# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNC CNR MNDC OLC RP FF

Preliminary Issues

**Tenants' Application**

Residential Tenancy Rules of Procedure, Rule 2.3 states that, in the course of the dispute resolution proceeding, if the arbitrator determines that it is appropriate to do so, he or she may dismiss the unrelated disputes contained in a single application with or without leave to reapply.

Upon review of the Tenants' application I have determined that I will not deal with all the dispute issues the Tenants have placed on their application. For disputes to be combined on an application they must be related. Not all the claims on this application are sufficiently related to the main issue relating to the Notices to end tenancy. Therefore, I will deal with the Tenants' requests to set aside, or cancel the Landlord's Notice to End Tenancy issued for cause and unpaid rent; and I dismiss the balance of the Tenants' claim with leave to re-apply.

**Res Judicata**

Res judicata is a doctrine that prevents rehearing of claims and issues, arising from the same cause of action between the same parties, after a final judgment was previously issued on the merits of the case.

The parties confirmed they attended dispute resolution on April 30, 2013, after which an Arbitrator issued a decision and orders on May 22, 2013. I informed both parties that I could not change that Arbitrator's decision, nor could I hear testimony about matters that related to her decision and orders because that would constitute res judicata.

**Landlord's Evidence**

At the outset of this proceeding the Landlord's agent (hereinafter referred to as the Landlord) confirmed that the Landlord has not filed their own application to seek monetary compensation. Therefore, I could not consider their evidence relating to the

Landlord's request for monetary compensation. The Landlord is at liberty to file their own application.

**Procedural Issues**

At the beginning of this proceeding the Landlord's telephone line was not connected to the hearing correctly which caused excessive feedback and squealing. The Landlord hung up and called back in to the hearing and it was still causing feedback. He then changed the telephone he was using and it became quiet. During this time I attempted to ask the Landlord questions about his phone and he refused to answer them and simply began talking about something totally different. When his phone line finally quieted down I attempted to clarify if he was calling from a cell phone. After several questions he finally answered by question by telling me that he had called in using an office phone.

It was evident that the Landlord's first language was not English so I explained to him that it was important the he answer my direct questions so that I could ensure he understood what I was saying. He agreed; however, throughout the remainder of this hearing he continued to avoid or avert my direct questions; especially when the questions were related to anything that pertained to the previous decision or orders or the owner's legal name. At all other times during this hearing I had no problem understanding the Landlord and he did not indicate he was having any problems understanding me. Therefore, I find the Landlord's behaviour was not caused by a language barrier; rather, it was the result of the Landlord's continued attempts to avoid having knowledge of the previous decision and orders from May 22, 2013. It is my opinion that he thought if he did not receive the May 22, 2013, decision he would not have to comply with the orders and could proceed with ending this tenancy.

I make this finding in part because at the outset of this proceeding I discussed how the parties attended dispute resolution on April 30, 2013, and that I could not hear arguments about any of the orders in the May 22, 2013 decision. I asked each party if they understood this and if they had questions about this. They both agreed that they understood and neither party had questions or mentioned that they did not know about the May 22, 2013, decision. Then I confirmed that the Landlord had received all of the Tenants' evidence and I listed off various items in that evidence including the May 22, 2013, decision. The Landlord confirmed that he received all of the Tenants' evidence. Later in the hearing when I asked the Landlord for clarification about the amounts listed on the 10 Day Notice he began arguing that he has never seen a copy of the May 22, 2013, decision. He then claimed that he never received a copy from the *Residential Tenancy Branch* and he never received a copy in the Tenant's evidence.

In *Bray Holdings Ltd. V. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The Test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities of which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

I find the Landlord's explanations that he has never seen the May 22, 2013, decision put forth by the original Arbitrator to be improbable. There is no indication on the previous file that the decision that was mailed to the Landlord in May was returned to the office. The address listed on file is the same address that the Landlord advised me of in this hearing. Furthermore, the Tenant provided the Canada Post tracking number and provided affirmed testimony that a copy of the decision was sent to the Landlord in the evidence package and was signed received as noted on the Canada Post website.

