



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

Dispute Codes: FF MNDC OLC

### Introduction

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 Landlords apply for review on the following grounds:

- A party has new and relevant evidence that was not available at the time of the original hearing.
- A party has evidence that the director's decision or order was obtained by fraud.

A Dispute Resolution Officer may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the issues raised can be dealt with under the provisions of the Legislation that allow an Dispute Resolution Officer to correct a typographical, arithmetical or other similar error in the decision or order; clarify the decision, order or reasons, or deal with an obvious error or inadvertent omission in the decision, order or reasons;
- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the Dispute Resolution Officer should be set aside or varied;
- the application is frivolous or an abuse of process;

- the applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

### **Issues**

Do the Landlords have new and relevant evidence that was not available at the time of the original hearing?

Have the Landlords supplied sufficient evidence to show that the decision/order was obtained by fraud?

### **Facts and Analysis**

The Decision/Order under review is a decision which provided the Tenant a Monetary Order pursuant to the provisions of Section 67 of the Act.

### **New and Relevant Evidence**

The Landlords have provided photographs of the rental property and indicate on their application:

“Located photo evidence not available to present at hearing. Property manager (“V”) and brother was not served and not aware of hearing and away day of hearing. (V) has managed this property for last 8 years its very important his evidence is heard the tenant has dealt with V 98% of the time.”

In her Application for Dispute Resolution, the Tenant named MS as a Landlord but did not name V as a Landlord. The Landlords now state that V’s testimony is crucial. MS was duly served with the Notice of Hearing documents. MS did not provide written statements by V refuting the Tenant’s claim, nor did he apply for an adjournment prior to the Hearing so that V could attend the Hearing to give evidence. 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” refers to any oral statement, document or thing that is introduced to prove or disprove a fact in an arbitration hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be evidence.

The Landlords did not explain why the photographs were not available at the time of the Hearing, or how they were relevant to the Tenant’s application, however the Dispute Resolution Officer noted in the Decision:

“The landlord did not bring any material evidence to support his submissions. I find that he does in fact rely heavily on his property manager, who was not present for these proceedings, to resolve problems with this tenancy. Nor did the landlord appear to be prepared for this hearing to substantiate his testimony.”

The Landlords also provided a list of submissions they would have made if V had been at the Hearing. **The Application for Review Consideration is not an opportunity to re-argue the case.**

Leave may be granted on the basis of new and relevant evidence if the applicant can prove that:

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

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

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.

Based on the written submissions of the Landlords, I find that they have not provided sufficient proof that the photographs were not available at the time of the Hearing or that they were relevant to the matter before the Dispute Resolution Officer. Therefore, the Landlords have failed to disclose sufficient evidence to support this ground for review.

### **Decision Obtained by Fraud**

Under this ground, the Landlords provided a copy of a Decision made December 16, 2010 with respect to this tenancy. The Landlords submit that some of the claims made by the Tenant were already decided in the December 16, 2010, decision.

The Decision of December 16, 2010, found that the fridge belonged to the Tenant and that it was the Tenant's responsibility to have the fridge inspected and repaired:

"The tenant testified that the signed tenancy agreement states that appliances are included in the tenancy but that the fridge in the rental unit belongs to the tenant."

"It should be noted, however that the fridge belongs to the tenant, should the fridge require repairs, this responsibility falls upon the tenant and not the landlord to have these repairs completed."

Part of the Tenant's more recent application dealt with compensation for the fridge. The Decision includes a finding that the Landlord compensate the Tenant \$300.00 for loss of use of the fridge.

Fraud is the intentional "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive." Fraud may arise where a party has deliberately misled the Dispute Resolution Officer by the concealment of a material matter.

Fraud must be intended. There is insufficient information or facts to clearly establish that the Tenant was fraudulent. A negligent act or omission is not fraudulent. However, I do find that the Decision and Orders *may* have been different if the Dispute Resolution Officer had this information been before him while making his determinations.

On this basis, in the interest of the principles of natural justice, I allow the Application for a Review for the limited and express purpose of considering the evidence with respect to the fridge only and I hereby Order that the Hearing be reconvened pursuant to the provisions of Section 82(2)(b) Act,. This hearing will be held face-to-face at the date and time shown in the attached Notice of Hearing.

I further Order that the Decision and Orders in this matter, dated September 28, 2011, **be suspended** until such time that reconvened Hearing is conducted and a decision is reached with respect to the Tenant's application for compensation for the fridge.

Pursuant to the provisions of Section 81(4), the Landlords must serve the Tenant with a copy of this Review Decision and the attached Notice of Hearing within **three (3) days** of receiving this Review Decision.

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: October 24, 2011.

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Residential Tenancy Branch