



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

Dispute Codes: FF MND MNDC MNR MNSD

### Introduction

On February 01, 2013, a hearing was conducted to resolve a dispute between these two parties. The landlord had applied for a monetary order. The Arbitrator granted a portion of the landlord's application. The tenant has applied for a review of this decision.

Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

The applicant relies on sections 79(2)(b) and (c) of the *Residential Tenancy Act* (the "Act"). Section 79(2) (b) provides that the director may grant leave for review if a party has new and relevant evidence that was not available at the time of the original hearing. Section 79(2)(c) provides that the director may grant leave for review if a party has evidence that the arbitrator's decision or order was obtained by fraud.

### Issues

Does the applicant have new and relevant evidence that was not available at the time of the hearing? Does the applicant have evidence that the Arbitrator's decision was obtained by fraud?

### Facts and Analysis

#### **New and Relevant Evidence**

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the hearing;
- the evidence is new,
- the evidence is relevant to the matter before the Dispute Resolution Officer,
- the evidence is credible, and
- the evidence would have had a material effect on the decision.

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, the applicant states that during the hearing on February 01, 2013, the landlord testified that repairs to the rental unit were complete and paid for by January 10, 2013. The applicant states that he inspected the home in early March and the repairs were not done. The applicant has attached photographs of the rental unit and states that it is evident from the photographs that the blinds were not changed and the lawn was not repaired.

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

“New” evidence includes evidence that has come into existence since the arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

The applicant stated that as of early March the repair work was not done. This means that this work was also not done at the time of the hearing on February 01, 2013. The tenant could have taken photographs prior to the hearing and presented this evidence during the hearing to dispute the landlord’s claim. The tenant did not do so despite being aware of the landlord’s claim for the cost of repairs. Therefore I find that the tenant has not provided any new evidence that was not available prior to the hearing.

On this ground for review, the tenant also states that he moved out on November 28, 2012 and not December 18, 2012 as stated on page 2 of the decision. Upon review of the decision I find that the Arbitrator states “*Mr. D. claims that he moved at the end of November, leaving only a couch and some garbage.*” Therefore the Arbitrator

considered the tenant's testimony regarding the date he moved out and used this fact in the making of the decision.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, I find that the applicant has not provided any new evidence and therefore has failed to meet the test to establish grounds for review in this tribunal and accordingly, I find that the application for review on this ground must fail.

### **Decision obtained by Fraud**

This ground applies where a party has evidence that the Arbitrator's decision was obtained by fraud. A party who is applying for review on the basis that the Arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the Arbitrator, and that that evidence was a significant factor in the making of the decision. The burden of proving this issue is on the person applying for the review. If the Arbitrator finds that the applicant has met this burden, then the review will be granted.

On this ground for review, that the Arbitrator's decision was obtained by fraud, the applicant states:

1. The lease agreement was unilaterally changed by the landlord
2. Repair work was not done as claimed by the landlord
3. Presence of Illegal clauses in the tenancy agreement

The decision addresses each of the above points that the tenant makes in his application that the decision was obtained by fraud. Regarding the tenancy agreement, the Arbitrator states "*Whether or not there are defects in the written tenancy agreement, none are such as to affect its validity generally. Even had it been unenforceable, there still would have been a tenancy agreement of some kind between the parties*"

The tenant provided a photograph to show the condition of the yard and stated that the lawn was not repaired. However, the Arbitrator awarded the landlord an amount that he deemed reasonable to repair the lawn when weather permits. At the time the tenant took the photograph, weather may have been a factor in the delay. In any event, the Arbitrator determined that the tenant was responsible for the repair of the lawn and other repairs and therefore awarded the landlord the cost of doing so.

With respect to the matters the applicant asserts are fraudulent, they were not matters unknown to the applicant at the time of the original hearing. They were in existence and could have been addressed at the original hearing. The applicant may disagree with

the Arbitrator's findings of fact, but he had an opportunity to respond to the landlord's evidence at the hearing.

This ground for review is not designed to provide parties a forum in which to rebut findings by the Arbitrator or to allege an error of fact or law, but to provide evidence which could not have been presented at the time of the hearing because it was not in existence at that time. The applicant is free to apply for judicial review in the Supreme Court, which is the proper forum for bringing allegations of error.

The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof. Accordingly, I find that the application for Review on this ground must also fail.

Therefore, **I dismiss the application for Review and confirm the original decision dated February 01, 2013.**

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: March 20, 2013

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Residential Tenancy Branch