

## **DECISION**

### **Introduction**

This hearing dealt with an application filed by both the Tenants and the Landlord pursuant to the Residential Tenancy Act (the “Act”):

The Tenants applied for:

- an order for the Landlord to make emergency repairs for health or safety reasons under sections 33 and 62 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

The Landlord applied for:

- an Order of Possession based on an uninhabitable rental unit and frustrated tenancy agreement pursuant to section 44 of the Act

The hearing began on May 6, 2025. The Tenants attended. The Landlord also attended with MS attending as their lawyer. The parties were affirmed and were advised that recording of the RTB hearing is prohibited.

Following the hearing, I determined it was necessary to adjourn the matter to allow for additional evidence submissions. An Interim Decision was issued on May 9, 2025, in which the hearing was adjourned to May 26, 2025, at 9:30 a.m. This Interim Decision is incorporated by reference and should be read in conjunction with this Decision.

At the reconvened hearing, the Tenant AG attend for the Tenants. The Landlord attended with KK attending as their lawyer.

### **Service of Notice of Dispute Resolution Proceeding (Proceeding Package)**

As both parties were in attendance, I confirmed there were no issues with service of the parties’ additional evidence. In accordance with section 71 of the Act, I find that both parties were served with the other’s additional evidence.

## **Issues to be Decided**

Are the Tenants entitled to an order for the Landlord to make emergency repairs for health or safety reasons?

Are the Tenants entitled to recover the filing fee for this application from the Landlord?

Is the Landlord entitled to an Order of Possession based on a frustrated tenancy agreement?

## **Background and Evidence**

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that this tenancy began on May 1, 2024, with a monthly rent of \$2,500.00, due on the first day of the month. The Landlord collected a security deposit in the amount of \$1,000.00 and a pet damage deposit in the amount of \$500.00, which they continue to hold in trust.

The Tenants are seeking an Order for the Landlord to make emergency repairs for health or safety reasons. The Tenant's application states:

Requesting emergency septic maintenance. The field has failed but the tank functions as a short term holding tank. A full blockage occurred on April 12, and the tank was pumped on April 14. It is nearing full again (plumber verbally estimates 2 week capacity), another blockage is imminent. With interim pump-outs, the home remains liveable. Landlord denied maintenance, citing frustration of tenancy. We do not agree and request interim pump-outs or a long-term solution under Section 32 of the RTA

The Tenants submitted that since January 2025, they have notified the Landlord of their concerns surrounding the septic system. The Tenants testified the tanks has been pumped out twice at the expense of the Landlord and on a third occasion at the expense of the Tenants.

The Tenants testified that the Landlord refused to pump the septic tank on April 24, 2024, therefore the Tenants went ahead with the pump out themselves on April 25, 2025.

The Tenants testified the septic tank is undamaged based on the information provided to them by Affordable Septic. The Tenants provided an undated report from Affordable Septic to support their position on this point. The Tenants testified that during the tank pump out on April 25, 2025, a professional from Affordable Septic inspected the tank, indicating that the tank appears to be in good condition with minimal concrete corrosion and no cracks observed. The Tenants noted that Affordable Septic advised that the septic distribution box has severe concrete corrosion and requires replacement. The Tenants testified that Affordable Septic recommended frequent pumping of the septic tank until the distribution box is replaced and the field is hydro jetted.

The Tenants submitted that their position is that pumping the tank is a viable option to allow the tenancy to continue until such time as the Landlord issues a Four Month Notice for major renovations or repairs under section 49.2 of the Act.

The Tenants testified that the repairs are the responsibility of the Landlord and as such, the Landlord must comply with the Act. The Tenants testified that they have no intention of remaining at the property during the septic system repair or returning to the property after the repairs are completed. Rather, they are seeking the intermittent pump out of the tank until such time as the tenancy is ended by way of a Four Month Notice.

In response to the Tenant's submission, MS submitted that the tank is not functional and cannot be pumped out intermittently to allow the tenancy to continue. MS submitted that a septic specialist from SP Pumps and Tanks inspected and pumped the tank on April 14, 2025, as requested by the Landlord.

MS noted that according to the SP Pumps and Tanks Report which is included in the Landlords evidence and dated April 25, 2025, continuing to pump the tank is not a viable option.

MS noted that the septic specialist found:

- 1) The septic system has failed due to its age, a naturally occurring event that could not be prevented with any previous maintenance.
- 2) The holding tank is cracked, letting raw sewage seep into the ground.
- 3) The cracked septic tank does not comply with health and safety regulations as it is not viable to hold raw waste.
- 4) The tank is not to be used and poses an environmental issue.

