



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

A matter regarding BC HOUSING MANAGEMENT  
COMMISSION and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes:** Tenant: CNR, MNDCT, DRI, RR, AAT, RPP, AS, OLC  
Landlord: OPR-DR, MNR-DR, FFL

### **Introduction**

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlord requested:

- an Order of Possession pursuant to section 55;
- a monetary order for overholding pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*

The tenant requested:

- cancellation of the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order requiring the landlord to return the tenant’s personal property pursuant to section 65;
- Is the tenant entitled an order to allow access to or from the rental unit or site for the tenant or the tenant’s guests;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- an order allowing the tenant to assign or sublet because the landlord’s permission has been unreasonably withheld pursuant to section 65.

MH (“landlord”) appeared as agent for 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.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch’s teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

The tenant confirmed receipt of the landlord’s application for dispute resolution (‘Application’) and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the tenant duly served with the landlord’s Application and evidence. The landlord testified that although they were not served with the tenant’s application and evidence package, they did obtain a copy from the RTB, and were okay with proceeding. Accordingly, the hearing proceeded to hear both applications.

The tenant confirmed receipt of a 10 Day Notice dated October 13, 2022, which was posted on their door. In accordance with sections 88 and 90 of the *Act*, I find the tenant deemed served with the 10 Day Notice on October 16, 2022, 3 days after the 10 Day Notice was posted.

### **Preliminary Issue – Unrelated Claims**

Residential Tenancy Branch (RTB) Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claims related to the 10 Day Notice and the return of the tenant’s personal property are not sufficiently related to the tenant’s other claims. In order to provide the parties with a timely decision related to the priority claims, I exercise my discretion to dismiss the applications unrelated to the 10 Day Notice and the application for the return of the tenant’s personal property with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

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

Should the landlord’s 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the landlord entitled to monetary compensation for overholding?

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

Is the tenant entitled to an order for the landlord to return their personal property?

### **Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

Both parties confirmed that the tenancy referred to in this application began on January 1, 2020. Monthly rent was set at \$328.00, payable on the first of the month. No security deposit was collected for this tenancy.

The rental unit was flooded on June 16, 2022, and the tenant was temporarily relocated to a different rental unit on the same day. On June 21, 2022, the tenant informed the landlord that they did not wish to return to the rental unit after the restoration was completed, and the tenant was offered a transfer to a different rental unit at a different address where the tenant currently resides. A copy of the transfer request was submitted in evidence, which is dated June 22, 2022 and signed by both parties, and stamped as received on June 29, 2022.

The restoration for the flooded unit was completed on June 27, 2022, and the landlord offered the tenant the opportunity to return, which was declined by the tenant. On July 12, 2022, the tenant's transfer request was approved, and the two parties completed a new tenancy agreement for the new unit effective August 1, 2022. A move-in inspection was completed for the new unit on July 15, 2022, and the tenant was provided with the keys to the new rental unit. The landlord submits that the tenant agreed to move out of the original rental unit by July 31, 2022.

The landlord submits that the building manager had attempted to arrange a move-out inspection with the tenant for the old rental unit, but the tenant informed them that they were not finished moving. The landlord submits that on August 9, 2022, the tenant demanded compensation for the loss of their personal belongings and garbage disposal fees, and would not be moving out until compensation was received. The landlord submits that despite their attempts to discuss and resolve the matter with the tenant, the tenant continues to overhold the original rental unit by refusing to return the keys and move the rest of their personal belongings until the tenant's requested compensation was received. After a letter was issued to the tenant on August 12, 2022, the landlord served the tenant with a 10 Day Notice to End Tenancy on October 13, 2022 as the tenant has not returned the keys, nor has the tenant removed the rest of their personal

belongings from the original rental unit. The landlord is requesting an Order of Possession as well as Monetary Order for overholding since August 1, 2022.

The tenant testified that they have moved to the new rental unit as agreed by both parties, but due to financial hardship and their physical disability, they have been unable to retrieve or move the rest of their personal belongings from the original rental unit to the new one. The tenant testified that they are only occupying the new rental unit, and requested that the landlord deliver the tenant's remaining furniture to them at the new rental unit. The landlord testified in the hearing that they have only entered the original rental unit twice, and the landlord cannot confirm specifically what has been left behind.

### **Analysis**

Section 44 of the *Residential Tenancy Act* states how a tenancy may end:

- 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, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
  - (c)the landlord and tenant agree in writing to end the tenancy;
  - (d)the tenant vacates or abandons the rental unit;
  - (e)the tenancy agreement is frustrated;
  - (f)the director orders that the tenancy is ended;
  - (g)the tenancy agreement is a sublease agreement.

