Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

INTERIM DECISION

Dispute Codes: CNL

Introduction

This decision is in response to submissions by the tenant and the landlord regarding the format of a rehearing to be conducted as a result of a judicial order made on a judicial review of the decision on the tenant's Application for Dispute Resolution seeking to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property.

Issues to be Decided

It must be determined if the rehearing ordered by the Supreme Court and confirmed by the Court of Appeal should be conducted on the existing record and by the original arbitrator. It must also be determined if the hearing should be conducted in an alternate format to the usual teleconference call format. Finally, it must be determined if the director should record the hearing or allow the parties to do so outside of the requirements set by section 6.12 of the Rules of Procedure.

Background

On August 1, 2017, the tenant submitted an Application for Dispute Resolution seeking to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property, issued by the landlord on July 28, 2017. A hearing was set for October 12, 2017. The proceeding was adjourned twice with reconvened hearings being held on November 9, 2017 and January 29, 2018.

Arbitrator C. Wilson issued his final decision on January 29, 2018, dismissing the tenant's Application for Dispute Resolution and granting the landlord an Order of Possession. The tenant submitted an Application for Review Consideration on February 2, 2018 but was denied a new hearing in a decision written on February 6, 2018, as it was determined the tenant had applied too late for consideration.

Subsequently, the tenant sought judicial review of the original decision through the Supreme Court of BC. The entered order of Mr. Justice Brundrett made April 6, 2018 states that the decision of Arbitrator C. Wilson is set aside and the "application for dispute resolution is remitted back to the Director for rehearing in accordance with the reasons of this court".

Justice Brundrett found the Arbitrator's decision was patently unreasonable. In his order dated April 6, 2018 and entered on May 24, 2018, he set aside the order of Arbitrator C. Wilson, remitted the tenant's application for dispute resolution back to the Director for "rehearing", and vacated the writ of possession.

On May 14, 2019, the BC Court of Appeal dismissed the landlord's appeal of Justice Brundrett's decision and confirmed the order vacating the Order of Possession and remitting the matter to the RTB for reconsideration. While the Court of Appeal found it was open to Arbitrator Wilson to conclude the landlord's repairs required vacant possession, he erred by placing the onus on the tenant to prove the landlord was acting in bad faith and by failing to come to any conclusion with respect to the effect of the deficiency in the Landlord's electrical permit.

On May 17, 2019, legal counsel for the landlord submitted a letter to the Residential Tenancy Branch requesting a new hearing date be set "for a reconsideration hearing in accordance with the Court of Appeal's decision". In this letter, counsel acknowledges that in his experience the Residential Tenancy Branch does not usually seek submissions on how the hearing of an application sent back to the Branch on judicial review should be conducted. He goes on to make submissions on how the hearing should be conducted.

Counsel for the landlord submits the rehearing should be:

- Conducted by the original Arbitrator;
- Conducted on only the existing record with no further witness testimony or documentary evidence permitted;
- Conducted by written submissions alone or, in the alternative, by telephone hearing; and
- Restricted to the provision of legal submissions alone.

In addition, counsel submits that the Arbitrator be restricted to determining the issues of good faith and "upholding an order of possession when one of the permits in question required an amendment". He states that the court made no reference to inappropriate conduct of the Arbitrator in the original hearing.

Counsel also submits that conducting a new hearing that would allow for new evidence or arguments on issues that were not considered by the courts, in this case, would be "excessive, prejudicial, and not a reasonable use of public resources" because:

- None of the original witnesses' evidence was challenged at judicial review;
- The judge on judicial review did not find any error in the admission of evidence or submissions or in how the original hearing was conducted; and
- There is no need to call new or fresh evidence because the original Arbitrator can just consider new legal submissions along with the existing record.

In response, the tenant's legal counsel sent a letter on May 24, 2019. In his letter, he submitted the hearing should be heard by a different Arbitrator; be in-person (with certain witnesses connected by telephone if necessary and appropriate); and be recorded either by the Residential Tenancy Branch or by the parties without the requirement to hire a court reporter.

Tenant's counsel submits that having the matter reconsidered by the original Arbitrator based on the existing record would be unfair and impossible because there was no recording of the original hearing.

Her counsel goes on to submit that the hearing should be conducted in person because there are important issues of credibility since the tenant is questioning the landlord's good faith intention in issuing the Notice to End Tenancy. They also anticipate many people attending the hearing including lawyers, advocates, agents, and witnesses. Counsel does acknowledge that the first hearing included these same participants but then points out this number makes a teleconference hearing impractical.