Based on the SP Pump and Tanks Report, MS disputed the Tenant's assertion that the tank is not damaged and that pumping the tank is a viable option such that the tenancy could continue.

At the reconvened hearing, KK submitted that the Landlord contacted the technician from Affordable Septic via email. The email communication is submitted into evidence. KK noted that in communication with the Landlord, the technician from Affordable Septic confirmed that they are not a Registered Onsite Wastewater Practitioner (ROWP) and recommended that an ROWP perform a thorough inspection of the system. The technician further confirmed that the inspection completed on April 25, 2025, was a basic virtual inspection carried out during the pump out that should not be considered comprehensive.

KK submitted that the Tenants suggestion that the septic tank can be intermittently pumped for a period of four months is simply not possible. KK submitted that information provided by the septic professional in the SP and Pumps comprehensive report should be preferred over the Tenants' evidence.

The Landlord is seeking an Order of Possession based on an uninhabitable rental unit and frustrated tenancy agreement.

The Landlord's application states:

The Unit's septic system has failed, requiring complete removal and re-installation. A septic professional has confirmed that system cannot be used in its current state without leaching contamination into the property - which violates health and safety standards. The unit is not habitable as running water cannot be used for foreseeable future. Septic professional confirmed remediation would require the report of an engineer, would take a significant amount of time and cost more than \$60,000.00.

During the hearing on May 6, 2025, MS submitted that the rental property is uninhabitable at this time and the Landlord has not received any advice from a professional that there is an interim solution that would allow the rental property to remain habitable. MS submitted that the repairs to the septic system are estimated to take 6-8 weeks, which could likely increase based on the engineering report and the necessity of outbuilding and tree removal on the property.

During the hearing on May 26, 2025, KK referred to the case of Wilkie v. Jeong 2017 BCSC 2131 at paragraph 18 where the Court note that the test for frustration has two elements:

- 1) a qualifying supervening event (one for which the contract makes no provision, which is not the fault of either party, which was not self-induced, and which was not foreseeable), which

2) caused a radical change in the nature of a fundamental contractual obligation

KK submitted that in this case, both elements of the test have been met. Regarding element 1, KK submitted that the failure of the septic system was not in the contemplation of the parties when the contract was entered into. KK pointed to the Addendum to the tenancy agreement which contemplates only maintenance (pump outs) and use of the system during the tenancy.

KK went on to note that failure of the septic system was the result of age that could not have been prevented and was not the result of a lack of maintenance. The failure of the septic system during the tenancy was not foreseeable. KK submitted that there was no indication when the septic tank was pumped and inspected immediately prior to the tenancy that the system was at risk of total failure in the foreseeable future.

Regarding element 2, KK submitted that the property is no longer habitable given the septic system cannot be used. KK submitted that any use of the system is a violation of health and safety standards and a risk to the landlord's property. KK submitted that there is no practical way for this tenancy to move forward.

The Tenants testified that the failure of the septic system was or should have been in the contemplation of the Landlord when the contract was signed given the age of the system, 47 years, and the typical lifespan of a system, 40 years. The Tenants testified that the system failed due to the Landlord's lack of maintenance of the system. The Tenant's pointed to an CRD Information Sheet to support their position that regular inspections and maintenance of the septic system was required.

The Tenants noted that the Landlord has not provided maintenance records to support that the septic system was maintained in accordance with local government recommendations, nor have they provided a record of the inspection they purport to have occurred when the septic tank was pumped immediately prior to the tenancy.

The Tenants argued that the failure of the septic system was not an unforeseeable event and therefore the occurrence does not meet the definition of frustration. The Tenants dispute the Landlord's application for an Order of Possession based on a frustrated tenancy.

## **Analysis**

When two parties to a dispute provide equally possible accounts of events or circumstances related to a dispute, the party making the claim has responsibility to provide evidence over and above their testimony to prove their claim.

**Is the Tenant entitled to an order for the Landlord to make emergency repairs for health or safety reasons?**

Section 33(1) of the Act defines emergency repairs as those that are urgent and necessary for the safety of individuals or the preservation of the residential property. These repairs include:

- Major leaks in pipes or the roof
- Damaged or blocked water or sewer pipes
- Plumbing repairs
- Repairs to the primary heating system
- Fixing damaged or defective locks that provide access to a rental unit
- Electrical system repairs
- Repairs in prescribed circumstances related to a rental unit or residential property

The Tenant bears the burden to prove that they have emergency repairs to be completed which the Landlord has not completed in a reasonable time frame after being notified by the Tenant in accordance with section 33 of the Act.