(2)[Repealed 2003-81-37.]

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 24 of the Residential Tenancy Regulation states the following about abandonment

**Abandonment of personal property**

**24** (1) A landlord may consider that a tenant has abandoned personal property if

(a) the tenant leaves the personal property on residential property that the tenant has vacated after the tenancy agreement has ended, or

(b) subject to subsection (2), the tenant leaves the personal property on residential property

(i) that, for a continuous period of one month, the tenant has not ordinarily occupied and for which the tenant has not paid rent, or

(ii) from which the tenant has removed substantially all of the tenant's personal property.

(2) The landlord is entitled to consider the circumstances described in paragraph (1) (b) as abandonment only if

(a) the landlord receives an express oral or written notice of the tenant's intention not to return to the residential property, or

(b) the circumstances surrounding the giving up of the rental unit are such that the tenant could not reasonably be expected to return to the residential property.

(3) If personal property is abandoned as described in subsections (1) and (2), the landlord may remove the personal property from the residential property, and on removal must deal with it in accordance with this Part.

(4) Subsection (3) does not apply if a landlord and tenant have made an express agreement to the contrary respecting the storage of personal property.

It is undisputed by both parties that the following has taken place:

- A) The tenant completed an application to transfer rental units, which was approved by the landlord.
- B) Both the tenant and landlord completed a new written tenancy agreement for the new rental unit, effective August 1, 2022.
- C) The tenant was provided keys to the new rental unit, and has been residing there and paying rent for the new rental pursuant to the written tenancy agreement referenced above.

In review of the evidence and testimony before me, I find that although the tenant may not have returned the keys to the landlord, or have removed the remainder of their personal property from the original rental unit, I find that the tenant has moved to the new rental unit, where they are currently residing. The tenant testified in the hearing that they are no longer residing in the old rental unit, and that they have been unable to remove the remainder of their belongings. Based on this testimony, and the above facts, I find that the tenant has clearly communicated to the landlord that they do not plan on returning to live there. I find that this was expressed by their application to transfer dated June 22, 2022, and by entering into the written tenancy agreement effective August 1, 2022 for the new rental unit.

As the tenant had moved to the new rental unit, and expressed their intentions of not returning there, pursuant to section 44(1)(d) of the *Act*, and section 24(2) of the *Regulation*, I find the unit may be considered abandoned or vacated as of July 31, 2022. As the tenant has clearly expressed that that they are now residing at the new rental unit, and do not plan on returning to the old one, I find that the tenancy has ended in accordance with section 44(1)(d) of the *Act*, and an Order of Possession is not required for possession of the rental unit by the landlord. I dismiss the landlord's application for an Order of Possession, and the 10 Day Notice dated October 13, 2022 is cancelled, and is of no force or effect.

Sections 25 and 26 of the Regulation speak to the landlord's obligations for abandoned personal property, and how a tenant may claim it. Section 29 of the Regulation speaks to the disposal of abandoned property.

### **Landlord's obligations**

**25** (1)The landlord must

- (a) store the tenant's personal property in a safe place and manner for a period of not less than 60 days following the date of removal,
- (b) keep a written inventory of the property,
- (c) keep particulars of the disposition of the property for 2 years following the date of disposition, and
- (d) advise a tenant or a tenant's representative who requests the information either that the property is stored or that it has been disposed of.

(2) Despite paragraph (1) (a), the landlord may dispose of the property in a commercially reasonable manner if the landlord reasonably believes that

- (a) the property has a total market value of less than \$500,
- (b) the cost of removing, storing and selling the property would be more than the proceeds of its sale, or
- (c) the storage of the property would be unsanitary or unsafe.

(3) A court may, on application, determine the value of the property for the purposes of subsection (2).

### **Tenant's claim for abandoned property**

**26** (1) If a tenant claims the tenant's personal property at any time before it is disposed of under section 25 or 29 [*disposal of personal property*], the landlord may, before returning the property, require the tenant to

- (a) reimburse the landlord for the landlord's reasonable costs of
  - (i) removing and storing the property, and
  - (ii) a search required to comply with section 27 [*notice of disposition*], and
- (b) satisfy any amounts payable by the tenant to the landlord under this Act or a tenancy agreement.

(2) If a tenant makes a claim under subsection (1), but does not pay the landlord the amount owed, the landlord may dispose of the property as provided by this Part.

