



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC, FF

### Introduction

The tenant applies for a monetary award for damages resulting from a hot water tank leak and from a major flood of her basement suite a few days later. She takes the position that the tenancy has not ended.

Both parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

### Issue(s) to be Decided

Was the landlord responsible for either the hot water tank leak or the basement flood and if so, what damages has the tenant suffered? Has this tenancy ended?

### Background and Evidence

The rental unit is a one bedroom basement suite in a house. The landlord occupies the upstairs. There is no written tenancy agreement. The tenancy started in May 2013. The rent was \$800.00 per month plus one-third utilities. The tenant paid a security deposit at the start of the tenancy and it has been returned to her.

At some uncertain time a few days before March 28, 2017 the tenant noticed a wet spot on her carpet. At first she thought that one of her dogs had an “accident.” A friend of the landlord’s inspected and determined that the hot water tank had a slight leak. The

landlord fixed it. The tenant says she spent time vacuuming up the moisture and feels entitled to compensation for that work.

On March 28, 2017 during a very heavy rain, the perimeter drain on this older home failed. As a result, moisture seeped through the house foundation and pooled in the basement suite. The parties agree that the floor was soaked and in lower areas of the floor there were pools of water perhaps half an inch in depth.

The landlord's insurer attended promptly and a restoration company was quickly brought onto the site to begin work.

The renovation work estimated by the restoration company turned out to be significant. The bottom of the drywall in the suite had been soaked and it would be necessary to take all drywall out up to a height of about two feet. As well, it became apparent that some of the building material contained asbestos, a dangerous substance when let into the air. It requires special care when removed.

The tenant was told she could not reasonably remain in the suite during the renovation and she acceded to leave. However, she was under the impression that the work would take six to eight weeks and that she would move back in.

By a letter from the landlord given about April 16 it was plain the landlord did not agree. His letter purported to give the tenant "formal notice of termination" of the tenancy because of the flood.

The tenant quickly responded in writing that she was still a tenant and that the landlord must give her a "legal notice" if he wished to end the tenancy.

In a later letter dated September 1, 2017 the landlord put forward his position, repeated at this hearing, that the flood and renovation work had caused the tenancy agreement to be "frustrated."

The tenant never did move back in. She secured new rental accommodation May 1, 2017 at a higher rent than she was paying for this suite.

The landlord never did give the tenant a Notice to End Tenancy in a form required by the *Residential Tenancy Act* (the "Act").

The renovation of the suite is still not finished. The landlord has not re-rented it nor sought a new tenant. He explains the delay in repairs to be a difficulty his general contractor is having finding available tradesmen. He is not prepared to have the tenant back because the suite will be newer and he'll want more rent. As well, he no longer wishes to permit tenants to have dogs and this tenant has two.

The tenant seeks compensation for having to vacuum up water after the flood, for work having to box and remove belongings, for the cost of interim accommodation, out-of-pocket expenses for moving her things, compensation for meals, damages for pain and suffering and lost wages.

### Analysis

There are three separate claims; the hot water tank leak, the major flood and the ending of the tenancy.

#### Hot Water Tank

Section 32 of the *Act* sets out a landlord's responsibility to maintain rental premises. It provides:

**32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In certain circumstances a landlord may be responsible for damage caused by a leaking hot water tank. For example, if the landlord knew the tank was prone to leaking or that the tank was beyond its reasonable life expectancy and therefore ought to have been replaced before it failed.

In this case, there is no evidence of prior leaking nor is there any indication that the tank was beyond its reasonable life expectancy. I therefore dismiss this portion of the tenant's claim.

In any event, the leak was of a size small enough for the tenant to mistake it for a pet dog's urine stain and would not have justified the eight hours of water removal the tenant claims.

## The Flood

Considering s. 32 above I find that the landlord was not responsible to the tenant for damage caused by the perimeter drain pipe failure.

The tenant alluded to an earlier problem with a cracked drain pipe but the landlord denied any prior indication of a fault in the pipe. Prior warning of possible pipe failure has not been proved.

There was no evidence about the age of the pipe nor what a reasonable life expectancy for it would be.

The pipe failed during a severe rain storm, the worst in 61 years according to the news article filed by the landlord. It has not been shown that the flood resulted from the breach of any obligation on the landlord to maintain the premises.

As a result, the significant effort and expense the tenant was put to in packing, moving and storing her items, staying in temporary accommodation, losing time at work, her inconvenience or "pain and suffering," must be born by her.

## The Ending of the Tenancy

The landlord argues the tenancy was "frustrated" by the flood and renovation work. I don not agree. Residential Tenancy Policy Guideline 34 "Frustration" provides:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are

concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

In this case the rental unit, the subject of the contract, remained. It merely required repair and renovation. The tenancy agreement was not frustrated.

It is apparent that the work to be done by the restoration company was not compatible with the tenant living there. During the restoration work the walls were torn out, the flooring pulled up, the appliances and the toilet were disconnected.

The Act permits a landlord to end a tenancy by giving a two month Notice to End Tenancy where renovations to the rental unit require vacant possession. Section 49(6) provides:

(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:

(a) *demolish the rental unit;*

**(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;**

(c) convert the residential property to strata lots under the [Strata Property Act](#);

(d) convert the residential property into a not for profit housing cooperative under the [Cooperative Association Act](#);

(e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;

(f) convert the rental unit to a non-residential use.

*(emphasis added)*

This tenancy agreement is over. The tenant has not continued to occupy the premises or pay rent or make an agreement for a reduced or waived rent during the renovation work. She has found alternate accommodation.

In my view the landlord erred in concluding the tenancy had been frustrated. He should properly have issued to the tenant a two month Notice to End Tenancy. Had he done so he would have been required by s. 51 of the *Act* to compensate the tenant by paying her the equivalent of one month's rent.

I find that the tenant was entitled to a two month Notice in these circumstances and I award her \$800.00; the equivalent of one month's rent.

### Conclusion

The tenant is entitled to a monetary award of \$800.00 plus recovery of the \$100.00 filing fee for this application. She will have a monetary order against the landlord in the amount of \$900.00.

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: October 13, 2017

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Residential Tenancy Branch