

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *4375421 Nova Scotia Ltd. v. Clements*, 2023 NSSM 38

Date: 20230724

Claim: 523434

Registry: Halifax

Between:

4375421 Nova Scotia Ltd.

Appellant

v.

David Clements

Respondent

Adjudicator:	J. Scott Barnett
Heard:	July 4, 2023
Written Decision	July 24, 2023
Counsel:	Ian Armour and Janelle Poushay, Agents appearing for the Appellant Katie Brousseau and Liam Wilford, Agents appearing for Respondent

By the Court:

[1] This is an appeal from an Order of the Director of Residential Tenancies dated April 24, 2023. The Appellant Landlord, 4375421 Nova Scotia Ltd., seeks a termination of the tenancy of the Respondent Tenant, David Clements, and a vacant possession order, for the purpose of conducting a renovation of the residential premises where Mr. Clements lives. The relief sought by the Appellant was denied by the Residential Tenancy Officer in the first instance.

ORDER OF THE DIRECTOR (APRIL 24, 2023)

[2] A property management company retained by the Landlord filed an Application to Director on the Landlord's behalf on December 12, 2023. At that time, the Application indicated that the building in which Mr. Clements' apartment is located "needs a full renovation" to deal with, among other things, mold, plumbing and electrical issues throughout the building.

[3] The Residential Tenancy Officer observed that the Landlord had filed similar Applications in respect of several other tenants in the building, some of which had already had Orders of the Director on file that had been appealed to the Small Claims Court of Nova Scotia.

[4] In the Order of the Director in this case, the Residential Tenancy Officer appropriately cited various portions of the

Residential Tenancies Act, R.S.N.S. 1989, c. 401. In the face of a lack of guidance within the *Residential Tenancies Act*, the associated regulations or any other available guidelines in this Province, the Residential Tenancy Officer then considered statutory residential tenancies provisions in British Columbia (as he found that Nova Scotia's statutory provisions mirrored those of British Columbia) as well as the website for the B.C. Department of Housing's Residential Tenancies Branch which refers to court cases in British Columbia.

[5] In particular, the Residential Tenancy Officer mentioned the decision of the British Columbia Court of Appeal in *Aarti Investments Ltd. v. Bauman*, 2019 BCCA 165 and B.C.'s Residential Tenancy Policy Guidelines including Policy 2B (Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). That last mentioned policy includes an appendix which lists examples of various common renovations and repairs and, as a guideline, indicates the expected degree to which there would be disruption to tenants and whether or not vacancy would be required for the renovations or repairs to be carried out.

[6] After considering the evidence available to him, the Residential Tenancy Officer concluded that although he had no doubt that the Landlord wished to complete renovations, he did not accept that the renovations were so extensive as to require Mr.

Clements to vacate. He therefore dismissed the Landlord's Application.

STANDARD OF REVIEW

[7] It has been established, without doubt, that appeals to the Small Claims Court from Orders of the Director are to be conducted as hearings *de novo*: *MacDonald v. Demont*, 2001 NSCA 61, *Patriquin v. Killam Properties Inc.*, 2014 NSCA 114, *Cote v. Armstrong*, 2012 NSSC 15 and *Crane v. Arnaout*, 2015 NSSC 106.

EVIDENCE OF THE PARTIES

[8] Ian Armour is one of the owners of the Landlord corporation. He testified that the Appellant Landlord acquired the building in question a little over a year ago and the initial intention was to simply continue operating the building as it was. However, it soon became apparent that there were issues such as an absence of proper insulation as well as rusted and deficient plumbing. Since the remediation work would be extensive in any event, it was also decided to upgrade the electrical system in the building.

[9] The Landlord made efforts to reach agreements with the tenants in all eight units of the building with regard to lease termination given the extensive nature of the renovation work. Some accepted, others did not. As a result of an inability to secure

agreements with all of the tenants in the building, the Landlord filed a number of Applications to Director as required by the *Residential Tenancies Act*.

[10] In the context of the appeal before me, Mr. Armour referred to evidence submitted by the Landlord including a Halifax Regional Municipality Residential Building Permit issued on January 31, 2023 (and expiring on January 31, 2025), a document on All Seasons Roofing & Exteriors letterhead dated October 4, 2022 showing the scope of the upgrade work for the building in question (along with the associated cost) and a Nova Scotia Power Wiring Permit issued on June 27, 2023 (and expiring on June 27, 2024).

[11] Some work on apartments in the Landlord's building has already been carried out. With respect to Mr. Clements' apartment, based on Mr. Armour's understanding (which includes his own direct familiarity with a number of prior renovations including "house flips"), the renovation work is expected to take a number of months. He indicated that it is entirely possible that more issues will become apparent once the demolition work commences (which will include removing the drywall from the ceiling and the walls).

