



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MNR, MNDC, FF (Owner's Application)  
                             CNR, FF, O (Occupants Application)

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by both the Owner of the dispute property and the Occupant. In the parties' documentary evidence, they are referred to as Landlord and Tenant respectively.

The Occupant applied to deal with the following issues: to cancel a notice to end tenancy for unpaid rent; to recover the filing fee; and for "Other" issues, namely to determine jurisdiction in this matter. The Owner applied for: an Order of Possession; a Monetary Order for unpaid rent; for monetary compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; and to recover the filing fee.

The Owner appeared for the hearing with his wife and his legal counsel. Only the Owner provided affirmed testimony. Legal counsel presented evidence and made submissions on behalf of the Owner. There was no appearance for the Occupant during the 50 minute duration of the hearing, even though the Occupant's Application was scheduled to be heard at the same time as the Owner's Application in this hearing. Neither was there any submission of evidence by the Occupant prior to the hearing. Therefore, I turned my mind to the service of documents for this hearing by the Owner.

The Owner testified that he served the Occupant with a copy of his Application and his documentary evidence by registered mail on July 17, 2015. The Owner provided the Canada Post tracking number into evidence and testified that the Canada Post website showed that it had been received and signed for on July 20, 2015.

Based on the undisputed evidence of the Owner, I find that the Occupant was served by the Owner pursuant to Section 89(1) (c) of the Act. As a result, the hearing continued to hear the undisputed testimony and evidence of the Owner.

### Preliminary Jurisdictional Issue

On May 6, 2015 a review hearing took place between the same parties in response to the Owner's application for an Order of Possession and a Monetary Order. The Arbitrator who conducted that hearing considered the evidence of both parties in relation to whether there was jurisdiction in this matter. In a decision dated May 25, 2015 that Arbitrator declined jurisdiction because the parties had entered into a rent to own agreement which was referred to in that decision as the "lease/option agreement". However, the Arbitrator noted the following in the conclusion section of that same decision:

*"If the Landlord takes formal steps to terminate the lease/option agreement he may reapply for dispute resolution, but this determination should not be interpreted as a binding determination with respect to jurisdiction upon a future application by the Landlord.*

[Reproduced as written]

At the start of the hearing, legal counsel explained that since the issuing of the May 25, 2015 decision, the lease option agreement has been terminated and the Occupant has since been served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice") on July 2, 2015. As a result, the Owner now applies for an Order of Possession and Monetary Order for two months of rent which have been unpaid since the lease option agreement had been terminated.

The Occupant made his Application to dispute the Notice on July 6, 2015. In the details section of his Application, the Occupant writes the following:

*"This is not a rental agreement. This is a lease to own agreement with 36,000 deposit and \$65,000 that was withheld at the time the Landlord bought the property from current teannants"*

[Reproduced as written]

In consideration of the issues on both parties' Applications, I decided to first turn my mind to the issue of jurisdiction in this situation.

### Background and Evidence

The Owner testified that he purchased the rental unit from the Occupant's family members in April 2014 with the intention that the Occupant would rent the property back from the Owner and that they would have an option to purchase the property at a future date.

As a result, the Owner and his wife signed a residential tenancy agreement (the “tenancy agreement”) on April 20, 2014 with the Occupant. The tenancy agreement was provided into evidence and shows a start date of June 1, 2014 with rent payable in the amount of \$2,600.00 on the 10th day each month. The length of the tenancy is for a fixed term of two years due to end on July 31, 2016; after this point the tenancy continues on a month to month basis. The Owner testified that the tenancy agreement called for a security deposit of \$1,300.00 but this was not paid by the Occupant because of financial problems the Occupant was having.

After the completion of the sale of the property at the end of May 2014, the Owner signed a document with the now Occupant titled, Lease Agreement with Option to Purchase Real Estate (the “lease option agreement”). That lease option agreement was signed on June 18, 2015, two months after the tenancy agreement was signed on April 20, 2014. However, the Occupant named on the tenancy agreement was not a signatory to the lease option agreement as it was signed by the Occupant’s wife and son.

