# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNL-4M, LAT, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the Four Month Notice to End Tenancy for Demolition, or Conversion of Rental Unit (the "Notice"), pursuant to section 49;
- authorization to change the locks, pursuant to section 31; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Tenant P.A., tenant P.A.'s advocate (the "advocate"), the landlord's agent (the "agent"), and the landlord's resident manager attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

Tenant P.A. testified, and the agent confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. The agent testified, and the tenant confirmed, that the landlord served the tenant with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue- Severance

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the Notice and the continuation of this tenancy is not sufficiently related to the tenant's claim for authorization to change the locks to warrant that they be heard together.

The tenants' claim for authorization to change the locks is unrelated in that the basis for it rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the Notice. I exercise my discretion to dismiss the tenants' application for authorization to change the locks with leave to reapply.

Preliminary Issue- Res Judicata

The advocate submitted that this matter is res judicata and cannot be heard again based on issue estoppel.

The advocate submitted that the Residential Tenancy Branch has already heard the landlord's claim to end the tenancy for conversion of the rental unit to a caretaker unit and that the matter cannot be re-heard.

The advocate submitted that the landlord served the tenant with a Four Month Notice to End Tenancy for Conversion of Rental Unit dated April 20, 2022 and that the tenant applied to cancel that Notice. The advocate submitted that the matter was set down for

a hearing on August 26, 2022 and that in a Decision dated August 26, 2022 the Notice was cancelled because the landlord failed to meet the required burden of proof.

The August 26, 2022 decision was entered into evidence and states:

> …
>
> The landlord issued a 4 Month Notice dated April 20, 2022 with an effective date of August 31, 2022 indicating the reason for the tenancy to end is that the landlord intends to convert the rental unit for use by a caretaker, manager, or superintendent of the residential property. The tenant confirmed receipt of the 4 Month Notice and filed their application for dispute resolution on April 26, 2022.
> …
> I accept the undisputed evidence that the 4 Month Notice was received on or about April 20, 2022 and the tenants filed their application for dispute resolution on April 26, 2022. I therefore find the tenant are within the time limits provided under the *Act* to dispute the 4 Month Notice.
>
> As set out in Residential Tenancy Rule of Procedure 6.6 when a tenant files an application to dispute a Notice to End Tenancy, the landlord bears the burden to prove the grounds for the 4 Month Notice on a balance of probabilities.
>
> In the present case I find the landlord has not met their evidentiary onus to demonstrate the reasons provided on the Notice. The landlord failed to submit any documentary evidence to support their testimony and provided little details about the intended use of the property.
> …
> Based on the paucity of the landlord's evidence, I find the landlord has failed to satisfy the burden of proof on a balance of probabilities. I am not satisfied that the landlord has the good faith intention to convert the rental unit for occupation by a caretaker or manager as stated on the 4 Month Notice. I therefore allow the tenants' application to cancel the 4 Month Notice. This tenancy continues until ended in accordance with the Act.

The parties to the previous action are the same as in the current action.

Both parties agree that after the August 26, 2022 hearing and Decision the landlord served the tenants with another Four Month Notice to End Tenancy for Conversion of a Rental Unit, with the same reason to end the tenancy, that being the landlord is going to

“convert the rental unit for use by a caretaker, manager, or superintendent of the residential property”.

The tenants entered into evidence an email from the agent which states in part:

> I have received the arbitrator’s order….We will serve you with another 4 month notice and if you file to have that set aside I will prepare more adequately for the arbitration.

Both parties agree that the Four Month Notice to End Tenancy for Conversion of a Rental Unit that is currently under dispute was served on the tenants in September of 2022. The above notice is dated September 22, 2023. The agent testified that the year on the notice is a typo and should read September 22, 2022.

The advocate submitted that the Four Month Notice to End Tenancy for Conversion of a Rental Unit that is currently under dispute was served on the tenants because the landlord did not adequately prepare for the August 26, 2022 hearing.

The advocate submitted that the landlord is barred from pursuing the Four Month Notice to End Tenancy in this application due to the principles of res judicata and issue estoppel as set out by the Supreme Court of Canada. The advocate quoted the following from *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 18:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause.

The advocate submitted that there is a three point test for the application of *res judicata:*

1. That the same question has been decided;
2. That the judicial decision which is said to create the estoppal was final; and
3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppal is raised or their privies.