In regard to having the original Arbitrator conduct the reconsideration, tenant's counsel states that it is "untenable and raises serious issues of procedural fairness." He submits the issue is not that the original Arbitrator is biased but rather there is a reasonable apprehension of bias if the original Arbitrator reheard the matter.

He makes this submission based on his position that the "first decision was found to be so profoundly flawed that it could not be allowed to stand even applying the most deferential standard known to law". Counsel states that since "the landlord is now actively lobbying for its preferred arbitrator, being the very same arbitrator who previously rendered an irrational and unjustifiable decision in its favour, also raises a reasonable apprehension of bias."

Finally, the tenant's counsel submits that the Residential Tenancy Branch record the hearing or give permission for the parties to record it without requiring the tenant hire and pay for a court reporter as required by the Rules of Procedure. Counsel argues that by not having a recording of the original hearing "significant problems arose in the Court proceedings". Counsel also states that the Rules of Procedure which require a court reporter to be used are "preposterous and unfair."

Tenant's counsel also asks that the Residential Tenancy Branch canvass the parties for their availability and time estimates before scheduling the rehearing in order to avoid adjournments.

On May 24, 2019, counsel for the landlord sent an email in reply to the submissions made by tenant's counsel. While landlord's counsel only sent this email to counsel who acted for the Director on the judicial review, that counsel forwarded the submissions to the Residential Tenancy Branch. I have reviewed these reply submissions in making my decision.

Landlord's counsel submits in reply that tenant's counsel's position ignores the case law he had provided in his original submissions and that she is not entitled to something that was not ordered by the courts.

In regard to the full record, landlord's counsel submits there is no rule of law requiring a transcribed hearing for a full record to exist. He further submits the tenant could have obtained a transcript of the original hearing had she requested one in according with the Rules of Procedure.

Landlord's counsel submits the issue of credibility as put forth by the tenant's counsel is exaggerated. He states there was never an issue of credibility of the witnesses at issue in the judicial review. He further submits the tenant's good faith argument was "based on a single document – a transcript of an audio recording" and as such there is no need for a "live hearing" for that issue.

Counsel also takes offence to the assertion that he was "actively lobbying for its preferred arbitrator". He submits the case law he provided explains why this case should be reheard by the same arbitrator. Landlord's counsel suggests the tenant would prefer a de novo hearing so that she can "bolster her evidence and make new arguments and present new evidence never before seen by the RTB and have an entirely new hearing".

Finally, landlord's counsel argues that there is no case authourity that an in-person hearing is required for compliance with rules of procedural fairness and natural justice.

Analysis

Section 62(1) of the *Residential Tenancy Act (Act)* states the director has authority to determine disputes in relation to which the director has accepted an application for dispute resolution, and any matters related to that dispute that arise under the *Act* or a tenancy agreement.

Section 64(3) states that subject to the rules of procedure established under Section 9(3) of the *Act*, the director may:

> (a) deal with any procedural issue that arises,
> (b) make interim or temporary orders, and …

Section 74(1) stipulates that the director may conduct a hearing in the manner she considers appropriate. Section 74(2) allows the director to hold a hearing in person, in writing, by telephone, video conference or other electronic means, or by any combination of the methods noted above.

Section 5(2) of the *Judicial Review Procedure Act* directs the court to advise the tribunal of its reasons for directing the tribunal to reconsider a matter and to give the tribunal any

directions that it thinks appropriate for the reconsideration of the matter that is referred back for reconsideration.

I note that in similar cases, where the court remits an application for review back to the Residential Tenancy Branch for reconsideration and provides no further direction, the Branch typically assigns the file back to the original Arbitrator and does not allow the parties to submit any new and/or additional evidence.

I also note that conducting such a hearing on the original record, for the Branch, means the existing documentary evidence, which includes existing video and/or audio recordings. This method does not preclude the parties and witnesses from providing oral testimony at the rehearing and consideration of this testimony; however, it does require the availability of the witnesses to attend and provide their testimony at the new hearing.

If the court were to determine that there is a need for the Branch to use any specific process when conducting a reconsideration of an application for dispute resolution, it would provide instructions in its decisions and orders. In the case at hand, both the Supreme Court and Court of Appeal have only stated that the matter be remitted back to the Residential Tenancy Branch for reconsideration with no further instruction.

I also note that at the conclusion of the judicial review in the Supreme Court, as reflected in the oral reasons for judgment, Mr. Justice Brundrett specifically asked both counsel for the landlord and the tenant if they had anything else that they wanted him to deal with, and both counsel indicated there was nothing further.