[12] Mr. Amour was candid in admitting that after the renovation work is completed, rent will be set at the market rate but perhaps in

the range of \$1,050 to \$1,100 a month. Mr. Clements' current monthly rent is \$689.

[13] In addition, Mr. Armour also admitted that the documentary evidence tendered on behalf of the Landlord does not include any documents that refer to the presence of mold. Mr. Armour indicated that no testing has been done to confirm the toxicity of any mold that might exist although he stated the mold could be an issue especially after demolition.

[14] With respect to whether any claimed issues relate specifically to Mr. Clements' apartment, Mr. Armour indicated that an apartment on the floor above had a toilet that leaked that affected the apartment directly below and that Mr. Clements' apartment is directly adjacent to the same. He also confirmed that the electrical and plumbing systems in Mr. Clements' apartment require upgrading.

[15] Mr. Clements' testimony was brief. He stated that he has lived in the apartment in question for almost eight years and that he has had no real problems with electricity in his apartment. When asked in cross-examination as to whether or not there is mold in his bathroom, he indicated that he could not say what it is but that he has been spraying mold and mildew killer on it.

[16] It is worthwhile pointing out the contents of the All Seasons Roofing & Exteriors document reference electrical upgrades

(including changing fuses to breakers, removing all baseboards, the oil boiler and all oil tanks in order to install new electric baseboard heaters and installing new lighting and smoke detectors), removal of all drywall to expose studs, replacement of old wiring and plumbing with new wiring and plumbing where needed but necessarily including new vanities, toilets, vanities, bathroom fans and tub surrounds and installation of insulation and new drywall.

[17] The scope of the aforementioned work is listed in the HRM Residential Building Permit which identifies All Seasons Roofing & Exterior as the “Responsible Contractor” and which permit provides the following description of work:

The units that will be renovated are units 2, 3, 5, 7, 8

Bare stud demolition of units 2, 3, 5, 7, 8

Re-wiring electrical in units 2, 3, 5, 7, and 8. Switching off all hot water heating to electric, oil heating to baseboard electric, install heat pumps in each unit, install brand new electrical panels for each unit

All new plumbing as per code

All new insulation as per code

All new drywall fire rated to code 1 hour fire separately provided

Water will be shut down to units for duration of construction.

[18] Mr. Clements' apartment is clearly one of the "units" referred to in the HRM Residential Building Permit.

[19] Finally, the Wiring Permit is not itself specific in terms of the scope of work to be done but it does clearly apply to the building where Mr. Clements lives.

DECISION

(a) Introduction

[20] I am satisfied that the Appellant Landlord has the burden of showing, on a balance of probabilities, that it should be granted the relief it seeks.

[21] It is obvious that the relevant provisions in the *Residential Tenancy Act* are Sections 10AB and 10AC.

[22] In particular, Section 10AB(1) permits landlords and tenants to mutually agree to terminate a tenancy for the purpose of demolition or making repairs or renovations to residential premises. However, when agreement does not come to pass, the landlord is permitted to make an Application to Director in order to seek vacant possession for a date specified in a subsequent Order of the Director which cannot be less than three (3) months and not greater than twelve (12) months from the date of the Order: Section 10AB(2).

[23] In order to obtain the relief sought, Section 10AB(3) states as follows:

(3) In an application under subsection (2), the landlord shall satisfy the Director that the landlord has all the necessary permits and approvals required by law and that the landlord in good faith requires possession of the residential premises for the purpose of

- (a) demolition of the residential premises; or
- (b) making repairs or renovations so extensive as to require a building permit and vacant possession of the residential premises.

[24] While the Director of Residential Tenancies is required to consider any vacant possession guidelines prescribed by regulation (Section 10AB(4)), no such guidelines currently exist.

[25] If an Order for vacant possession is granted, the tenant is entitled to compensation equal to the rent in an amount that will differ depending upon the number of apartments in the building where the tenant's apartment is located – if the building has four or fewer apartments, then the compensation is the amount equal to the rent payable for the last month and if the building has five or more apartments, then the compensation is the amount equal to the rent payable for the last three months: Section 10AC(2).

[26] Whether the tenant receives a cash payment or merely does not have to pay rent during the compensation period depends on how long the tenant continues to reside in the residential premises. If a tenant stays until the date specified in the Order for vacant possession, then the tenant is not required to pay rent for the applicable compensation period: Section 10AC(3). If the tenant leaves early (before the vacant possession date), then the landlord is required to pay the tenant any remaining compensation owed for the relevant period so long as the tenant has given at least ten (10) days advance notice of a desire for early termination: Section 10AC(4).

