



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW CONSIDERATION DECISION**

Dispute Codes: FF MNSD

### 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 tenant applies 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.

An Arbitrator 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 Arbitrator 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 Arbitrator 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 tenants/applicants have new and relevant evidence that was not available at the time of the original hearing?

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

## **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 original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Arbitrator;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the Arbitrator

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

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.

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.

Evidence is “relevant” that relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact.

Evidence is “credible” if it is reasonably capable of belief.

Evidence that “would have had a material effect upon the decision of the Arbitrator” is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A mere suspicion of fresh evidence is not sufficient.

### **Decision Obtained by Fraud**

This ground applies where a party has evidence that the Arbitrator’s decision was obtained by fraud. 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.” Intentionally false testimony would constitute fraud, as would making changes to a document either to add false information or to remove information that would tend to disprove one’s case. Fraud may arise where a witness has deliberately misled the Arbitrator by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

Fraud must be intended. A negligent act or omission is not fraudulent.

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 party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the Arbitrator, and from which the Arbitrator conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. 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.

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 upon by the Arbitrator. A review hearing

will likely not be granted where an Arbitrator prefers the evidence of the other side over the evidence of the party applying.

## **Analysis**

The Decision/Order under review is a decision to dismiss the tenants' claim for recovery of double their security deposit and to grant the landlords a monetary Order for unpaid rent, compensation for damage or loss and recovery of the filing fee. The landlord was also granted an Order allowing them to retain the security deposit in partial satisfaction of their claim.

Both parties attended the original hearing of this matter.

## **New Evidence**

The tenants/applicants state that they now wish to present photographs of the rental unit taken at the time of their departure as well as print-outs of the landlord's advertisement and further oral testimony as to why a prospective tenant declined to move in.

With respect to their application with respect to new and relevant evidence, I find that the application does not meet the five criteria set out above that would allow me to grant a Review under the ground. In particular the tenants/applicants have failed to show:

- that the evidence the tenant/applicant now wishes to present was not available at the time of the original arbitration hearing; and
- the evidence is new

## **Fraud**

On this ground in response to the question "Which information submitted for the initial hearing was false and what information would have been true?" The tenants/applicants state that they would like to submit "...the damage report..." "...prior to moving in assessment..." (*reproduced as written*). The tenants/applicants say this assessment was not signed by JB and that it was not present at the move-in walk through or at the signing of the tenancy agreement.

The tenants/applicants say that the person who submitted this evidence knew it was false because the signature is false. The tenants/applicants say that this evidence was used to allow the landlords to claim damages to the rental unit even though a damage assessment had not been prepared. The tenants/applicants say that in this case the

landlords could not claim damages because there was no proof that the damages occurred while the tenants resided there.

In her Decision, with respect to the issue of damages, the Arbitrator notes that the tenant admitted liability for the hole in the wall and the Arbitrator allowed \$120.00 for that damage. With respect to the damaged carpet, the Arbitrator preferred the evidence of the landlord and awarded \$160.00 for that damage. Condition Inspection Report(s) were not noted as being a factor in the Arbitrator's Decision.

Both parties attended the hearing at which time the tenants/applicants had an opportunity to raise objections to any of the evidence presented. By this Application for Review I find that the tenants are merely trying to reargue the case. Further, with respect to their application based on fraud, I find they have failed to provide sufficient evidence to show that false evidence on a material matter was provided to the Arbitrator or that the evidence was a significant factor in making the decision. I find that the tenants/applicants have failed to prove new and material facts, or newly discovered and material facts, which were not known to them at the time of the hearing, and which were not before the Arbitrator from which I, in conducting this review, can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud.

Overall the application does not disclose sufficient evidence of a ground for review, nor does the application disclose any basis upon which, even if the submissions in the application were accepted, the decision or order of the Arbitrator should be set aside or varied.

The original decision and orders rendered March 22, 2012 are confirmed.

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: April 17, 2013

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Residential Tenancy Branch