



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding 1600 DAVIE LIMITED PARTNERSHIP  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      CNC, OLC, CNR  
                                 OPL, MNRL

### **Introduction**

Two Applications for Dispute Resolution were filed by the Tenant (the Tenant's Applications) under the Residential Tenancy Act (the Act). The first Application was filed on August 10, 2022, seeking:

- Cancellation of a One Month Notice to end Tenancy for Cause (the One Month Notice).

The second Application was filed on November 11, 2022, seeking:

- Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or utilities (the 10 Day Notice).

An Application for Dispute Resolution was also filed by the Landlord under the Act (the Landlord's Application) on September 1, 2022, seeking:

- An order of possession for cause based on the One Month Notice.

On September 16, 2022, the Landlord submitted an #RTB-42L (Landlord Request to Amend a Dispute Resolution Application), seeking to add a claim for the recovery of unpaid rent in the amount of \$3,264.92.

The Applications were set to be heard together and the hearing was convened by telephone conference call at 11:00 AM on January 10, 2023. The hearing was attended by two agents for the Landlord D.B. and N.O. (the Agents), who provided affirmed testimony. No one attended on behalf of the Tenant. The Agents were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing.

The Agents were advised that pursuant to rule 6.10 of the Rules of Procedure, interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The Agents were asked to refrain from speaking over me and to hold their questions and responses until it was their opportunity to speak. The Agents were also advised that personal recordings of the proceeding were prohibited under the Rules of Procedure and confirmed that they were not recording the proceedings.

The Rules of Procedure state that the respondent must be served with a copy of the Application, the Notice of Hearing, and any documentary evidence intended to be relied upon at the hearing by the applicant(s). As the Tenant did not attend the hearing, I confirmed service of these documents as explained below.

The Agents testified in the hearing that the Notice of Dispute Resolution Proceeding package (NODRP), which includes the Application and the Notice of Hearing, as well as the documentary evidence before me on behalf of the Landlord and the #RTB-42L were posted to the door of the rental unit in a single package on September 16, 2022, by D.B. in the presence of N.O. The Agents stated that the Tenant is still in the rental unit as of the date of the hearing. Although postage to the door is not an acceptable method of service under section 89(1) of the Act for service of the NODRP, based on the undisputed testimony of the Agents, I am satisfied that the Tenant still resides in the rental unit and therefore it is more likely than not that they received this notice. Pursuant to section 71(2)(b) and (c), and section 90(c) of the Act, I therefore find the Tenant to be deemed sufficiently served for the purposes of the Act on September 19, 2022. Further to this, I note that the Tenant filed two Applications that were set to be heard at the same date and time as the Landlord's Application. As a result, I am satisfied that the Tenant was aware of the date and time of the hearing.

Residential Tenancy Branch (Branch) records indicate that the NODRP was sent to the Landlord by email, as per their request, on September 15, 2022. As I am satisfied that the NODRP was provided to Tenant on September 16, 2022, by posting it to the door of the rental unit, I therefore find that the Landlord complied with section 59(3) of the Act and rule 3.1 of the Rules of Procedure.

Although two Applications were also before me for consideration from the Tenant at the hearing, the Agents denied any knowledge of the Tenant's Applications, stating that they were unaware that anything but the Landlord's Application would be heard at the hearing as they had not been served with anything by the Tenant.

I confirmed that the hearing details shown in the NODRP were correct and I note that the Agents had no difficulty attending the hearing on time using this information. In any event, as the Tenant was sent NODRP's in relation to their own Applications on both August 25, 2022, and November 23, 2022, which contain information on the date and time of today's hearing, I am satisfied that they were duly advised by both the Landlord and the Residential tenancy Branch (the Branch) of the date and time of the hearing and how to attend. Rule 7.1 of the Rules of Procedure states that the dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator. Rule 7.3 of the Rules of Procedure states that if a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party. Based on the above and as there was no evidence before me that the parties had agreed to reschedule or adjourn the matter, I commenced the hearing as scheduled, despite the absence of the Tenant or an agent acting on their behalf.

The ability to know the case against you and have an opportunity to respond is fundamental to the dispute resolution process. As there is no evidence to the contrary, I accept the Agents' affirmed and undisputed testimony that they were not served with any documentation in relation to the Tenant's Applications including but not limited to the NODRP's. As a result, I find that the NODRP's were not served on the Landlord in accordance with section 59(3) of the Act or rule 3.1 of the Rules of Procedure. I therefore find that it would be significantly prejudicial to the Landlord and a breach of the Act, the Rules of Procedure, and the principles of administrative justice and procedural fairness to proceed with the hearing. Further to this, rule 7.3 states that if a party or their agent fails to attend the hearing, the arbitrator may dismiss the application with or without leave to reapply. As a result, I therefore dismiss the Tenant's Applications in their entirety, without leave to reapply, as the timelines for disputing the notices to end tenancy are now long past. The hearing therefore proceeded based only on the Landlord's Application and amendment.

Although I have reviewed all documentary evidence before me that was accepted for consideration in accordance with the Act and the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the Agents, a copy of the decision and any orders issued in favor of the Landlord will be sent to them by email at the email address listed in the Application and confirmed at the hearing.

### Preliminary Matters

The Agents stated that since the time the amendment was filed, additional rent has gone unpaid and that the Tenant currently owes \$16,524.00 in outstanding rent for the period of September 2022 – January 2023. As a result, they sought to amend the amount of their monetary claim at the hearing.

Rule 4.2 of the Rules of Procedure states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing without the need for an amendment to be submitted or served. As a result, I amended the amount of the Landlord's monetary claim at the hearing to include the additional rent allegedly owed.

### Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession pursuant to section 55 of the Act?

Is the Landlord entitled to recovery of unpaid rent?

### Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that rent in the amount of \$2,995.00 is due on the first day of each month, and that a security deposit and pet damage deposit were both required in the amount of \$1,497.50 each. At the hearing the Agents stated that both deposits are still held in trust by the Landlord and that the Landlord is seeking retention of these deposits against any amounts owed for outstanding rent.

The Agents testified that the One Month Notice was posted to the door of the rental unit on July 26, 2022, by D.B. in the presence of N.O., both of whom attended the hearing as Agents.

The One Month Notice in the documentary evidence before me is on a 2021 version of the form, contains the address for the rental unit, is signed and dated July 26, 2022, and has an effective date of August 31, 2022. The One Month notice states that the tenancy is being ended because:

- The tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
- The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
- The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord; and
- A breach of a material term of the tenancy agreement was not corrected within a reasonable time after written notice to do so was given.

In the details of cause section of the One Month Notice it states that the Tenant has been given three official notices regarding excessive noise, specifically music, and has disturbed their neighbours on numerous occasions including a recent incident on July 23, 2022, where the Tenant put speakers on their balcony to play music at night, disturbing both other occupants of the building and residents of the neighbourhood.

At the hearing, the Agents stated that the Tenant did not dispute the One Month Notice within the time period set out under section 47(4) of the Act and therefore sought an Order of Possession for the rental unit as soon as possible. The Agents also stated that rent is owing for September, October, November, and December of 2022, as well as January of 2023, and therefore sought a Monetary Order in the amount of \$16,524.60, less the amount of the deposits currently held in trust by the Landlord.

Although the teleconference remained open for the 18-minute duration of the hearing, no one attended on behalf of the Tenant to provide any evidence or testimony for consideration.

### Analysis

Based on the undisputed documentary evidence and testimony before me, I find that a tenancy to which the Act applies exists between the parties. I also find that rent in the amount of \$2,995.00 is due on the first day of each month and that rent has not been paid by the Tenant for September - December of 2022, or January of 2023.

Section 47 of the Act outlines the grounds upon which a notice to end tenancy for cause may be issued and states that a landlord may end a tenancy by giving notice to end the

tenancy if the tenant or a person permitted on the residential property by the tenant has done any of the things alleged in the One Month Notice, among other things.

Section 47(4) of the Act states that a tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice. Section 47(5) of the Act also states that if a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

I have reviewed all relevant documentary evidence and oral testimony and in accordance with section 88 of the Act, I find that the One Month Notice was posted to the door of the rental unit on July 26, 2022. Pursuant to section 90(c) of the Act, I therefore deem the Tenant served with the One Month Notice on July 29, 2022, unless earlier received. As a result, I find that the Tenant had until August 8, 2022, to file an application seeking its cancellation. Although the Tenant filed an application seeking to dispute the One Month Notice, I note that it was not filed until August 10, 2022. As a result, I find that the Tenant did not dispute the One Month Notice in compliance with section 47(4) of the Act. In any event, the Tenant also failed to attend the hearing of their own Application seeking cancelation of the One Month Notice, which was therefore dismissed without leave to reapply.

Based on the above, I therefore find that conclusive presumption under section 47(5) of the Act applies, that the tenancy ended on August 31, 2022, the effective date of the One Month notice, and that the Tenant has been overholding the rental unit since that date.

Section 55(2) of the Act states that a landlord may request an order of possession of a rental unit if notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution, and the time for making that application has expired. Section 55(3) of the Act states that the director may grant an Order of Possession before or after the date when the tenant is required to vacate a rental unit and that the order takes effect on that date. Pursuant to sections 55(2) and 68(2)(a) of the Act, and considering that rent has not been paid for many months, I therefore grant the Landlord an Order of Possession effective two days after service on the Tenant.

I have already found above that the Tenant has not paid any rent for September - December of 2022, or January of 2023, and that rent in the amount of \$2,995.00 is due on the first day of each month. As I have found that the tenancy ended on August 31, 2022, the Landlord is therefore only entitled to compensation for overholding, calculated on a per diem basis up to a maximum of the full rent amount each month, for each day the Tenant has overheld the rental unit pursuant to section 57(3) of the Act. I therefore grant the Landlord compensation for overholding in the amount of \$12,964.60, calculated as follows:

- \$11,980.00 for September, October, November, and December of 2022, calculated at \$2,995.00 per month; and
- \$984.60 for January 1, 2023 – January 10, 2023, calculated at \$98.46 per day ( $\$2,995.00 \times 12 = \$35,940.00 / 365$  days).

The Landlord remains at liberty to file a subsequent application for dispute resolution against the Tenant if the Tenant overholds the rental unit past January 10, 2023, the date of the hearing, or if additional loss of rent is suffered by the Landlord, should they wish to do so.

The Agents stated that the Tenant paid \$2,995.00 in deposits at the start of the tenancy, which the Landlord still holds in trust, and that the Landlord wishes to retain this amount against the above noted amounts owed. Pursuant to the regulations, I find that \$1.60 in interest has been accrued, and therefore the Landlord is deemed to currently hold \$2,996.60 in deposits on behalf of the Tenant. Pursuant to section 72(2)(b) of the Act, I therefore authorize the Landlord to withhold the \$2,996.60 held in trust for the security and pet damage deposit, towards the amounts owed to the Landlord for compensation for overholding. Pursuant to section 67 of the Act, I therefore grant the Landlord a Monetary Order in the amount of \$9,968.00.

### Conclusion

The Tenant's Applications are dismissed in their entirety, without leave to reapply.

Pursuant to section 55(2)(b) of the Act, I grant an Order of Possession to the Landlord effective **two days after service on the Tenant**. 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 Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$9,968.00**. 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 Branch under Section 9.1(1) of the Act.

Dated: January 10, 2023

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Residential Tenancy Branch