



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## Decision

### Dispute Codes:

OPT, OLC, MNDC, FF

### Introduction

This Dispute Resolution hearing was convened to deal with the tenant's application seeking an order of possession for the tenant under section 54 of the Act.

Both the landlord and the tenant appeared and each gave testimony in turn.

### Preliminary Matter 1

The parties had each submitted late evidence primarily comprised of case law examples, that were received on file and served on each other just prior to the hearing date.

Pursuant to the Residential Tenancy Proceedings Rules of Procedure, Rule 3.5 requires that, to the extent possible, the Applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

Rule 4.1 of the Residential Tenancy Proceedings Rules of Procedure states that if the Respondent intends to dispute an application, the evidence upon which the Respondent intends to rely must be received as soon as possible and at least 5 days before the dispute resolution hearing or if that is not possible, the evidence must be filed with the Residential Tenancy Branch and received by the Applicant at least 2 days prior to the hearing.

The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term "*at least*", then the first and last days must be excluded, and if served on a business, it must be served on the previous business day. Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

Rules 3.5(c) and 4.1(c) of the Residential Tenancy Rules of Procedure provide that, if copies of the evidence are not received by the Residential Tenancy Branch or the other party as required, the dispute resolution officer must apply Rule 11.6 to the

evidence.[*Consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance of the hearing*]

In this instance I found that the evidence would not be considered as it was received late and was not specifically material to the issues to be determined in the application before me. Accordingly, this late evidence was not taken into consideration in the determination of this dispute.

However, verbal testimony by the participants with respect to the content of the late evidence was accepted and considered.

### **Preliminary Matter 2**

With respect to the portion of the tenant's application relating to the monetary claim for damages and loss, I find that this claim is premature as the issue of the tenancy had not been concluded prior to the application, and the full extent of the damages that would stem directly from the delay in tenancy, if found to exist, may not have yet been incurred. This could result in having to estimate damages or would necessitate a second application.

Rule 2.3 of the Dispute Resolution Proceedings Rules of Procedure provide that, in the course of the dispute resolution proceeding, if the Dispute Resolution Officer determines that it is appropriate to do so, he or she may dismiss unrelated disputes contained in a single application with or without leave to reapply.

Accordingly, I make no findings in relation to the tenant's monetary claims for compensation for damages or loss at this time. I find I must dismiss this portion of the tenant's application with leave to reapply and the tenant is at liberty to make a subsequent application with respect to alleged damages or loss stemming from the tenancy relationship.

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

The remaining issue to be decided is whether or not the tenant is entitled to an order of possession pursuant to the Act or Agreement.

### **Background and Evidence**

The parties negotiated and signed a tenancy agreement on July 15, 2011 for a fixed term tenancy to begin on September 1, 2011. The fixed term was to end on August 31, 2012 and at the end of the fixed term the tenancy would continue on a month-to-month basis for an additional 18 months. The rent was \$6,500.00 and the tenant paid security and pet damage deposits totalling \$6,500.00.

Both parties testified that the landlord advised the tenant shortly before the date of possession that the rental unit was no longer available and that the tenant could not move in on the date previously agreed-upon.

The parties communicated with each other, with the tenant taking the position that he was entitled to possession of the unit as of September 1, 2011 in accordance with the agreement and the landlord taking the position that there was no agreement, meaning that the landlord would not be relinquishing possession of the unit to the tenant.

The tenant testified that the landlord's refusal to comply with the tenancy agreement caused a great deal of disruption to his family and the tenant was not willing to waive the agreement. The tenant testified that he therefore found it necessary to file for dispute resolution seeking possession of the rental unit pursuant to the Act and agreement. The tenant was seeking an order of possession.

The respondent testified that the contract was void as she had contracted with the tenant without authorization from the co-owner who did not agree to the tenancy. The respondent felt that this fact would completely nullify the agreement because she lacked authority in the business partnership to grant possession of the rental unit or to contract on behalf of the true landlord. The tenant argued that the contract was therefore frustrated. The landlord summarized case law and relevant judicial review decisions which held that a person, other than the rightful landlord, could not validly form a tenancy agreement without the consent of the true landlord, and that such a contract if formed under these circumstances, would not be valid nor binding on the parties.

The landlord testified that, although she had intended in good faith to offer the rental unit for lease, and had actually sold her furniture and moved out of the unit to do so, her plans to relocate to the United States were thwarted and she was forced to move back into the rental unit with her children. The landlord stated that there was no way she could turn over possession to the tenant without severe hardship for the landlord's family.

The landlord testified that alternate accommodation was suggested to the tenant in place of the rental unit to assist the tenant. The landlord did not agree with the tenant's position that the tenant was entitled to exclusive possession of the rental unit.

The landlord had also argued that the tenant was not entitled to an Order of Possession based on section 56.1 of the *Residential Tenancy Act*, (the Act), which permits the landlord to end a tenancy without notice to a tenant in certain restricted and compelling circumstances, including frustration.