The Landlord's behaviour of avoiding my direct questions continued throughout this proceeding. For example when attempting to determine if the Landlord's wife was in fact the owner listed on the tenancy agreement, I asked him what his wife's legal Asian name was to which he responded by saying what her Canadian first name was. I found his continued evasive behaviour lessoned the credibility of his evidence. Therefore, I find that the Tenant's submissions that the Notices to end tenancy were directly related to issues that were heard and decided upon in the April 2013, to be probable given the circumstances presented to me during this proceeding.

Introduction

This hearing dealt with an Application for Dispute Resolution filed on May 17, 2013, and amended on May 24, 2013, by the Tenants to dispute notices to end tenancy issued for cause and unpaid rent or utilities; and to recover the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally and respond to each other's testimony. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the 10 Day Notice to end tenancy issued May 21, 2013, be upheld or cancelled?
2. Should the 1 Month Notice to end tenancy issued May 6, 2013, be upheld or cancelled?

Background and Evidence

The Tenant submitted documentary evidence which included, among other things, copies of: the May 22, 2013 decision; the tenancy agreement; Canada Post receipts; their written submission; the 10 Day Notice; the 1 Month Notice; utility bills; monetary order worksheet; and various e-mails sent between the parties.

The Landlord submitted documentary evidence which included, among other things, copies of: his written submission; a monetary order worksheet; the 1 Month Notice; various e-mails between the parties; picture of text messages; notices from the municipality; and the 10 Day Notice.

The parties confirmed they entered into a fixed term tenancy agreement that began on September 1, 2012 and is set to switch to a month to month tenancy after August 31, 2013. Rent is payable on the first of each month in the amount of $1,675.00 and on August 10, 2012 the Tenants paid $837.50 as the security deposit.

The Landlord testified that the 10 Day Notice was taped to the Tenants' door on May 23, 2013, seeking payment for $702.00 for hydro utilities that accumulated from the winter months.

The Tenant confirmed receipt of the 10 Day Notice and testified that this amount was discussed in the April 30, 2013 hearing and that that Arbitrator made a ruling that they were to pay a flat rate for the hydro and water bills, as previously agreed between the parties. He pointed to his evidence which included an e-mail from the Landlord dated January 23, 2013 at 8:48 p.m. where the Landlord agreed to the flat rate payments. They provided the Landlord with post dated cheques for payment of utilities which the Landlord picked up in late January early February. The Landlord has been cashing these cheques ever since.

The Landlord confirmed this amount was discussed in the previous hearing and argued that that Arbitrator did not allow him to discuss how the payment amount was based on summer usage. He confirmed receipt of the post dated cheques as payment towards utilities and after my attempts to clarify the cashing of these cheques he finally agreed that he has been cashing them.

Upon review of the 1 Month Notice the Landlord pointed to his written submission to support the three reasons for issuing the 1 Month Notice. He claims that the Tenants have illegally sublet the rental unit to other people. He does not know how many people and he does not know when the new people began occupying the rental unit.

The Landlord claimed that the Tenant had threatened him by telling him that there was a law suit against the Landlord. He alleged his wife was threatened as well because the Tenant has sent her an e-mail with inappropriate swear words. He is very upset that the Tenant keeps e-mailing his wife when she has nothing to do with this tenancy.

The Landlord suggests that the property has been put at risk due to the manner in which the Tenants have used the dryer and the way they are neglecting the property.

The Tenant stated that he has been sending e-mails to the e-mail address provided to him by the owner who is listed as the Landlord on the tenancy agreement. He said that when they first entered into the tenancy agreement he needed the owner's bank account information to deposit the security deposit and he received that information from the owner by e-mail. This is the e-mail address that he has sent e-mails to because he needed to make sure the owner was aware of what has been happening with her agent. He has never met the owner in person and is of the opinion that the owner is in fact the Agent's wife based on the agent's reaction. He acknowledged that he used inappropriate language in the e-mail and stated that he would not do that in the future.

