



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes OL

### Introduction

On December 7, 2018, the landlord submitted an application pursuant to the *Residential Tenancy Act* (the *Act*) seeking seven Orders of Possession pertaining to ending seven separate tenancies early pursuant to section 56 of the *Act*.

However, on December 14, 2018, the landlord submitted an Amendment to his original application, specifying that the tenancies required to be ended early due to frustration of tenancy agreement pursuant to section 56.1 of the *Act*.

As such, this hearing dealt with the landlord's amended application pursuant to section 56.1 of the *Act*.

The landlord and five of the named respondent tenants attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Three assistants, M.B., B.B., and K.H. attended the hearing to assist the tenants of Units 301, 200, and 201, respectively.

The landlord testified that he served all seven named respondent tenants with the original December 7, 2018 application and the December 14, 2018 Amendment to the original application, as well as all the evidentiary materials pertaining to this matter, by posting the package of documents on the tenants' individual rental unit doors on December 14, 2018.

In this Decision, I have referred to the tenants by their rental unit numbers. The tenants' names and corresponding rental unit numbers are noted on the cover sheet of this Decision.

The five tenants in attendance at the hearing, 301, 300, 200, 201, and 202, all confirmed receipt of the landlord's hearing documents and evidence.

The landlord testified that the remaining two tenants, 303 and 203, not in attendance at the hearing, still reside in their rental units to the landlord's knowledge. The landlord testified that he spoke with the tenants in the hallway of the rental property about this Application, between December 18 to 20, 2018, which was several days after the tenants had been served with the notice of this hearing.

Based on the testimony of the landlord, and given the fact that five of the seven tenants all served in the same manner, on the same date, with the same materials confirmed service of the hearing documents, I find that the landlord served all seven named tenants with his Application for Dispute Resolution and his Amendment to the original Application in accordance with section 89 of the *Act*.

None of the tenants submitted any evidence in this matter. I note that the only evidence from the landlord that was before me at the hearing consisted of a written summary statement from the landlord's insurance adjuster dated December 7, 2018. The landlord testified that he uploaded all his evidence through the Residential Tenancy Branch dispute website but acknowledged that it was a technologically challenging process.

As the tenants were in receipt of all of the landlord's evidence, which included a report prepared by the environmental consulting company in addition to the insurance adjuster's written summary statement, I allowed the landlord and the tenants to provide verbal testimony regarding the report for my consideration in this matter.

At the outset of the hearing, tenant 201 testified that he had stopped payment of his January 2019 rent as he was no longer residing in the rental unit. The tenant testified that he had returned to his rental unit on December 20, 2018 after being released from hospital and found the rental unit to be uninhabitable due to the formation of mold from water damage as a result of the building fire. Therefore, the tenant has not resided in the rental unit since December 20, 2018.

The landlord acknowledged that Unit 201 was one of the most severely impacted rental units.

With the agreement of both the landlord and 201, I found that this tenancy was deemed to have ended effective December 31, 2018. Tenant 201 testified that he had to leave all his belongings behind as they were contaminated with mold. The landlord and the tenant agreed to communicate over the next few days to discuss a settlement of the tenant's issues pertaining to his belongings.

As 201 was no longer a party to the dispute, since it was agreed the tenancy had ended, the tenant exited the hearing at this time.

The landlord and 201 are commended for trying to resolve their issues pertaining to the disposition of the tenant's belongings through discussion between them. I did advise the parties that if they are unable to come to a mutually agreeable resolution, they are at liberty to file an Application for Dispute Resolution with the Residential Tenancy Branch pertaining to the issue of the tenant's belongings.

#### Issue(s) to be Decided

Should the remaining six tenancies that are the subject of this dispute be ended due to frustration of tenancy pursuant to section 56.1 of the *Act*?

#### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The landlord explained that he purchased the rental property in September 2018, assuming the existing tenancies. The rental property is an approximately 100-year-old apartment building, consisting of three floors of rental units and a basement. There are 11 rental units on the first floor, 10 rental units on the second floor, and 10 rental units on the third floor. Most of the rental units are comprised of only a

bedroom and a sink, and are approximately 200 square feet in size. Some of the rental units have their own washroom and some also have their own kitchen. The landlord stated that the rental units which are the subject of this dispute fall into the first category, having only a bedroom and a sink.

