



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

### **Introduction**

On October 03, 2014 a hearing was conducted to resolve a dispute between these two parties. The tenant had applied for a monetary order for compensation, to cancel a notice to end tenancy and for an order directing the landlord to comply with the *Act*. The tenant also applied for an order to suspend or set conditions on the landlord's right to enter the rental unit. Both parties attended the hearing. The Arbitrator found that the *Act* did not apply and therefore the Residential Tenancy Branch did not have jurisdiction in the matter. Accordingly the tenant's application was dismissed. 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").

### **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 Arbitrator,
- 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 she intended to provide photographs of the landlord's own kitchen. The tenant also states that she did not provide these photographs because she did not know that the landlord intended to testify that he did not have a separate functional kitchen for his own use. The applicant states that she had no access to this area and was therefore unable to take photographs that she could rely on at the hearing. The tenant did not attach photographs to her application for review. She stated that she did not get an opportunity *"to access the landlord private space to take pictures of his own kitchen"*

"New" evidence includes evidence that has come into existence since the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place. 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.

I further find that even if the tenant was able to provide photographs of the landlord's *"own kitchen"* it does not prove that the landlord did not have access and use of the common kitchen.

I find that the tenant has not submitted any new evidence and therefore has failed to meet the criteria of 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 that the advertisement to rent the unit was misleading as it did not mention the presence of the landlord's own kitchen. The applicant states that the landlord collected a damage deposit and therefore the *Act* applies to this rental situation. The applicant also states that the landlord made contradictory statements regarding his use of the common kitchen and used the kitchen only after he was served with the tenant's application for dispute resolution and accompanying documents (the "Hearing Package").

The applicant goes on to say that she does not agree with the Arbitrator's statement that all the evidence and testimony were considered in the making of the decision. The applicant also stated that the Arbitrator did not "*get the whole picture, as has happened in this circumstance, to enable her to make an informed decision*". The applicant has cited decisions made by other Arbitrators that she would like referenced to make a competent decision. The applicant believes that "*the Residential Tenancy Branch breached its duty to be fair and that there was an error in law and that it is clear that the way the law was applied was patently unreasonable.*"

In the decision dated October 03, 2014, the Arbitrator found on a balance of probabilities that the landlord who is the owner of the property was free to use the common areas of the property which include the second bathroom and kitchen. The *Act* does not specify how often the shared facilities have to be used by the owner of the property. The Arbitrator further found that the landlord had control and access to the common areas and also had the use of the common kitchen and second bathroom.

Section 4 of the *Residential Tenancy Act*, addresses what the *Act* does not apply to. It states that the *Act* does not apply to living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation. Based on the above reasons the Arbitrator found that the *Act* did not apply and therefore the Residential Tenancy Branch did not have jurisdiction in the matter.

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. The applicant may disagree with the Arbitrator's findings of fact, but the tenant had an opportunity to respond to the landlord's evidence at the hearing.

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. The applicant has not provided me with new evidence to support the allegation that the decision under review was obtained by fraud. The applicant has not proven any new or newly discovered material facts and how that evidence could have been a significant factor in the making of the decision. The application discloses insufficient evidence that the decision under review was obtained by fraud; and therefore, fails to satisfy the inherent burden of proof.

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.

Therefore, **I confirm the original decision dated October 03, 2014.**

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: November 12, 2014

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Residential Tenancy Branch