The Tenant confirmed that he has allowed two other occupants to move into the house with him, since the other two Tenants have moved out for the summer. He submitted that this was decided upon in the previous Arbitrator's decision.

Prior to the conclusion of this proceeding, and in direct response to his claims that he has never seen the May 22, 2013, decision, I Ordered the Landlord to attend the *Residential Tenancy Branch* on Friday June 14, 2013, to request a printed copy of the May 22, 2013 decision and this decision. I instructed the Landlord to write down both file numbers and requested that he repeat them to me. He did so and confirmed that he understood that he was to attend the counter and request that they print him a copy of each decision.

Analysis

I have carefully considered all of the evidence before me and on a balance of probabilities I find as follows:

I find the amounts listed on the 10 Day Notice for unpaid utilities to have been previously decided upon in the May 22, 2013 decision. That decision clearly orders the Tenants to pay a flat rate fee for utilities. Neither party disputed that the Tenants have been paying that amount since February 2013; therefore, there is no balance owing. Accordingly, I hereby cancel the 10 Day Notice to end tenancy issued May 21, 2013.

Upon review of the 1 Month Notice to End Tenancy issued May 6, 2013, I find the Notice to be completed in accordance with the requirements of section 52 of the Act and

I find that it was served upon the Tenants in a manner that complies with section 89 of the Act.

The Notice was issued pursuant to Section 47(1) of the Act for the following reasons:

- Tenant or a person permitted on the property by the tenant has:
  - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord
  - Put the Landlord's property at significant risk
- Tenant has assigned or sublet the rental unit/site without landlord's written consent

When considering a 1 Month Notice to End Tenancy for Cause the Landlord has the burden to provide sufficient evidence to establish the reasons for issuing the Notice to End Tenancy.

In this case, I find the Landlord has provided insufficient evidence to support the reasons for issuing the 1 Month Notice. I make this finding in part because the evidence relates to situations which occurred several months prior to the issuance of the Notice. The Landlord has never issued written warnings to the Tenants. Furthermore, the reasons provided do not prove the Tenants seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and do not prove that the Landlord's property is at significant risk.

Although there is undisputed evidence that there are two additional people occupying the rental unit, I find that this matter was decided by a previous Arbitrator in her May 22, 2013, decision, and therefore, cannot be considered as a reason for ending this tenancy. Also, I do not think it is a coincidence that this Notice was issued six days after the parties attended the previous dispute resolution hearing. Rather, I find the Notice was issued in retaliation to the anticipated decision from the April 30, 2013 hearing. Accordingly, I find there is insufficient evidence to uphold the 1 Month Notice, and it is hereby cancelled.

The Tenants have been successful with their application; therefore I award recovery of the **$50.00** filing fee.

Conclusion

I HEREBY ORDER the Landlord to attend the *Residential Tenancy Branch* on Friday June 14, 2013, to request a printed copy of the May 22, 2013 decision, and this decision.

The Tenants have been issued a monetary order in the amount of **$50.00.** They may choose to serve this Order upon the Landlord to collect the award for their filing fee "or" they may reduce their next rent payment by the onetime award of **$50.00.**

The balance of the Tenants' claim is HEREBY DISMISSED with leave to reapply.

The 10 Day Notice to end tenancy issued May 21, 2013, is hereby cancelled and is of no force or effect.

The 1 Month Notice to end tenancy issued May 06, 2013, is hereby cancelled and is of no force or effect.

I caution the Landlord that under section 95(2) of the Act, any person who coerces, threatens, intimidates or harasses a tenant from making an application under the Act, or for seeking or obtaining a remedy under the Act, may be found to have committed an offence and is subject to a fine or administrative penalty.

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: June 13, 2013

Residential Tenancy Branch