



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOWARD SMITH & COMPANY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNL OPL MNR MNDC ERP RP FF

Introduction:

Both parties attended the hearing and gave sworn testimony. Counsel for the landlord said they tried to cancel the hearing by letter which the tenant said they received yesterday. Counsel invited me to decline jurisdiction pursuant to section 58 of the Act as he said the matter is before the Supreme Court and the amount claimed exceeds our jurisdiction. The Two Month Notice to End Tenancy is dated September 25, 2017 to be effective November 25, 2017 and the tenant confirmed it was served by posting it on their door. The effective date of the Notice is automatically corrected to November 30, 2017 pursuant to section 53 (3) of the Act as the effective date is deemed to be the day before the day in the month that rent is due. The tenant /applicant gave evidence that they served the Application for Dispute Resolution dated December 15, 2017. and the landlord agreed they received it. I find the documents were legally served for the purposes of this hearing. The landlord applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) To obtain an Order of Possession for landlord's use of the property pursuant to sections 49 and 55;
- b) For a monetary order for unpaid rent and damages (\$19,992.00); and
- c) To recover the filing fee for this application.

The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- d) To cancel a notice to end tenancy for landlord's use of the property pursuant to section 49;
- e) For orders that the landlord do emergency and other repairs;
- f) For compensation or rent rebate for neglect of repair which significantly disturbed their peaceful enjoyment, limited their use of the premises and caused them significant hardship. They also ask to recover costs of items ruined due to lack of repair (total claim \$34,999); and
- g) To recover filing fees for this application.

Preliminary Issue:

Counsel for the landlord submitted I should decline jurisdiction in this matter pursuant to section 58 of the Act as the matter is before the Supreme Court. The tenant objected and said it was not fair for the landlord to try to cancel this hearing the day before and to try to circumvent their claim which is within the jurisdiction of the Act and cause them to suffer increased costs of the Supreme Court action.

I find section 58 of the Act provides a person may make an application under the Act in relation to a dispute in respect of rights, obligations and prohibitions under the Act.

Section 58(2) states the director must determine the dispute unless

- (a) The claim is more than the monetary limit for claims under the *Small Claims Act*,
- (b) The application was not made within the applicable period; or
- (c) The dispute is linked substantially to a matter that is before the Supreme Court.

I find the Act has jurisdiction over monetary claims up to \$35,000 and both the landlord's and tenant's claims are within this limit. Furthermore, I find insufficient evidence of the matter that is before the Supreme Court. There are no details of the action in evidence. I find it would be unfair to the tenant to refuse jurisdiction to hear their claim, especially as the landlord provided very short notice of their intentions. Therefore, I find I have jurisdiction to hear this matter. Counsel for the landlord had the landlord attend the hearing when I announced I was assuming jurisdiction.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that the tenancy is ended pursuant to section 49 and he is entitled to an Order of Possession or is the tenant entitled to any relief? Is the landlord entitled to compensation as claimed and to recover the filing fee?

Has the tenant proved on the balance of probabilities that the landlord neglected to repair and this caused significant interference with their reasonable enjoyment and caused them to incur costs? If so, to how much compensation have they proved entitlement?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. The evidence is that the tenancy commenced in October 2016, rent was \$2800 a month, with \$2100 allotted for the home and \$700 for the barn. A security deposit of \$1400 was paid. The landlord served a Notice to End Tenancy pursuant to section 49 of the Act for the following reasons:

- a) The landlord requires the property for their own use for occupancy by the landlord or the landlord's spouse or close family member (father, mother or child) of the landlord or the landlord's spouse.

Counsel for the landlord said this was a mistake as the section 49 Notice was served because the property was sold and the purchaser gave a letter stating they intended to occupy the home themselves. The letter is in evidence. However, the tenant has vacated the property so an Order of Possession is no longer required. I advised the tenants of their legal rights under section 51(2) of the Act to bring an Application for compensation of double the monthly rent as it appears the landlord is not using the property for the stated purpose on the Notice.