The landlord testified that, because her partner quashed the tenancy agreement, her ability to complete the contract was rendered impossible. The landlord felt that this would therefore fit the criteria for ending the tenancy through frustration. The landlord's position was that the tenancy had ended through frustration of contract and it followed that all e representations that had been made in anticipation of a possible new tenancy that would otherwise commence on September 1, 2011 would no longer have any force or effect.. The landlord testified that each party was released from their rights and obligations under the tenancy agreement signed.

### **Analysis**

58 (1) Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute in regard to any of the following:(a) rights, obligations and prohibitions under this Act; (b) rights and obligations under the terms of a tenancy agreement that:

- (i) are required or prohibited under this Act, or
- (ii) relate to
  - (A) the tenant's use, occupation or maintenance of the rental unit, or
  - (B) the use of common areas or services or facilities.

Given the above, I find that a dispute resolution Officer 's authority is limited to enforcing the Act or the Tenancy Agreement.

I find that, under the Act, the definition of "landlord", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
  - (i) permits occupation of the rental unit under a tenancy agreement, or
  - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, other than a tenant occupying the rental unit, who

- (i) is entitled to possession of the rental unit, and
- (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires

Given the above, I find that the respondent has fully met the definition of “*landlord*” under the Act. I also find that I am not at liberty to deliberate on the subject of the respondent’s personal or commercial relationship with her business partner or the co-owner of the property, as I have been granted the statutory authority to rule on application of the Residential Tenancy Act and Regulations, a tenancy agreement or a matter directly involved in a tenancy relationship between the two parties in a dispute.

Having found that the respondent is a landlord under the Act and the agreement, I find that all of the terms of the agreement and all of the provisions of the Act are applicable to this landlord and this tenant with respect to their reciprocal rights and obligations in the tenancy.

I find that the Act provides the following definition : “*tenancy*” means a tenant's right to possession of a rental unit under a tenancy agreement. I find that the tenant’s right to exclusive possession is an integral part of the tenancy.

**Section 16** of the Act states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. I find that, under the Act, the tenant’s right to possession commenced on September 1, 2011.

**Section 28** of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

**Section 30** (1) of the Act states that a landlord must not unreasonably restrict access to residential property by

- (a) the tenant of a rental unit that is part of the residential property, or

(b) a person permitted on the residential property by that tenant.

**Section 27** of the Act states that a landlord is not allowed terminate or restrict a service or facility if

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement

I find the landlord not to be in compliance with the above provisions of the Act.

On the issue of whether or not this tenancy relationship was validly terminated by the landlord, I find that the only way a landlord may legally take possession of the rental unit, would be if the tenancy was first ended in accordance with the Act.

**Section 44** of the Act specifies that a tenancy can be ended 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*];
- (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 provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(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;** (my emphasis)

(f) the director orders that the tenancy is ended.

I find that none of the above methods to end the tenancy could possibly apply to this situation, except in the event that this particular contract was genuinely frustrated. The Act provides a process for ending the tenancy when it is frustrated. Section 56.1 states

that a landlord may make an application for dispute resolution requesting an order (a) ending a tenancy because: (i) the rental unit is uninhabitable, or (ii) the tenancy agreement is otherwise frustrated.

If the dispute resolution officer is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order: (a) deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible, and (b) specifying the effective date of the order of possession.

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration was the result of their own deliberate or negligent act or omission.

In this instance the landlord was required to make an application if it sought to terminate the tenancy due to alleged frustration. I find that no application was ever made by the landlord. Moreover, I find that, even if the landlord had pursued issuing the applicable Notice, this tenancy could never be successfully terminated through frustration, because the key criteria to make the case for frustration was not met by the circumstances of this case.

As this tenancy was not validly ended in compliance with the Act, I find that I have no reason to deny this tenant an order of possession, since the original tenancy still exists and nothing has occurred to legally change that state of affairs. Therefore I find that the tenancy agreement would prevail.

In accordance with the tenancy agreement and the Act, I find that the tenant was entitled to exclusive possession of the rental unit as of September 1, 2011 and pursuant to this finding, that the tenant is now entitled to an Order of Possession.

**Conclusion**

Based on the evidence and testimony, I hereby grant an order of possession to the tenant effective at 1:00 p.m. on Saturday October 15, 2011. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I order that upon moving in, the tenant will be responsible for paying partial rent for the half month of October 2011, due and payable on October 15, 2011.

I also find that the tenant is entitled to be reimbursed for the \$100.00 cost of filing this application and I order that the tenant deduct \$100.00 as a one-time abatement off of the half-month rent due on October 15, 2011.

The portion of the tenant's application relating to the monetary claim for damages and loss is hereby dismissed with leave to reapply in future.

I make no other findings in regard to this tenancy.

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: September 29, 2011.

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Residential Tenancy Branch