



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW HEARING DECISION**

**Dispute Codes**      OPN, MNDC, AS, O, FF

### **Introduction**

#### *Reason for Review Hearing*

This hearing was reconvened in response to a successful Application for Review filed by the tenant – granting a Review Hearing based in respect to the tenant’s evidence of new and relevant evidence the original Decision was obtained by fraud.

I have determined this Review Hearing solely address particulars which gave rise to a Review of this matter. The balance of the original Decision is not in dispute and therefore a re-argument or reframing of those findings unnecessary.

Both parties were represented in this reconvened matter. The tenant was additionally represented by legal counsel.

The original Decision, in remaining relevant parts, is/states as follows.

*This hearing dealt with applications from both the landlord and the tenants under the Residential Tenancy Act (“the Act”). The landlord applied for a monetary order for damage or loss pursuant to section 67; an order of possession for the rental unit and clarification regarding the tenant’s notice to end tenancy.*

*The tenants applied for an order allowing the tenant to assign or sublet because the landlord’s permission has been unreasonably withheld pursuant to section 65; to end the tenancy early; a monetary order for damage or loss as a result of the tenancy and authorization to recover the filing fee for this application from the landlord pursuant to section 72.*

*Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord confirmed receipt of the tenant’s Application for Dispute Resolution package with evidentiary materials and the tenant confirmed receipt of the landlord’s Application for Dispute Resolution package with evidentiary materials.*

*At the outset of the hearing, the tenant withdrew his application for an order to assign or sublet, claiming that he only wished to vacate the residence, ending the tenancy early.*

**Issue(s) to be Decided**

*Is the landlord entitled to a monetary order for loss as a result of the tenant's early end of the tenancy and lack of formal notice in accordance with the Act?*

*Is the tenant entitled to authorization to end the tenancy early?*

*Is the tenant entitled to a monetary order for damage or loss incurred as a result of the tenancy?*

*Is the tenant entitled to recover the filing fee for this application?*

**Background and Evidence**

*This tenancy began September 1, 2015. The written tenancy agreement submitted as evidence at this hearing indicated that the tenancy was drafted and signed as a 2 year fixed term tenancy. The current rental amount of \$2700.00 was payable on the first of each month. The landlord testified that he continues to hold the tenant's \$1350.00 security deposit paid on July 11, 2015.*

*The landlord testified that the tenants attended to the residence on several occasions before agreeing to this two year tenancy. The landlord testified that the tenants insisted on a term of two years. The landlord testified that he was advised about a pest issue (silverfish) in the rental unit on or about October 31, 2015. The landlord testified that, when he was advised about the pest issue, he offered to hire pest control services to address the situation.*

*The landlord testified that the tenants provided no notice of their intent to vacate the rental unit until November 22, 2015. At that time, they sent an email to indicate their intention to vacate the residence at the end of January 2016, over one year prior to the scheduled end of their tenancy. The landlord testified that, when he became aware that the tenants wanted to vacate the residence, he also offered to settle this matter with the tenants and have them vacate the rental unit, as they requested with some notice and some compensation for breaking the lease provisions.*

*The tenants testified that early on in their tenancy, the tenants discovered silverfish (bugs) in their rental unit. They testified that not only did the prevalence of silverfish sightings increase over the course of their tenancy but the silverfish could have caused damage to their possessions. The tenants testified that they had to take action to protect their possessions and that the landlord should pay the costs for the intermediate steps that they took.*

*The tenants submitted materials from a pest control company website with respect to preparing for a pesticide treatment for silverfish, including moving furniture away from walls at least 2 feet, ventilating after the treatment and ensuring anyone with respiratory problems or autoimmune deficiencies remain away for at least 24 hours [when pesticides are used].*

*The tenants also provided materials regarding silverfish from a government of Canada website. That site provided the following pieces of information with regards to silverfish including that they;*

- Are "harmless to humans but consider pests because of their appearance";*
- Feed on crumbs, starch, paper products including books and other scrap items;*

- There “can be a lot of damage to [the above] items if very large infestations have been present over a long period of time”
- That cleaning is the “most important part of controlling” silverfish including;
  - Regular vacuuming
  - Keeping countertops clean
- They are easily trapped.