The landlord requests a monetary order for unpaid rent of \$14,000. Both parties agreed that rent was not paid since September 2017 to February 2018 when the tenants vacated. One month was free pursuant to the section 49 Notice but the landlord claims the remaining 5 months for a total of \$14,000. The landlord also claims his legal costs of \$8400.

The tenant claims \$34,999.00 for significant disturbance of their reasonable enjoyment due to lack of maintenance and repair by the landlord. Within this amount are costs they claim for losses. They said this would equate essentially a full refund of all rent paid because the home was uninhabitable. The home is described as having about 1700 to 2000 sq. ft. There is a basement, a recreation room on another level, then the main living and working area on another level with bedrooms upstairs.

They detail the problems as summarized below:

1. Mould was inside the walls of the bedrooms and the landlord only had it covered with drywall. No professional opinion is submitted as to the existence of mould.
2. The North West side of the home had no electrical outlets. They were unable to use all their appliances and that area of the home was dark.
3. Fencing was to be installed for their arrival but was not started until November 24, 2017. They have dogs and horses that were in jeopardy. This hindered them for 2.5 months as they had to chase an escaped dog and horses.
4. The barn/shop roof leaked and they lost hay. They said the loss was \$5500 (receipt enclosed) but a text at the time to the landlord said they lost \$2200 in hay. They had to buy hay in small increments for a year which added stress to their lives.
5. September 2 to 24, 2016, the septic system failed. The house and furnace suffered sewer or septic backup November 18, 2016. (the tenant's evidence is

confusing on dates as they write of all their problems with sometimes no dates and at others, inconsistent dates). They say the landlord left this situation for a week before contacting a plumber and told them to use a bucket for a toilet. They had to call an emergency plumber. No cost or receipt in evidence.

6. The well went dry and they had to truck in water for several months at about \$250 a truckload and an additional \$100 for drinking water. No receipts are provided as evidence of cost.
7. The recreation room flooded October 2017. The tenants notified the landlord by phone and text. Flooding is still happening, some personal items were destroyed and this portion of the home is not useable.
8. Bugs and rodents infest the house. No evidence the landlord was notified of this.
9. Water Line froze from February to March 2017 and they had to have portable toilets delivered. No receipt in evidence.
10. The landlord stored his tractor in one third of the workshop space they rented and did not remove it when requested.

Included with the evidence are many text messages, many undated and almost illegible due to mark up, invoices, a copy of the Notice to End Tenancy and written statements of the parties. On the basis of the documentary and solemnly sworn evidence presented for the hearing, a decision has been reached.

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Analysis:

As discussed with the parties in the hearing, the onus is on the landlord to prove on a balance of probabilities that they have good cause to evict the tenant. I find the Notice to End Tenancy is cancelled for the landlord has no intention of moving into the property. I find he sold it and the purchaser has written a letter of intent to occupy it. However, this is moot as the tenant has vacated and the landlord no longer needs an Order of Possession.

I find the evidence of the landlord credible that rent was not paid for 5 months. The tenant agreed with this. Section 26 of the Act provides that a tenant must pay rent when due whether or not the landlord fulfills their obligations under the Act. I find the landlord entitled to recover his unpaid rent in the amount of \$14,000 (less a rebate of 33% as stated below).

I find section 72 of the Act limits costs of the process of arbitration to \$100. Therefore, I find the landlord not entitled to recover legal fees for arbitration beyond the filing fee.

In respect to the tenant's claim, I find awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party. Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

I find the tenant's claim is problematic as they tendered no bills or receipts and it appears the rent was reduced to \$2700 in compensation for some of the initial problems such as the leak in the barn; the tenant said this was not compensation for the loss of the hay, however. Furthermore, there are bills in evidence from the tenant's company dated October 20, 2017 for emergency repairs of sumps, dehumidifiers and labour at \$110 an hour and a further bill dated May 20, 2017 for emergency repairs to the home. The tenant said their company was first engaged to do repairs but the bills were never paid. In evidence is a registered lien in the name of the male tenant against the land/home of the landlord for the unpaid bills in the amount of \$35,000 for emergency flood (? Unclear) repairs. As they have already registered a lien for their emergency work on the home, I find they are seeking compensation in another forum for this so this is not included in any monetary award in this hearing.