If the court or the parties had concerns about how the reconsideration would be conducted by the Residential Tenancy Branch, especially in relation to whether the matter must be heard by a different arbitrator, I find these concerns could have been raised in the parties' pleadings and with the court in order to have the court provide direction as allowed under Section 5 of the *Judicial Review Procedure Act*.

As the court has determined there is no need to provide further direction and in accordance with Sections 62, 64 and 74 of the *Act*, I find the director has authourity to determine how the rehearing will proceed and who should have conduct of it.

Counsel for the landlord does not have any issue with the rehearing being conducted by the original Arbitrator and, in fact, argues that is normally the legal outcome; however; counsel for the tenant argues that this would give rise to a reasonable apprehension of bias.

Legally, there is no rule that requires a different decision-maker rehear a matter that has been remitted back. The presumption of impartiality holds that it must be presumed in the absence of any evidence to the contrary that public officers will act fairly and impartially in discharging their adjudicative duties. Nothing in the court decisions rebuts this presumption. There were no perverse findings of fact identified. The errors which

led to this matter being remitted do not indicate the arbitrator would have a closed mind or an absence of objectivity with respect to the parties and issues in this matter. I do not conclude that reasonable and right-minded people, apprised of all of the relevant information and viewing the matter realistically and practically would think it more likely than not that the original arbitrator could not or would not decide the matter fairly or have prejudges the matter if they reheard it.

As such, I find there is no reason to assign this file in a manner different than the Branch's usual practice when given orders that do not specify the matter be reheard by a different arbitrator.

Having made this finding, I note that if Arbitrator Wilson determines that he would not be able to act impartially and with an open mind in conducting the rehearing and making a new decision because of his past involvement with this matter, then he will recuse himself and inform the parties of that decision. In that instance, the Branch would assign the rehearing to a different arbitrator.

In relation to the parties' submissions regarding the record for the rehearing, again, I note that there was no direction in either the Supreme Court or Court of Appeal decisions that new evidence should be allowed or considered.

There is nothing in the findings of the courts that indicate from a procedural fairness perspective that the parties require the ability to submit additional documentary evidence for the rehearing. Therefore, with one exception, I order the parties are not allowed to submit any new or additional documentary evidence. That exception is that the parties may submit any new and relevant evidence that was not available to them at the time of the original hearing as under sections 79 and 82 of the *Act* new evidence would allow for a review that could result in an original hearing being reconvened or a new hearing held. It is not practical or efficient to delay the reception of this type of evidence and potentially extend a final determination of this matter even longer.

With respect to whether witness testimony will be permitted, that is for Arbitrator Wilson to determine prior to the start of the hearing as he is in the position to know whether, in order to redetermine the application for dispute resolution, he needs to rehear oral evidence he previously heard. If it was necessary for a new arbitrator to be assigned, then that new arbitrator would need to hear oral evidence from witnesses.

While I have left the issue of witness testimony to Arbitrator Wilson, I have considered the issue of hearing format on the assumption that witness testimony will likely be allowed given the length of time since the original hearing and arbitrator file loads.

Residential Tenancy Policy Guideline 44 stipulates:

> The director may consider requests for a hearing in an alternate format in limited circumstances including when:

1. there is a history of abusive interactions;
2. a party has a medical condition that creates a barrier to participation in an oral hearing;
3. there are physical, geographical or language barriers for which an oral hearing would result in prejudice to one or both parties;
4. there is evidence that both parties have legal representation; or
5. there are a large number of applicants and/or respondents, and they do not self- identify a lead spokesperson or agent.

When considering a request for a hearing in a format other than telephone conference call, the director will consider the reason for the request based on the supporting documentation provided and why the party is unable to participate in a telephone conference call or be represented by someone who could.

If one party requests a hearing in a specific format, the director will provide the other party an opportunity to make submissions on the hearing format to ensure procedural fairness.

The only applicable circumstance listed above is that both parties are legally represented. Further guidance is provided in relation to allowing an alternate format hearing when both parties having legal representation. Guideline 44 explains the director may schedule a matter as a written hearing or consider a request to hold a written hearing where there is evidence that both parties have legal representation.

As both parties have already provided written submissions in regard to format, I have considered these submissions in conjunction with Policy Guideline 44.

Counsel for the landlord seeks a format of only written submissions. While Policy Guideline 44 does contemplate this option, at this point, where no determination has been made with respect to whether oral testimony will be allowed from witnesses, I find a written submission format would not be appropriate and I dismiss the landlord's request. It is, however, open to the landlord to make this request again or for Arbitrator Wilson to revisit the question of format if the circumstances later warrant it.