*The tenant submitted a copy of a pest control company receipt for \$278.25. On it was written, “call to schedule payment”. The tenants also submitted various receipts showing that they purchases plastic boxes and totes. The tenants testified that they put all of their belongings in these bins for protection and lived out of the bins for the majority of their 3 month tenancy. The tenants testified that they purchase a humidifier out of necessity to reduce the moisture in their unit and reduce the incidents of silverfish.*

*The tenants submitted drawings of the outlay of the rental unit as well as photographic evidence. Tenant SM testified that the drawings and attached calculations are intended to reflect that they have only been able to utilize 60 % of their rental unit because of their need to protect their belongings from silverfish. The tenants testified that all of their belongings were placed 2 feet away from the walls, as suggested on the pest control company website materials that they submitted.*

*The photographs submitted by the tenants a variety of bugs on a counter including some that appeared to be silverfish but also spiders, beetles, flies and other bugs. They provided photographs that they testified represented the 30 different traps that they used in their residence while they lived in the rental unit.*

*The tenants also submitted two doctor’s note indicating Tenant SL suffered from a back condition and a neurological condition. One night indicated that, it would be unsafe for the tenant to be exposed to pesticides*

*The landlord testified that he and his family resided in the rental unit until 2015. He testified that the tenants resided in the unit for approximately 5 months. The landlord submitted that he made efforts to address the problem when he became aware of it and that he disagrees with the severity of the problem as described by the tenants. He testified that, because of the broken 2 year lease, he has suffered a loss of rent for the unit and no longer has certainty of rental income for the unit.*

### **Analysis**

*The definitions section of the Act, Section 1 provides the definition of a “fixed term tenancy” – “a tenancy under a tenancy agreement that specifies the date on which the tenancy ends” In this case, the residential tenancy agreement indicates that the fixed term of this tenancy is 24 months with an end date of August 31, 2017.*

*According to section 44(1)(b) of the Act, a fixed term tenancy ends only on the date specified as the end of the tenancy or with an agreement between the parties to vacate on another date. Under section 45, a tenant must provide notice to end a fixed term tenancy that provides at least 30 days’ notice and is not earlier than the date specified in the tenancy agreement as the end of the tenancy. However, section 45 also provides that,*

45 (3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

*The tenants argue that as a result of the infestation of silver fish in their rental unit and his failure to correct the situation/infestation, they are entitled to give 30 days' notice. Therefore, the appropriate end date for this tenancy must be determined as a result of the tenants' meeting of the conditions required in section 45(3) of the Act.*

*Taking into consideration section 32 of the Act and Residential Tenancy Policy Guideline No. 1, a landlord must maintain "health, safety and housing standards' established by law, and are reasonably suitable for occupation given the nature and location of the property" while the tenant must maintain "reasonable health, cleanliness and sanitary standards' throughout the rental unit and property.*

*The tenants have provided some evidence that there were silverfish/bugs inside the rental unit. However, I do not find that their evidence is sufficient to show an infestation. Furthermore, I do not find that an infestation of a harmless insect can be grounds for a tenant to unilaterally end a fixed term tenancy. It is only over the course of November 2015, the same month when they indicated they would vacate the residence that the tenants advised the landlord of their pest problem. Furthermore, despite his provision of offers to address the matter, the tenants did not accept his remedies and acted on their own to have a pest control company to the residence. If the landlord has not corrected a situation or problem raised by the tenants within a reasonable period after the tenants gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice. However the tenants did not address the matter in this way. Therefore, I find the tenants were not entitled to end their tenancy.*

*Section 67 of the Act establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.*

*The tenant has supplied evidence of "loss" in that they expended costs for bins and boxes. I do not find that the tenant has provided sufficient evidence that the landlord is responsible for this loss in that the landlord either violated or contravened the Act in a manner which led to this loss. In this case, the landlord offered pest control services as well as a discounted rent to cover any costs related to the tenants' need to be out of the home while treatment was done in the rental unit. The landlord offered other options, as well. Any party claiming damage or loss has an obligation to mitigate their loss.*