I find the weight of the evidence is that the landlord violated sections 32 and 33 of the Act by not maintaining the home in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it fit for occupation by a tenant.

Due to this violation, I find the tenant suffered loss of water for several months, had a basement flood and a septic or drain backup. I find the landlord did reply to the tenant and engaged plumbers and repair persons from time to time. However, I find there was no water in the summer months from June to September and the pipes froze in the

winter which also resulted in a water problem. Although the tenant said she bought truck loads of water and also bottled water, I find she supplied no bills or receipts to prove their costs for water and said in an undated email on her pg. 8 that she was deducting the water cost from the rent.. I find also that the landlord did install a fence at an indeterminate time but this did not suit the tenants so they installed one which may or not be included in the bills on the lien on the house.

I find section 28 of the Act provides a landlord must protect the peaceful enjoyment of the tenants. I find the weight of the evidence is that the tenants' peaceful enjoyment was significantly impacted by the lack of water, the disgusting septic or drain backup and the basement flood. I find these items indicate a lack of maintenance and repair by the landlord. I find also that the fence was not installed in a timely manner. I find there were some electrical issues and wall problems but I find insufficient evidence that there was mould or other unsafe or health issues due to the electric or wall construction. I find the tenants continued to reside in the home so had use of the home and land for themselves, their horses and other animals; they even emailed in July 2017 that they wanted to buy the home which suggests the conditions may not have been as problematic as they state or else their options were very limited. I find also that the tenants undertook emergency repairs for the landlord in expectation of compensation and they have filed a lien to recover the compensation of \$36,000.

Considering all the factors and that they resided in the home during the whole period of time until February 2018, I find it would be unfair to the landlord to grant them a rebate of all their rent as requested. The house was not uninhabitable as they resided there. However, I find they had a significant loss of peaceful enjoyment due to the continuing problems of fencing, water, drainage, septic and flood. I find them entitled to a rebate of 33% of their rent from November 2016 to August 2017 when they made their last rental payment. Although the tenancy commenced in October 2016, I find the tenants did not pay full rent for October; according to texts in evidence, it appears they moved in on October 15, 2016 and only paid \$900 in rent for that month. The rent was also reduced to \$2700 a month 'when the workshop leak was discovered' according to the tenant. No dates were supplied. The landlord also said the rent varied and deductions were made from it but I find neither party provided documentary evidence of payments or deductions. I find the tenants entitled to a rent rebate of \$9000 (33% x 2700 x 10 months). I find them entitled to an extension of this rebate until February 2018 so 33% will be deducted from unpaid rent claimed by the landlord. Although the tenant said they lost \$5500 in hay they bought, I find they said in a text to the landlord in March 2017, that they paid \$2200 for the 'hay that got soaked and moldy'. As the amounts are inconsistent, I find the tenants entitled to recover the lesser amount of \$2200.

I dismiss the claims of the tenant for any further compensation, for example, for trucking water and buying water or hiring a portable toilet as I find insufficient evidence of the cost of these items or if the tenant paid for them. I dismiss any other claims of the tenant as I find they are adequately compensated by the global reduction in rent of 33% for most of the time they lived in the home.

Conclusion:

I find the parties entitled to compensation as follows and to recover their filing fees for their applications as both had merit. The result of the calculation is in favour of the tenant after offsetting the amount owed to the landlord. Therefore I find the tenant entitled to a monetary order for **\$1820.00**.

Landlord

Unpaid rent 14,000 less 33% rebate (4620)	9380.00	
Filing fee	100.00	
Total amount for landlord	9480.00	

Tenant

Rebate of rent -10 months x 33% of \$2700	9000.00
Compensation for lost hay	2200.00
Filing fee	100.00
Total amount for tenant	11300.00

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: February 22, 2018

Residential Tenancy Branch