[27] There is an exception in the compensation provisions in the *Residential Tenancy Act*. If the landlord provides a tenant with other residential premises acceptable to the tenant and the parties enter into a lease with the same benefits and obligations as the current lease being ended, then the tenant is not entitled to compensation under Section 10AC: Section 10AC(5).

[28] In short, before any consideration of compensation is made, the landlord must prove the following before being entitled to termination of tenancy and vacant possession in advance of contemplated renovations:

1. the landlord, in good faith, must require possession of the residential premises in question for the purpose of making renovations;
2. the repairs must be so extensive as to require a building permit and vacant possession of the residential premises in question; and
3. the landlord must have all necessary permits and approvals required by law for the renovations to be carried out.

[29] I note that I respectfully disagree with the proposition set out in *Burgess v. Fifield*, 2023 NSSM 11 at para. 13 that a landlord must also prove that there exists a need for renovations that require vacant possession. That is not part of the requirements set out in Section 10AB(3) other than perhaps indirectly via the good faith requirement. For example, if an apartment was recently renovated and yet the landlord is saying that it wants to do extensive renovations, that might be cause to question whether the landlord really intends to carry out renovations. In any event, when Section 10AB(3) speaks of the landlord needing to satisfy the Director that the landlord “requires” possession of the residential premises for the purpose of renovations, the word “requires” simply means “wants”: see *D. Jockel Holdings Ltd. v. Vardigans*, 2023 NSSM 16 at paras. 46 and 47.

(b) Possession for the Purpose of Renovations Required in Good Faith

[30] I previously discussed the concept of “good faith” in the context of Section 10(8)(f)(i) of the *Residential Tenancies Act: D. Jockel Holdings, supra*. In that case, the question was whether the landlord required, in good faith, the termination of a tenant’s tenancy for the purpose of occupying the tenant’s apartment. The requirement of good faith was simply described as a genuine intention on the part of the landlord to occupy the apartment.

[31] I believe that the same interpretation of the term “good faith” should be brought to Section 10AB(3). The factual question to be determined is whether the landlord has a genuine intention to reclaim residential premises for the purpose of carrying out renovations. In other words, does the landlord actually intend to carry out the renovations and, further, is vacant possession being sought because of the intended renovation work?

[32] The previously mentioned *Aarti Investments* case refers to a British Columbia Residential Tenancy Policy Guideline that attempts to define “good faith” and the case also refers to another British Columbia case (*Gallupe v. Birch*, [1998] B.C.J. No. 1023 (S.C.)) where there are discussions about the extent to which a landlord’s motivations behind a stated intention should be considered in similar circumstances.

[33] In my view, it is unwise to attempt to tightly define the meaning of “good faith”. The term “good faith” is an abstract and amorphous concept. It is probably fair to say that it is easier to recognize when “bad faith” is present – the antithetical of the concept of “good faith” – than it is to explain the meaning of “good faith.”

[34] For example, if a landlord seeks vacant possession because of a tenant who is perceived to be troublesome and renovations are merely a pretext, one would say that the landlord does not in good faith require vacant possession for the purpose of renovations – the purpose is to evict the tenant.

[35] By way of further example, if it can be determined that a landlord is presenting information indicating that it intends to carry out renovations but, in fact, it does not actually intend to carry out renovations after vacant possession is granted and the tenant and other occupants leave the leased residential premises, then there is also an absence of good faith on the part of the landlord.

[36] Beyond these observations, it seems best to allow leeway for Residential Tenancy Officers (and Adjudicators of the Small Claims Court) to consider the specific circumstances at hand in any particular case in deciding whether the landlord is acting in good faith or in bad faith as the case may be.

[37] Consistent with this approach, I would not endorse the use of guidelines from British Columbia where the legislative framework appears to be different from Nova Scotia. For example, Section 49.2(1) of the *Residential Tenancy Act*, S.B.S. 2002, c. 78, as amended, not only requires a landlord to prove what Nova Scotia's statute requires the landlord to prove in connection with intended renovations, but the landlord also has to prove that the renovations are "necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located" and that "the only reasonable way to achieve the necessary vacancy is the end the tenancy agreement."

[38] Of course, if ever regulations come into force in Nova Scotia that prescribe vacant possession guidelines pursuant to Section 10AB(4), then those will need to be considered. In the meantime, the use of guidelines from other provinces is not particularly helpful and might serve to confuse rather than to clarify the proper application of Section 10AB of the Nova Scotia *Residential Tenancies Act*.