*Policy Guideline No. 5 discusses the duty to mitigate in relation to ...*

*The duty to minimize the loss generally begins when the person entitled to claim*

*damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.*

*Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.*

*I do not find that the tenants have minimized their loss or incurred reasonable expenses that are the responsibility of the landlord.*

*On the other hand, when a landlord makes a claim with respect to loss of rental income as a result of an early end to tenancy by the tenants, he is also required to mitigate his loss.*

*In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent. Where the tenant has vacated or abandoned the rental unit or site, the landlord must try to rent the rental unit or site again as soon as is practicable.*

*In this case, the landlord testified that he has lost the stability of rental income for a 2 year fixed term tenancy. He submitted that the tenants should not have ended the tenancy as they did and that they were in contravention of the Act by doing so. Further, he testified that he was given very little notice, particularly as he does not reside in the province currently. He sought to recover 1.5 months' rent from the tenants for ending the fixed term with cause and without notice.*

*The landlord testified that he has been attempting to re-rent and will likely be able to do so in the near future but that this unexpectedly fast end to a tenancy that was scheduled for a 2 year period has placed him in a difficult position with respect to all aspects of maintenance of the unit. As well, he relied on the tenants to occupy his home while he resides in another province.*

*I do not find that the tenant is entitled to compensation in all of the circumstances. I find that the tenants did not make sufficient efforts to mitigate their loss, and that they failed to show that the landlord was responsible for any loss incurred. Therefore, I **dismiss** the tenants' application.*

### *Review Hearing Analysis*

In the original Hearing the landlord testified they had been attempting to re-rent the unit after receiving the tenant's notice to vacate and would likely be able to do so in the near future. During this Review Hearing it was confirmed the tenant vacated January 31, 2016. Effectively, the landlord's original application for loss of revenue was made prematurely given the tenant still occupied the unit for months following. The landlord originally argued for future losses, or prospective losses. The Arbitrator granted 1.5 months of prospective losses to the landlord for the tenant seeking to end the fixed term tenancy early.

The tenant argues the landlord has not suffered a loss. This Review Hearing heard that soon after the original hearing, and before the Decision, the tenant vacated the unit - and the landlord determined to list the rental unit for sale: which they claim doing February 19, 2016. A sale occurred and the purchase completed. The parties agreed the rent was paid to the end of their occupation, and the tenant argued the landlord did not do as they testified would occur after they vacated. The tenant argues the landlord did not pursue re-renting the unit, and therefore it cannot be said the landlord has now suffered a loss of rent revenue, as may have originally been contemplated.

It must be better highlighted that **Section 7** of the Act operates to guide claims of loss. Section 7 is comprised of 2 parts and it states as follows:

#### **Liability for not complying with this Act or a tenancy agreement**

**7** (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

I find that a tenant who signs a fixed term tenancy agreement is responsible for the rent to the end of the term – and a landlord's claim for a resulting loss of revenue is subject to their statutory duty pursuant to Section 7(2) of the Act to do whatever is reasonable to minimize the damage or loss.

I find the landlord successfully proved the tenant was attempting to not comply with the Act or tenancy agreement, thereby largely meeting the first part of Section 7. However, the landlord has not provided evidence establishing they took steps to minimize or

mitigate a loss of rent revenue going forward, so as to meet the second component of Section 7. I find that instead the landlord determined to sell the property after the tenant vacated. I find the Act does not operate to entitle the landlord to compensation or compensate the landlord to *prospective damages* in this type of matter. I accept the tenant's submission the landlord has not proven their claim of a loss of revenue as prescribed by the Act. As a result of all the above, I find the landlord is not entitled to loss of revenue and I dismiss this portion of the landlord's application. The original Monetary Order dated February 15, 2016, currently suspended, is set aside and is of no effect.

As the tenant vacated and the rental unit was sold, the original Order of Possession is irrelevant and cancelled. As a result of all the above the landlord's application is **dismissed** in its entirety.

### **Conclusion**

The tenant's application is **dismissed** in its entirety.

The landlord's application is **dismissed** in its entirety.

**This Decision is final and binding on both parties.**

*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 27, 2016

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Residential Tenancy Branch