### **Disposal of personal property**

**29** (1) For the purposes of this section, "**administrator**" has the same meaning as in the *Unclaimed Property Act*.

(2) If a landlord has complied with section 25 [*landlord's obligations*], the landlord may dispose of the property in a commercially reasonable manner unless, during the 60 days referred to in that section,

(a) a person referred to in section 27 (2) [*person entitled to notice of disposition*] who has been given a notice as provided in that section has taken or demanded possession of the property,

(b) a person who holds a security interest in the property has taken or demanded possession of the property, or

(c) a person claiming an interest in the property has made an application under subsection (7) or has brought an action to establish the person's interest in or right to possession of the property and the landlord has been notified of the application or action.

(3) If a landlord disposes of personal property under subsection (2), the landlord may retain proceeds of the sale sufficient to

(a) reimburse the landlord for the landlord's reasonable costs of

(i) removing, storing, advertising and disposing of the property, and

(ii) a search required to comply with section 27 [*notice of disposition*], and

(b) satisfy any amounts payable by the tenant to the landlord under this Act or a tenancy agreement.

(4) If any amount remains after payments are made under subsection (3), the landlord must pay the balance to the administrator, who must follow the procedure for an unclaimed money deposit set out in the *Unclaimed Property Act*.

(5) If a landlord pays money to the administrator under this section, the landlord must give the administrator a copy of the inventory of the personal property disposed of and written particulars of the disposition.

(6) The purchaser of personal property disposed of in accordance with this Part acquires a marketable title free of all encumbrances on payment of the taxes owing in relation to the personal property or the sale.



- (7) On the application of an interested person, a court may make an order
- (a) prohibiting or postponing disposition of the property under this section on any conditions the court considers appropriate,
  - (b) determining the right of a person claiming an interest in or right to possession of the property or the right of the landlord to dispose of it, or
  - (c) that an action be brought or an issue be tried.

In this case, I find that as of the hearing date, the landlord had yet to remove the remainder of the tenant's belongings pursuant to section 25 of the Regulation, nor has the landlord disposed of the tenant's personal belongings pursuant to section 29 of the Regulation. As the removal or disposal of the tenant's belongings have yet to take place, I dismiss the tenant's application for an order that the landlord return the tenant's personal property with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

Lastly, the landlord applied for a monetary order for overholding of the rental unit. As noted above, I find that the tenancy had ended as of July 31, 2022, and that the tenant had clearly expressed that they had no intentions of moving back to the rental unit. Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

*"Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss<sup>1</sup>. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.*

*The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation<sup>2</sup>. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.*

*The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."*

In this case, I find that the landlord was uncertain as to whether the unit was abandoned, or whether the tenant was overholding. The landlord attempted to resolve the matter with the tenant without success, and on October 13, 2022, the landlord served the tenant with a 10 Day Notice instead of considering the unit abandoned pursuant to section 44(1)(d) of the *Act*. Although the landlord may have been acting out of caution and with the best intentions, the landlord still had a duty to mitigate their losses. In this case, I am not satisfied that the landlord had made a reasonable effort to mitigate the tenant's exposure to the landlord's monetary losses as is required by section 7(2) of the *Act*. I find that in this case, instead of serving the tenant with a 10 Day Notice to End Tenancy, the landlord could have determined that the rental unit was abandoned, and removed the tenant's belongings pursuant to section 25 of the Regulation in order to re-rent the rental unit. On this basis, I do not find that the landlord is entitled to a monetary order of overholding, and I dismiss the landlord's application without leave to reapply.

For the purpose of clarity in relation to the landlord's right to take possession of the rental unit, and obligations in dealing with the tenant's personal belongings, I find that the rental unit may be considered abandoned pursuant to section 44(1)(d) of the *Act* as of July 31, 2022, and the landlord may act in accordance with sections 25 and 29 of the Regulation in order to remove the tenant's belongings for the purpose of re-renting the rental unit.

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 unsuccessful with their application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application. The landlord must bear the cost of this filing fee.

### **Conclusion**

I find that the tenant had abandoned the rental unit referenced in this application pursuant to section 44(1)(d) of the *Act*. I dismiss the landlord's application for an Order

of Possession without leave to reapply. The 10 Day Notice dated October 13, 2022 is cancelled is of no force or effect.

I remainder of the landlord's application is dismissed without leave to reapply.

The tenant's entire application is dismissed with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

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 27, 2023

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Residential Tenancy Branch