[39] In the case before me, I am satisfied that the Landlord does intend to carry out the renovation work that it says it intends to do. As already noted, the Landlord has already renovated some of the apartments in the building where Mr. Clements' apartment is located. During that process, the Landlord has confirmed the

presence of plumbing and electrical issues, some of which were patent before demolition and some that became obvious after demolition.

[40] While Mr. Clements appears to minimize the possibility that he is living in an apartment with a bathroom where mold is present, there is sufficient evidence to establish, on a balance of probabilities, that there is a reasonable basis for renovation work to be carried out.

[41] Finally, the Landlord candidly admits that the monthly rent for Mr. Clements' apartment may well increase after renovations are completed. If the rent charged for this apartment does ultimately increase, it would not contravene the provisions of the *Interim Residential Rental Increase Cap Act*, S.N.S. 2021, c. 22, as amended, as Mr. Clements would not then be an "existing tenant" if the Landlord's requested relief in this appeal is granted.

[42] Some describe this as a "loophole" in rent control in Nova Scotia. The issue of rent control is a difficult one that involves a number of policy considerations and most certainly requires a delicate balancing of various interests. In my view, this issue should be left to the Nova Scotia Legislature to address, if and how it deems fit.

[43] In all of the circumstances, I am satisfied that the Landlord in good faith requires possession of the residential premises in issue for the purpose of renovations.

(c) Are the Anticipated Renovations so Extensive as to Require a Building Permit and Vacant Possession?

[44] On whether a building permit is required for the proposed renovations, the documents tendered on behalf of Mr. Clements include a printout from the HRM website that refers to Building and Development Permits and, specifically, to “Changes to Existing Commercial Buildings”. Neither party challenged the requirement for a building permit in this case where the proposed renovations relate to changes to the interior walls, plumbing and drywall repairs (among other things).

[45] The more contentious issue was whether vacant possession was required so that the renovations can be carried out. The Court was referred to the Appendix in the B.C. Residential Tenancy Policy Guideline that purports to set out common renovations or repairs and whether it is unlikely, possible or likely that a certain type of renovation or repair will require vacancy.

[46] While I have already rejected the application and use of out-of-province guidelines such as this, it is worth noting that even this B.C. Policy Guideline indicates that if the renovation involves full

interior wall and ceiling demolition, then vacancy is likely required. In this case, a full interior wall and ceiling demolition is part of the proposed renovation work.

[47] In final argument on behalf of Mr. Clements, the claim was made that the Landlord is required to demonstrate that “the only possible, feasible way” to carry out the renovations is for vacant possession to be granted. I do not accept that formulation of the requisite test as I believe it sets the bar at a level higher than that actually set out in the legislation.

[48] Regardless, when one considers that there will be a significant amount of time that water will be shut off to Mr. Clements’ apartment, that the walls and ceiling will be stripped back to the studs and that the bathroom will be completely unusable for a period of time, I am satisfied that the amount of time during which Mr. Clements’ apartment will effectively be unlivable makes vacant possession reasonably required.

(d) Does the Landlord Have All the Necessary Permits?

[49] In this case, by the time of the appeal hearing, the Landlord did indeed secure a building permit and an electrical permit.

[50] The challenge mounted on Mr. Clements’ behalf was with respect to the HRM Residential Building Permit that has been issued. In accordance with the information contained in the

printout from the previously mentioned HRM website, it is stated that a “Commercial Building Permit” is required. Here, the argument made on behalf of Mr. Clements is that the Landlord does not have the right permit because it has a “Residential Building Permit” and therefore the Landlord does not have “all necessary permits.”

[51] This argument has no merit. The fact is that the HRM building permit specifically indicates on its face that the property owner is a numbered Nova Scotia company and that the number of “existing residential units” at the property is eight. This is clearly not a single occupancy residential house.

[52] I cannot explain why the HRM issued a “Residential Building Permit” as opposed to a “Commercial Building Permit” in a circumstance where the HRM apparently considers the building where Mr. Clements’ apartment is located to be a Multi-Unit Residential Building that falls within the meaning of a Commercial Building. However, the point is that the HRM appears to be fully aware of the situation and it has nevertheless issued the building permit with the word “residential” in the title.

[53] The Landlord in this case can reasonably rely on the fact that it has a building permit in connection with the proposed renovation work and, for all intents and purposes, it has the necessary building permit from the HRM along with the necessary electrical permit.

[54] I will briefly mention another argument made on behalf of Mr. Clements. It was argued that because the Landlord in this case did not have an electrical permit when it first made its Application to Director seeking vacant possession or even when this matter was first scheduled for an appeal hearing (an adjournment request by the Landlord was granted at that time), that it should be held that the Landlord did not have all necessary permits by the time that it should have had them or, alternatively, that the Landlord has not acted in “good faith.”

