



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OFL, FF

### Introduction

This hearing convened to hear the landlord's application for dispute resolution (application) seeking remedy under the Residential Tenancy Act (Act) for:

- an order of possession of the rental unit based upon a frustrated tenancy; and
- to recover the cost of the filing fee.

The landlord, the landlord's legal counsel (counsel), and the tenant attended, the hearing process was explained, and they were given an opportunity to ask questions about the hearing process.

The parties were informed prior to the start of the hearing that recording of the dispute resolution hearing is prohibited.

Thereafter all parties were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch (RTB) Rules of Procedure (Rules). However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

*Preliminary Issue –*

The tenant confirmed receiving the landlord's evidence. Counsel confirmed receiving a portion of the tenant's evidence; however, counsel objected to the tenant's digital evidence as the tenant had not conformed to the requirements of the Rules regarding digital evidence. I elected to continue the hearing rather than adjourn the hearing to deal with evidence issues. My Decision was made on the landlord's evidence, submissions, and the tenant's oral evidence.

Issue(s) to be Decided

Is the landlord entitled to an order of possession of the rental unit based upon a frustrated tenancy and to recover the cost of the filing fee?

Background and Evidence

This tenancy began on September 1, 2020, for a monthly rent of \$1,250.

The rental unit is in the basement level of a home, owned and occupied by the landlord on the upper level.

In support of their application, the counsel submitted that on January 2, 2022, a flood occurred and water entered the rental unit. The tenant notified the landlords and the landlords attempted an inspection on January 3, 2022. The assessment was cancelled by the tenant, due to her illness, according to counsel.

Filed in evidence by the landlord was a "Preliminary Estimate" dated January 17, 2022, from a company, which indicated that the rental unit was inspected on January 11, 2022, which revealed that water damage was apparent on the living room and adjacent bedroom floor. The fireplace surround appeared to have some moisture damage as well. The document goes on to explain how mold can occur and that moisture can be found underneath baseboards and the lower casings close to the floor.

The document states that the health of the occupants will be adversely impacted by the profusion of mold spores and cleaning and repairs will become more difficult and costly as more surfaces are impacted, the longer the remediation is delayed. The document stated that the source of the flooding event appears to be an exterior hose bib which froze under the recent very cold conditions.

The recommendation in this document stated that the wall with the suspect hose bib needs to be opened from the interior, requiring removal of drywall, vapor barrier and insulation. The casings and baseboards in the living room and bedroom should be removed and a general inspection needed to be made.

The document goes on to describe possible work needed to be performed after inspection and that the work required the area to be vacated prior to the onset of remedial work. The estimated time frame of work would take 2-3 months.

Filed in evidence by the landlords was a letter from their insurance company, dated January 10, 2022, providing an update and instructions to the landlord. Included in the letter was the instructions from the insurance company that the water damage issue should be remediated immediately and if the landlords did not act promptly, their failure to act could result in the policy not cover in the future with respect to any injury or damage that results.

Filed in evidence by the landlords was a copy of an undated report from the restoration company, indicating that the laminate floor and tile fireplace surround were wet and stating that all content in the basement suite would need to be off the floor for restoration work.

Filed in evidence was a copy of an email dated January 21, 2022, from an insurance claims company to the landlord, stating that during their site visit, "it was discovered that the laminate flooring in the basement suite and the bedroom in your space is wet and will require removal and replacement". This email also indicated that the repairs would take approximately 2 months and that the contents in the affected areas will need to be removed in order to facilitate the repairs.

Counsel confirmed there has been no work on the repairs, with the reasoning that the tenant has refused access and will not vacate the rental unit. In response to my inquiry, counsel said that the tenant was given a written notice to vacate, but refused.

#### Tenant's response –

The tenant submitted that the rental unit is not uninhabitable and that she only denied access one time when she was sick. The tenant submitted that the landlords just want

her out of the rental unit and have repeatedly been trying to evict her through various unsuccessful eviction notices.