Legal counsel for the Owner referred to various parts of the lease option agreement to suggest that it was not adhered to. Legal counsel firstly explained that the agreement starts by stating:

*“In consideration of the sum of one THOUSAND dollars (\$1,000.00) and mutual promises and covenants hereinafter stipulated, the parties hereby agree as follows.”*

[Reproduced as written]

Legal counsel explained that the Occupant had failed to pay this required \$1,000.00. Secondly, the lease option agreement also provides that rent will be paid “*As per rental agreement*” which it was not. Thirdly, the lease option agreement provides that:

*“If and whenever:*

- a) The Rent or other amounts payable by the Tenant/Buyer under this agreement or any part thereof are not paid within (30) days of demand by the Landlord/Seller for payment thereof;...*

*Then and in every such case, the Landlord/Seller, at its option, may terminate this Agreement by delivering to the Tenant/Buyer notice in writing to that effect and immediately upon such delivery this Agreement will terminate, without prejudice to any rights of the Landlord/Seller which may have accrued prior to such termination*

*and to any claim for loss or damages which the Landlord/Seller may have against the Tenant/Buyer in respect of the Tenant/Buyer's default.*

[Reproduced as written]

I also note that the "Option to Purchase" terms stated in the lease option agreement also included the following:

**"15. Price and Terms**

*The Tenant/Buyer has the Option to Purchase the Property for the price of **Five Hundred Thirty Five Thousand Dollars** (\$535,000.00). The Landlord/Seller agrees to credit the Tenant/Buyer the sum of \$30,000.00 towards the purchase price provided no term(s) of the contract is in default. Should the Tenant/Buyer fail to exercise the option to purchase the Landlord/Seller **is NOT required to reimburse or pay the Tenant/Buyer any monies.***

***This is be in addition to \$400 each month that rent was paid, total of \$9,600.00."***

[Reproduced as written]

The Owner provided evidence of rent payments made by the Occupant since June 2014 to January 2015 and testified that no rent has been paid since this time. Legal counsel explained that since the issuing of the May 25, 2015 decision, the Occupant was sent two letters. The first one was sent on May 29, 2015 which explained that the Occupant was in rental arrears and that a demand had been made for payment of the arrears. The second letter was sent to the Occupant on July 9, 2015 which explained that as the Occupant had failed to pay rent, the lease option agreement was terminated. The Owner provided evidence to show that these letters were registered mailed to the Occupant. Legal counsel explained that to date, he has not had any response from the Occupant with regard to the letters or the rental arrears.

Legal counsel acknowledged that the May 25, 2015 decision was correct in concluding that the Act does not have jurisdiction in the lease option agreement. However, he submitted that now the lease option agreement has been terminated, the residential tenancy agreement still applies and is still in effect. Therefore, as the Occupant has failed to pay rent under the tenancy agreement the Owner now seeks an Order of Possession and a Monetary Order for the rent arrears that have accumulated since the lease option agreement has been terminated. The Owner testified that if the Occupant were to pay rental arrears he would consider entering into a new lease option agreement but this would have to be worked out with his legal team.

I note in the Owner's signed Affidavit, the Owner writes that the Occupants "*have until July 31, 2016 to exercise their option to purchase the property, at which time, a portion of the rent paid will be credited towards the purchase price*". The Owner submitted that the lease option was not exercised and the rental agreement must be complied with in order for the Occupant to be able to exercise the lease to own option.