[55] I do not find these submissions to be convincing. The permits that are in evidence and that were available at the time of the appeal hearing must be considered by this Court. Further, a relatively late realization by a party that there is an evidential gap in its case that it seeks to rectify by the time of a hearing does not represent an absence of good faith which could somehow preclude the Court’s consideration of otherwise relevant and admissible evidence.

(e) Conclusion Regarding Section 10AB(3)

[56] I am satisfied that an Order granting vacant possession should be issued in this case as the Landlord has proven its entitlement to the same.

(f) Compensation Pursuant to Section 10AC

[57] Neither of the parties made any submissions on this question of the compensation to which Mr. Clements should be entitled pursuant to Section 10AC if the Court accepted that the Landlord was entitled to an Order for vacant possession pursuant to Section 10AB.

[58] The primary question is when vacant possession should be granted. After that determination is made, the compensation to which Mr. Clements will be entitled is dictated by Section 10AC.

[59] In the case of *Burgess v. Fifield* to which I have previously referred, the Adjudicator took the view that the minimum three (3) month period and the maximum twelve (12) month period runs from the date of the Order of the Director, not from the date of the decision of an Adjudicator following an appeal of the Order of the Director: see paragraph 28. I must once again respectfully disagree with the content of this earlier decision.

[60] Section 17D(1)(b) of the *Residential Tenancies Act* indicates that the Small Claims Court, in resolving an appeal from an Order of the Director, can “make any order that the Director could have made.” Of relevance to this appeal is Section 17A(e) which sets out that, among other possibilities, an Order of the Director may “terminate a tenancy on a date specified in the order and order the tenant to vacate the residential premises on that date.” That means that an Adjudicator can issue an order with the same content.

[61] The obvious purpose behind Section 10AB(2) with the stipulated minimum amount of time that must pass before an effective date for vacant possession is so that the tenant who is being required to leave can have sufficient time to find alternate accommodations. Depending upon when the Order of the Director is issued and when an appeal to the Small Claims Court is finalized, the total period of time involved could be longer than the minimum three month period such that a tenant could be ordered to move forthwith.

[62] On this point, the facts of *Burgess v. Fifield* present an example of the potential problem. The Order of the Director that rejected the landlords' Application to Director seeking vacant possession for the purpose of carrying out renovations was dated November 4, 2022. The landlords' appeal was allowed and, pursuant to an Order dated on or about March 15, 2023, the Adjudicator ordered vacant possession on February 18, 2023 (or as otherwise agreed to by the parties) which was a date roughly three and a half months after the date of the Order of the Director.

[63] If the tenant was still in possession of her apartment as at the date of the Adjudicator's Order, something which is unclear from the decision but which is theoretically possible, then the somewhat surprising result would be that the tenant was required to immediately vacate the premises without any time to find alternate

accommodations. That would appear to be incongruous with the obvious purpose behind the minimum period set out in Section 10AB(2).

[64] Accordingly, I am satisfied that, in the context of an appeal to the Small Claims Court of Nova Scotia, when Section 10AB(2) refers to a three to twelve month period “from the date of the order,” that phrase means from the date of the Order of the Adjudicator. Interpreted in this way, the provision ensures that the tenant will have a minimum amount of time as set by the Nova Scotia Legislature to find alternate accommodations if vacant possession is ordered.

[65] In this case, an Order will be issued terminating the tenancy and granting vacant possession to the Appellant Landlord on October 31, 2023.

[66] If Mr. Clements currently has no rental arrears, the upshot of this decision is that he is not required to pay rent for the months of August, September or October 2023 even if he remains in possession of the apartment until the end of October 2023.

[67] Of course, if Mr. Clements decides to leave before October 31, 2023 and gives proper advance notice to the Appellant Landlord pursuant to Section 10AB(5) that he intends to do so, he will potentially be entitled to monetary compensation in accordance with Section 10AC(4). However, the determination as

to what would be owed by the Appellant Landlord to Mr. Clements in that circumstance would have to be made in light of the balance of any remaining compensation owing as of the effective date of the early lease termination, something which is merely hypothetical at this point.

(g) Conclusion

[68] The Appellant Landlord has been successful on this appeal and costs should follow the event.

[69] In that regard, costs are payable by the Respondent to the Appellant in the total amount of \$130.85 which represents the initial filing fee for the Application to Director and the filing fee for this appeal.

[70] An Order will be issued in accordance with these reasons for judgment.

J. Scott Barnett

Adjudicator of the Small Claims Court