Counsel for the tenant seeks a combined format of an in person and telephone hearing, whereby it appears they seek to have the lawyers, advocates, agents, parties and most witnesses attend in person and other witnesses call in if necessary and appropriate. They submit this is required, in part, because the "matter engages important issues of credibility". They submit the tenant has impugned the landlord's good faith in that she believes the landlord does not intend to make renovations requiring vacant possession and that the landlord is acting with an ulterior motive. They state that she intends to "thoroughly cross-examine the landlord's witnesses." They also assert that a telephone hearing would be "impractical" because many people will be attending as with the first hearing.

It is important to note that the vast majority of hearings conducted by the Residential Tenancy Branch, most of which require an arbitrator to do some assessment of the credibility of the parties and their witnesses, are conducted via telephone conference calls.

The question of good faith is a common ground for disputing a notice to end tenancy for landlord's use of property and except in exceptional circumstances, all of these files would normally be scheduled, as this file originally was, for a telephone conference call.

In addition, the original hearing was conducted by telephone conference call. There is nothing in the courts' decisions to suggest that this format led to the errors that were identified in the original decision or that this was an unfair or impractical process. As well, while the hearing did have to be reconvened a few times, there is nothing in the original decision to suggest that the process was impractical and could not be managed.

For the above reasons, I find there are no reasons aligned with Policy Guideline 44 to grant the tenant's request for an in-person hearing or combination hearing. Therefore, I dismiss the tenant's request for a hearing in an alternate format. It is, however, open to the arbitrator hearing this matter to revisit this decision if, in the course of hearing the matter, they determine this is necessary.

As to the recording of the hearing, tenant's counsel seeks to have the Residential Tenancy Branch record the hearing or to allow the parties to do so without requiring the parties to engage the services of a court reporter. Rule 6.11 of the Rules of Procedure specifically prohibits persons from recording a dispute resolution hearing. This prohibition includes any audio, photographic, video or digital recording. Despite counsel's submissions that Rule 6.12 of the Rules of Procedure, which requires a court reporter, is preposterous and unfair, it is a rule established and published by the director pursuant to section 9(3) of the *Act* for a variety of policy reasons.

The Director's powers in section 64(3) of the *Act* to make interim orders and to deal with any procedural issue that arises are expressly limited by the rules of procedure established under section 9(3). Rules 6.11 to 6.13 apply to all parties who participate in hearings with the Residential Tenancy Branch and the option of requesting an official transcript under Rule 6.12 is available to the tenant if she feels it is sufficiently important to having the hearing recorded and transcribed.

I find the tenant has not submitted a request for an official transcript as required under the Rules of Procedure and as such I dismiss the tenant's request to allow the parties to record the hearing as expressly prohibited by Rule 6.11. Either party may still make a written request under Rule 6.12 at least seven days before the hearing.

Furthermore, I also dismiss the tenant's request that RTB record the hearing. As noted earlier, most dispute resolutions heard by the Director involve oral testimony and credibility issues. The Branch is not equipped at this time to record dispute resolution hearings, to store recordings or to transcribe or otherwise make recordings available. It

does not presently have the resources to equip itself in this manner. There is nothing in the particular circumstances of this case, when compared with the majority of cases heard by the Branch, that would warrant the Director authorizing expenditures out of her limited budget to have this hearing recorded for the benefit of the two private parties in this matter.

Conclusion

In conclusion, I order the rehearing required by the order made on judicial review is to be scheduled as a telephone conference call before the original Arbitrator.

I order that counsel representing both parties must submit their availability for the period July 1, 2019 to September 30, 2019 to the Residential Tenancy Branch no later than June 17, 2019. Counsel must take into consideration party and witness availability as well when providing dates for scheduling. Once a decision has been made by the arbitrator on whether witness testimony will be permitted, the length of time scheduled for the hearing can be revisited by the parties if necessary.

I order the evidence considered by the Arbitrator will consist of the original record including documentary and audio recording submissions, as well as any new and relevant evidence that was not available to the party at the time of the original hearing that a party submits in accordance with the Rules of Procedure. The issue of oral testimony from witnesses will be determined by the original Arbitrator.

I order that no recording of the hearing will be made by the Residential Tenancy Branch. I order that no recording of the hearing will be made by either party, unless they obtain a written decision by the Arbitrator with conduct of the matter allowing them to have an official transcript subject to Rule of Procedure 6.12.

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 07, 2019

Residential Tenancy Branch