

5. Duty to Minimize Loss

Jan 04

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.

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 loss¹. 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 Legislation². 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. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved. The landlord or tenant entitled to contract for repairs as a result of a breach by the other party, may choose to pay a service charge that exceeds what one would reasonably be required to pay for the service in the circumstances. In that case, the arbitrator may award a reduced claim based on the reasonable cost of the service. If partial mitigation occurs, the arbitrator may apportion the claim to cover the period during which mitigation occurred. The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy;

¹ *Residential Tenancy Act*, s. 7(2); *Manufactured Home Park Tenancy Act*, s. 7(2)

² RTA, s. 32; MHPTA, s. 26

5. Duty to Minimize Loss

Jan 04

however, claims for loss of rent for subsequent months may be successful once efforts to find a new tenant are made.

Claims for loss of rental income

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent. Where the tenant has vacated or abandoned the rental unit or site, the landlord must try to rent the rental unit or site again as soon as is practicable.

Where the landlord gives a notice to end tenancy and is entitled to claim damages for loss of rental income, the landlord's obligation to re-rent the rental unit or site begins after the relevant dispute period set out in the *Residential Tenancy Act*³ or the *Manufactured Home Park Tenancy Act*⁴ have expired. If the tenant files an application to dispute the notice, the landlord is not required to find a new tenant until the arbitration decision and order are received, the time limits for a review application have passed, and, where a review application is made by the tenant, after the review decision is received by the landlord.

Where an arbitrator orders the tenancy ended under the *Residential Tenancy Act*⁵ or the *Manufactured Home Park Tenancy Act*⁶, or issues an order of possession⁷, the landlord must begin efforts to find a new tenant after the time limits for a review application have passed, and, where a review application is made by the tenant, after the decision and order are received by the landlord.

3 RTA, ss. 46(4), 47(4), 48(5) and 49(8)

4 MHPTA, ss. 39(4), 40(4), 41(5) and 42(4)

5 RTA, s. 56

6 MHPTA, s. 49

7 RTA, s. 55: MHPTA ss 48