### Jurisdictional Analysis

In making findings of jurisdiction in this matter, I refer to parts of the analysis section of the May 25, 2015 decision as follows:

*"I do not accept the tenant's submission that the tenancy agreement has been replaced by the lease/option agreement. I find that the tenancy agreement has not been supplanted and replaced by the lease/option agreement; I accept the submissions of the landlord that the lease/option agreement contemplates and refers to the separate tenancy agreement and I find that the tenancy agreement must be interpreted by reference and with regard to the lease/option agreement..."*

*I find that in the absence of a notice of default or termination given by the Landlord/Seller, the lease /option agreement continues in force and pursuant to the terms of that agreement, while it is in force the Tenant/Buyers (who are not parties to this proceeding) have an interest in the land in the form of credits towards the purchase price in the stated sum of \$30,000.00 plus a portion of rent paid. It is my finding that so long as the option agreement continues in force there is an interest in land that falls outside of the definition of tenancy agreement under the Act. I therefor conclude that the tenancy as currently constituted does not fall within the definition in the Act because the Tenant/Buyer has an interest in the rental property that exceeds a right of exclusive possession."*

[Reproduced as written]

In accordance with the previous decision of May 25, 2015, I accept the evidence before me that the Act does not have jurisdiction in the lease option agreement. The Owner relies on the fact that in accordance with Arbitrator's decision of May 25, 2015 they have now terminated the lease agreement and therefore the Act applies to the signed tenancy agreement. Section 64(2) of the Act explains that the director must make each decision on the merits of the case as disclosed and is not bound to follow other decisions. In addition, the decision of May 25, 2015 also states that it was not a binding determination on the matter of jurisdiction for this situation. Therefore, I must make the following findings based on my further analysis of this situation.

I find the Owner's evidence suggests that while they have made attempts to contact the Occupant and serve him with the relevant notices in an effort to have rent paid, the submission that the lease option agreement has been terminated was done unilaterally. The Occupant writes in his Application that this is not a rental agreement. I find this is sufficient evidence for me to determine that the lease option agreement is still under dispute by the Occupant. Furthermore, I find there is no jurisdiction for me to make a determination on whether the lease option agreement has been terminated as this would be a matter for the Supreme Court to determine.

The Owner and legal counsel also argued that because the lease option agreement had been terminated, the parties were now bound by the residential tenancy agreement. However, I find there is insufficient evidence to suggest that another oral tenancy agreement has been established or entered into between the parties after the lease option agreement was claimed to have been terminated. I base this finding on the evidence that the Occupant has not paid any rent since the lease option agreement was unilaterally terminated, as claimed by the Owner.

I also refer to Policy Guideline 27 to the Act which explains the jurisdiction Arbitrators have under the Act. This was also referenced in the May 25, 2015 decision. Section 5 of this guideline states:

*"If the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply as the parties have not entered into a "Tenancy Agreement" as defined in section 1 of the Acts. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are changing hands are part of the purchase price, a tenancy agreement has not been entered into.*

*Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Acts, is the right to possession of the residential premises. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In such a case the RTB may again decline jurisdiction because the Acts would not apply.*

*In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Acts may apply and the RTB may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser".*

[Reproduced as written]

I find that the payment of rent under the tenancy agreement is inextricably linked to the lease option agreement. In the Owner's own written submissions, he writes that had the Occupants exercised their right to purchase the property, at that time, a portion of the rent would have been credited towards the purchase price. Therefore, I find that when the parties signed the lease option agreement, the Occupants expressed an interest in possession of the lands that went beyond renting the property. This is further reinforced by the fact that the monies being exchanged as rent were eventually intended to form part of the purchase price. I also find that the lease option agreement does not expire until July 31, 2016. Therefore, there is still time for the Occupants to exercise their option even though there is evidence to suggest that rent under the tenancy agreement has not been paid and this matter is still under dispute.

Based on the foregoing, I find that the Act does not apply to this situation. Therefore, I must decline jurisdiction in this matter. The parties are at liberty to seek alternative legal remedies to address their dispute.

#### Conclusion

For the reasons set out above, I decline jurisdiction in both Applications.

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: September 08, 2015

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Residential Tenancy Branch