I have considered the positions of the parties, and I find that while I am satisfied that an urgent and necessary repair to the septic system is required for the safety of individuals and the preservation of use of the residential property, I find requested repairs by the Tenant are not possible. I find the Landlord's SP Pump and Tanks report is deserving of more weight than the Tenant's Affordable Septic report, given the Landlord's documentary evidence which shows that the Affordable Septic inspection was basic, visual, not comprehensive and completed by an individual who is not qualified as a ROWP. On that basis, I find I am satisfied based on the Landlord's documentary evidence and testimony that the septic tank is not useable and poses and environmental hazard.

As a result, I find there is no obligation on the Landlord to complete the repairs sought by the Tenants or reimburse the Tenants for the repairs (pump out) which was completed without the Landlord's authorization on April 25, 2025.

Based on the foregoing, the Tenants application for an order for the Landlord to make emergency repairs for health or safety reasons is dismissed without leave to reapply.

**Are the Tenants entitled to recover the filing fee for this application from the Landlord?**

As the Tenants were not successful in this application, I find the Tenants are not entitled to recover the filing fee for this application from the Landlord. The Tenant's application for authorization to recover the filing fee for this application from the Landlord under section 72 of the Act, is dismissed without leave to reapply.

**Is the Landlord entitled to an Order of Possession based on an uninhabitable rental unit and frustrated tenancy agreement?**

Residential Policy Guideline 34: Frustration states:

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.

[...] 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.

I accept the Landlord's position as documented in SP Pump and Tanks report that:

- 1) The septic system has failed due to its age, a naturally occurring event that could not be prevented with any previous maintenance.
- 2) The holding tank is cracked, letting raw sewage seep into the ground.
- 3) The cracked septic tank does not comply with health and safety regulations as it is not viable to hold raw waste.
- 4) The tank is not to be used and poses an environmental issue.

I further accept that the only viable option available to the Landlord is install a new septic system.

I find that that the lack of a functioning septic system at the rental unit render the property uninhabitable, given the lack of running water.

I accept that the system failed due to age; however, based on the Addendum to the tenancy agreement which contemplates only the use of the septic system and the pumping requirement of the parties before and after the tenancy, I find that a total failure of the septic tank and system was not within the contemplation of the parties at the time the contract was made.

I find the Tenants' assertion that the tank and system were not reasonably maintained by the Landlord suggestive and inconsistent with the Landlord's affirmed testimony and documentary evidence that the tank was pumped and inspected at the outset of the tenancy and pumped and inspected when advised by the Tenants of their concerns until such time as the Landlord was made aware that the system was no longer viable.

I find the rental unit becoming uninhabitable, based on the absence of a functioning septic system is a change in circumstances that affects the nature, meaning, purpose, effect, and consequences of the contract, which is to provide the tenant a rental unit that meets health, safety, and housing standards, through no fault of the landlord.

I find it reasonable based on the Landlord's testimony and documentary evidence, namely the SP Pump and Tanks report, that the required repairs will likely exceed the 6-8-week estimate, given the necessity of outbuilding and tree removal. Importantly, the Tenants indicated that they are not willing to vacate for the period of repairs and do not wish to return the rental property once the required repairs are complete.

Based on the foregoing, I find the rental unit is uninhabitable, given the lack of running water, and the tenancy is otherwise frustrated. I find the only reasonable outcome to resolve this dispute is to end the tenancy. On that basis, I order this tenancy is ended on June 30, 2025. Under section 56(2) of the Act, the Landlord is granted an Order of Possession that is effective by June 30, 2025 at 1:00 p.m., after service on the Tenants.

The Landlord's application for an Order of Possession based on an uninhabitable rental unit and frustrated tenancy agreement is granted.

## Conclusion

I grant an Order of Possession to the Landlord **effective by 1:00 PM on June 30, 2025, after service of this Order on the Tenants**. The Landlord must serve the Tenants with this Order as soon as possible in accordance with my Order under section 62 of the Act as stated above. Should the Tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

The Tenants' application for an order for the Landlord to make emergency repairs for health or safety reasons under sections 33 and 62 of the Act, is dismissed, without leave to reapply.



The Tenants' application for authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: June 5, 2025

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Residential Tenancy Branch