any loss of rent suffered for the next month as a notice given by the tenant during the month would not end the tenancy until the end of the subsequent month. If a month to month tenancy is ended for cause, even for a fundamental breach, there can be no claim for loss of rent for the subsequent month after the notice is effective, because a notice given by the tenant could have ended the tenancy at the same time.

In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

Even if a landlord is successful in re-renting the premises, a claim for loss of rent may still be successful where the landlord has other vacancies and is able to establish that those other premises would have been rented had the tenancy in question continued.

In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent or damages, but any remainder is not recoverable by the tenant. In a month to month tenancy the fact that the landlord may have been able to re-let the premises at a higher rent for a subsequent tenancy does not serve to reduce the liability of the previous tenant.

Even where a tenancy has been ended by proper notice, if the premises are un-rentable due to damage caused by the tenant, the landlord is entitled to claim damages for loss of rent. The landlord is required to mitigate the loss by completing the repairs in a timely manner.