On November 22, 2018, a fire occurred in Unit 302. The landlord explained that police are investigating the cause of the fire and the fire department has investigated and are in the process of finishing their report. The tenant who was residing in Unit 302 at the time of the fire is currently incarcerated as a result of involvement in another fire incident not related to the apartment building. The fire destroyed some of the water pipes, causing a waterfall from the top to the bottom of the building as it took some time to shut off the main water to the building.

The landlord's insurance adjuster retained the services of a restoration company that attended at the building the next day on November 23, 2018 to set up blowers to begin addressing the water damage. The landlord testified that the blowers continue to run at the apartment building. Starting on November 26, 2018, moisture testing and subsequently a hazardous materials survey by an environmental consulting company were conducted to provide an initial assessment of the extent of the repairs required.

The landlord testified that he has been advised by the restoration contractor that the remediation work could take five to six months as walls and ceilings need to be removed due to the water damage and for piping to be replaced. The hazardous materials survey indicated asbestos in the building materials, which will require special protocols to seal off the work areas when this hazardous material is removed.

As a result, the landlord testified that vacant possession of the six units, which are the remaining subjects of this dispute, is required in order to begin work immediately before the mold from the water damage spreads and causes more contamination and more walls to be removed. The landlord testified that if the condition in the building continues to deteriorate and more walls require removal, the area to be sealed off for removal of asbestos will expand, which would affect more rental units requiring more tenancies to be ended. The landlord referred to a written summary statement from his insurance adjuster dated December 7, 2018 submitted into documentary evidence, in support of his testimony.

### Analysis

Having heard the explanation regarding the issue of asbestos in the building materials requiring the remaining six rental units that are located in the affected areas of the building to be vacant as the areas will need to be sealed off during remediation, the landlord and the four tenants 301, 300, 200 and 202 in attendance at the hearing engaged in a discussion regarding options to settle the dispute.

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute; and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order.

During the hearing the parties in attendance discussed the issues between them, turned their minds to compromise and achieved a resolution of their dispute.

The landlord and four tenants 301, 300, 200 and 202 (herein referred to as "the four tenants") agreed to the following terms in settlement of the landlord's Application for Dispute Resolution:

1. The four tenants agree to provide interim vacant possession of their rental units to the landlord as of 1:00 p.m. on February 1, 2019. The landlord has been provided with Orders of Possession for this date, enforceable against ONLY those tenants of the four rental units who fail to abide by the agreed upon terms of the settlement.
2. The four tenants will not be required to pay rent to the landlord while they do not reside in the rental units.
3. The landlord agrees to allow the four tenants to return to their rental units as of 1:00 p.m. on May 1, 2019 in continuance of their current tenancy agreements, meaning all terms of their current tenancies, including the amount of monthly rent and provision of services and facilities. The four tenants have been provided with Orders of Possession for their rental units for this date, enforceable ONLY if the abatement and remediation work for the hazardous materials has been completed in the areas of their rental units, and if the three tenants 301, 300, and 202 have repaid their security deposit to the landlord as required by Term #5 of this settlement (noted below).
4. The landlord agrees to return the security deposits to tenants 301, 300, and 202 in accordance with their request, by no later than January 15, 2019, to assist them with securing new interim accommodation. If the security deposit is returned in cash to the tenants, the landlord and these tenants agree to ensure the transaction is documented in writing for the benefit of both parties. Tenant 200 requested that the landlord continue to hold his security deposit, therefore this term of the settlement does not apply to Tenant 200.
5. The tenants 301, 300, and 202 agree to repay the original amounts of their security deposits back to the landlord upon their return to their rental units on May 1, 2019. **I note that this is a requirement of the Act as the landlord may be at liberty to end the tenancies pursuant to section 47 of the Act if the tenants fail to repay their security deposits.** Tenant 200 requested that the landlord continue to hold his security deposit, therefore this term of the settlement does not apply to Tenant 200.
6. The landlord agrees to prioritize addressing the moisture issue in the basement so that the four tenants will have the option of storing some of their personal belongings in the basement, secure and safe from water damage, during their interim vacancy.
7. The four tenants agree that they understand the reconstruction work will likely need to continue for another 2 to 3 months upon their return to the rental units in May 2019, therefore, they agree to provide access to their rental units to the landlord in order to complete the reconstruction work. The landlord agrees to request only reasonable access to the rental units to complete construction work, and that this access shall be requested in accordance with the Act, or per a schedule agreed upon by the parties in advance.
8. The landlord agrees to provide the four tenants with an update regarding the progress of the reconstruction work by March 15, 2019, to the contact address or email address provided to the landlord by each of the four tenants. The four tenants agree to provide the landlord with their interim forwarding address or email address so that the landlord can contact the four tenants regarding the status of the reconstruction.
9. If any of the four tenants decide that they do not wish to return to their rental units, they are required to give written notice to the landlord to the contact address or email address provided to them by the landlord. The four tenants are not required to provide one month's notice in accordance with the Act, but instead are allowed to give written notice to end their tenancy, without penalty, by no later than April 15, 2019.
10. Both parties agreed that the terms of this settlement as outlined above constitute a final and binding resolution of the landlord's application.

