



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

Dispute Codes: MNR OPR

### Introduction

This is an application filed by the tenants on January 21st, 2012 for review of a Dispute Resolution Officer decision and order dated January 20, 2012 on the above noted matter.

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.

### Issues

In this matter the tenants rely on the second and third grounds: new and relevant evidence not available at the time of the original hearing, and information obtained by fraud.

### Facts and Analysis

It should be noted that the landlord applied for dispute resolution by way of direct request and as such attendance was not required by the parties. The tenants however submit in this application that they were not served the application for dispute resolution; they state that the landlord and his spouse were in India on the date of the notice and that they did not return until after Christmas and that the landlord served the orders from the original decision on January 9<sup>th</sup>, 2012. The tenants state that up to that date they contacted the Residential Tenancy Branch concerning the nature of this dispute, and that as instructed they were waiting for service of a Notice of Dispute Resolution from the landlords.

The tenants state that neither the landlord nor his wife served them notice, and that the proof of service is a blatant lie. They state that they were ready to make an application for dispute resolution, had they been served with the landlord's notice.

The tenants attached a copy of their application for dispute resolution with relevant evidence.

Residential Tenancy Policy Guideline #24 addresses the grounds for review. Concerning new and relevant evidence the guideline states in part:

*It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence to the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a 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 hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained, such as photographs that could have been taken or affidavits that could have been sworn before the hearing took place.*

In order to be considered new, the applicant must prove that:

- The evidence was not available at the time of the original hearing.
- The evidence is new.
- The evidence is relevant to the matter which is before the Dispute Resolution Officer.
- The evidence is credible.
- The evidence would have a material effect on the decision.

In the context of the Guideline I do not consider the tenants' evidence new; rather, it was available and would have been presented had they been served with the landlord's notice of dispute resolution. At issue is whether the tenants provided sufficient evidence to prove that the original decision was obtained by fraud.

Concerning fraud the guideline states in part:

*"Fraud must be intended. A negligent act or omission is not fraudulent. A party who is applying for review on the basis that the dispute resolution officer's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the dispute resolution officer, and that the evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new and material facts, which were not known to the applicant at the time of the hearing, and which were not before the dispute resolution officer, and from which the dispute resolution officer conducting the review can*

*reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the dispute resolution officer finds that the applicant has met this burden, then the review will be granted.*

*It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated by the arbitrator. A review hearing will not be granted where an arbitrator prefers the evidence of the other side over the evidence of the party applying.”*

The tenants state that the landlord and his wife were in India and that they were never served as alleged. The tenants provided a comprehensive and reasonable explanation concerning their inability to dispute the landlord's application for dispute resolution; they provided a copy of their own notice for dispute resolution dated January 9<sup>th</sup>, 2012 and they were waiting to receive the landlord's notice. They contacted the Residential Tenancy Branch for advice and they complied as directed. The landlord's application was processed by direct request and the Dispute Resolution Officer did not have an opportunity to question the veracity of the documents submitted by the landlord. If the tenants were not served I am not persuaded that the failure was caused by a negligent act or omission.

I find that the tenants provided sufficient evidence to warrant a face-to-face or a teleconference hearing in order to hear the parties' testimony concerning this dispute. I am also satisfied that the tenants' evidence may produce a different outcome than the one made by the original Dispute Resolution Officer.

On that basis I accept that the tenants were not served with a notice of hearing. Therefore I grant the application for review and I direct that the review proceed by conducting a new hearing. The original decision and order are suspended pending the outcome of the review hearing. As previously stated it is therefore not necessary that I consider the tenants' application on the second ground.

### Decision

Both parties will be notified of a new hearing date. The tenants must serve the landlord with a copy of this decision with their evidence in accordance with section 89(1) of the *Residential Tenancy Act*.

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: January 25, 2012.

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Residential Tenancy Branch