The tenant submitted a copy of the written notice from the landlord, dated January 25, 2022. Counsel referred to this letter during submissions.

The landlord informed the tenant the tenancy was frustrated and that the tenancy ended on January 2, 2022.

### Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

The burden of proof is on the party making the claim, on a balance of probabilities.

Section 56.1 of the Act states, “A landlord may make an application for dispute resolution requesting an order ending a tenancy because the unit is uninhabitable, or the tenancy agreement is otherwise frustrated.”

In this case, the landlord sought to have the tenancy agreement declared frustrated as the rental unit is uninhabitable.

Residential Tenancy Policy Guideline #34 notes, “A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because of an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible.

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.”

The landlord presented that a flood occurred on January 2, 2022, which caused the rental unit to be uninhabitable. I disagree. From my review of the evidence, the event leading to water seeping into the rental unit was variously described in the documentary evidence as a flood outside the home, caused by a frozen pipe, which caused water to

seep into the home, caused the floor to be wet, or water to leak into the home, or have water incursion. I did not find the home itself to be flooded.

After reviewing the evidence, I find the landlord submitted insufficient evidence to support their application that the tenancy agreement was frustrated. I find the landlord submitted insufficient evidence to show that the contract became incapable of being performed because of an unforeseeable event. I do not find the unforeseen event of the frozen pipe has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible.

I find the landlords will have to make repairs to the rental unit, which require the tenant to remove her contents from the floor of the affected areas, according to their documentary evidence. I find from the evidence there is no reason the tenant cannot remove her contents from the affected area for the duration of the repairs and resume her tenancy after repairs are made. The tenant indicated she is willing to temporarily relocate from the rental unit while the repairs are being made.

In addition, I find it just as likely as not that some portion of the length of time for repairs will be in repairing a portion of the landlord's upper suite, not in repairing the rental unit. The email of January 21, 2022 indicates that the bedroom in the landlord's space was wet and will require removal and repair. For this reason, it is quite feasible the repairs to the rental unit will take less time than the quoted time, which in turn, means the tenant can return to the rental unit earlier than expected after the repairs to her rental unit are made. For these reasons, I therefore find the contract can be fulfilled.

I find the issue in this application related to a repair issue, not in anyway a frustration of the tenancy. For instance, the home did not burn down such that the terms of the contract could not be fulfilled.

I did not find it unreasonable that the tenant did not vacate, as the landlord's letter attempted to end the tenancy, rather than have the tenant vacate to arrange for the repairs to be made.

As a result of the above, I find the tenancy is not frustrated and therefore, I **dismiss the landlord's application for an order of possession of the rental unit, without leave to reapply**. Likewise, I dismiss the landlord's request for recovery of the filing fee.

As the repairs have not been made as of the date of the hearing, I find it appropriate for the landlord to arrange to make any necessary repairs that are a result of the water event. From the evidence presented from the landlords, I find it was not clear if the tenant was required to vacate the rental unit. The statements and reports from the different companies and professionals were inconsistent as to whether the rental unit needed to be vacant or if the belongings of the tenant could be moved from room to room to accommodate the repairs. However, the tenant must not interfere with the landlord's rights to make repairs and the tenant must follow all instructions to prepare the rental unit from the company the landlord chooses to make the repairs. This might mean the tenant will have to remove furniture.

If the tenant temporarily vacates the rental unit to accommodate the repairs needed, the tenant should provide the landlords with her new contact information, including address, in order to facilitate communication with the tenant as it is expected that the landlord keep the tenant informed when she may return to the rental unit. If or when the tenant vacates to accommodate the repairs, the landlords are informed this does not mean the tenancy ends.

### Conclusion

The landlord's application for an order of possession of the rental unit due to the tenancy agreement being frustrated and for recovery of the filing fee is **dismissed, without leave to reapply**.

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*. Pursuant to section 77(3) of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: March 15, 2022

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Residential Tenancy Branch