11. The parties agreed to these settlement terms free of any duress or coercion.

I confirmed with the four tenants that none of them had been engaged by tenants 303 or 203 to act as their agents or speak on their behalf at the hearing.

Therefore, in the absence of tenants 303 and 203, or anyone acting as their agents, in attendance at the hearing to agree to the above-noted settlement, I must proceed with making an arbitrated decision regarding the landlord's application against tenants 303 and 203 for an Order of Possession pursuant to section 56.1 of the *Act*.

Section 56.1 of the *Act*, as set out below, provides that a landlord may be granted an order of possession if a rental unit has become uninhabitable or the tenancy agreement is otherwise frustrated:

- (1) A landlord may make an application for dispute resolution requesting an order
  - (a) ending a tenancy because
    - (i) the rental unit is uninhabitable, or
    - (ii) the tenancy agreement is otherwise frustrated, and
  - (b) granting the landlord an order of possession of the rental unit.
- (2) If the director is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order
  - (a) deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible, and
  - (b) specifying the effective date of the order of possession.

Residential Tenancy Policy Guideline #34. Frustration provides a further explanation of the criteria for frustration of a tenancy agreement, in part, as follows:

*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.*

In this matter, I find that the November 22, 2018 fire and the resulting water damage to the apartment building to be an unforeseeable event, and that there is no evidence before me that either the landlord or the tenants 303 and 203 are at fault regarding the fire and resulting water damage.

In the absence of tenants 303 and 203 attending the hearing to provide any testimony or evidence to the contrary, I accept the landlord's testimony, supported by the documentary evidence of the insurance adjuster's written statement, that this event has resulted in water damage requiring the removal of walls and ceilings within the apartment building.

Further, I accept the landlord's testimony and evidence that hazardous asbestos materials have been identified in the building materials, requiring specific abatement protocols that include sealing off parts of the apartment building during the remediation work to ensure the hazardous materials do not become airborne and affect the health and safety of the remaining tenants residing in the apartment building.

As a result of the required abatement safety protocols for hazardous materials, I find that the tenancy agreement as originally intended has now become impossible to be fulfilled as the rental units must be vacated in order to complete the required abatement and remediation work.

Therefore, based on the testimony and evidence before me, on a balance of probabilities, I find that the tenancy agreements between the landlord and tenants 303 and 203 to be frustrated, and as such, the parties to the tenancy agreements are discharged from fulfilling their obligations under the tenancy agreements.

Accordingly, pursuant to section 56.1(2)(a) of the *Act*, the tenancy agreements for tenants 303 and 203 are deemed to have ended on the date of this Decision, January 9, 2019, due to frustration of contract. Pursuant to section 56.1(2)(b) of the *Act*, I grant the landlord Orders of Possession for Units 303 and 203, dated to coincide with the agreed upon date and time for the other rental units to be vacated, effective for 1:00 p.m. on February 1, 2019.

### Conclusion

I grant Orders of Possession to the landlord for Units 303 and 203, effective **1:00 p.m. on February 1, 2019**. The landlord must serve these Orders on the respective tenants as soon as possible. Should the tenants or anyone occupying the rental units fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

To give effect to the settlement reached between the landlord and the four tenants of Units 301, 300, 200, and 202, I issue the following Orders:

- 1) To the landlord, I issue four Orders of Possession to be served on a tenant of Units 301, 300, 200, and 202 **ONLY** if the tenant fails to vacate the rental unit per the terms of the settlement. Should the tenant or anyone occupying the rental unit fail to comply with the Order, the Order may be filed and enforced as an Order of the Supreme Court of British Columbia.
- 2) To each of the tenants 301, 300, 200, and 202, I issue an Order of Possession to be served on the landlord **ONLY** if the landlord fails to return possession to the tenant per the terms of the settlement. Should the landlord fail to comply with the Order, the Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: January 09, 2019

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Residential Tenancy Branch