The advocate submitted that the question of whether or not the landlord is permitted to end the tenancy for conversion of the rental unit was previously decided in the August 26, 2022 Residential Tenancy Branch Decision.

The advocate submitted that the August 26, 2022 Decision was final as set out in section 77(3) of the *Act.* The advocate submitted hat the parties in both proceedings are identical. The advocate submitted that the three-point test has been met.

The advocate submitted that in Khan v. Shore 2015 BCSC 830 it was found that:

> …if in fact the issued raised by the Landlord were the same issues which had been determined in prior applications between the same parties, an arbitrator should consider whether *res judicata* applies.

The advocate submitted that the original August 26, 2022 decision should stand and that this matter should be not relitigated.

The agent testified that he is not familiar with res judicata and estoppel. The agent testified that in his experience, at the end of a decision the arbitrator will say whether or not there is leave to reapply. The agent testified that the arbitrator did not state in the August 26, 2022 decision that the landlord did no have leave to reapply.

The advocate submitted that nothing in the August 22, 2022 decision granted the landlord leave to reapply.

The agent testified that in this situation the landlord did not properly prepare for the August 26, 2022 hearing. The agent testified that the tenant is not prejudiced by the September 2022 Notice being adjudicated in this hearing because the landlord did not have all the required evidence at the last hearing.

## Issue to be Decided

Is the landlord's claim to end the tenancy for conversion of a rental unit res judicata?

## Analysis

The test for issue estoppel is confirmed in Angle v. Minister of National Revenue (1974), 1974 CanLII 168 (SCC), 47 D.L.R. (3d) 544 at pp. 555-56 [Angle] as follows:

a. First, has the same question been decided?

b. Second, was the decision that is said to create the estoppel final?
c. Third, were the parties to the decision *or their privies,* the same as the parties to the proceeding in which the estoppel is raised?

Issue estoppel relies on a two-step analysis. First, I must determine whether the criteria for estoppel are met. If they are met, then I must decide whether to exercise my discretion.

The onus is on the party seeking to rely on issue estoppel. Not only must they establish that the pre-conditions for issue estoppel are met but also that I should exercise my discretion to apply the doctrine and dismiss the matter on this basis. Issue estoppel is designed to protect principles like judicial economy, consistency, finality and the integrity of the administration of justice. But, as stated by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*]: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice".

On the first criterion set out in *Angle*, I must determine if the question has already been decided. Upon review of the August 26, 2022 Decision and the Four Month Notice to End Tenancy for Conversion of a Rental Unit disputed in this application for dispute resolution, I find that the question asked in each dispute, that being whether or not the landlord could end the tenancy to convert the subject rental property into a caretaker unit, are identical in both applications.

I find that the above question was decided in the August 26, 2022 Decision. The landlord was not permitted to end the tenancy for conversion of the subject rental property to a caretaker unit.

Section 77(3) of the *Act* states:

> Except as otherwise provided in this Part, a decision or an order of the director under this Part is final and binding on the parties.

Pursuant to section 77(3) of the *Act,* I find that the August 26, 2022 decision was final and binding.

Upon review of the style of cause of each of the two applications for dispute resolution in question, I find that the parties to both disputes are identical.

The doctrine of issue estoppel is discretionary. *Danyluk* states at paragraph 67 that the list of discretionary factors to consider is open and proceeds to set out the seven factors that were relevant in that case. The facts and relevant legislation found in *Danyluk* differ markedly from the facts and legislation found in this present case. It is therefore not surprising that the relevant factors to consider in the exercise of my discretion are not all the same as in *Danyluk;* however, the following factors from *Danyluk* are relevant:

1. *The Purpose of the Legislation;*
2. *The Availability of an Appeal;*
3. *The Circumstances Giving Rise to the Prior Administrative Proceedings; and*
4. *The Potential Injustice.*

The purpose of the *Act* is to balance the rights and obligations of landlords and tenants and to provide some protection to tenants given they are usually in a weaker bargaining position than landlords. I find that the purpose of the *Act* would be thwarted by allowing a landlord to serve repeated identical notices when previous notices were defeated. Commercial landlords frequently have greater resources than tenants and to allow such an occurrence would heavily favour the landlord who can more easily pursue multiple claims.

The landlord did not appeal (apply for review consideration) of the August 26, 2022 decision, though this action was available to them. The landlord has also not applied for judicial review of the August 26, 2022 Decision. I find that since the landlord had options to appeal the August 26, 2022 Decision and did not pursue those options, the failure of the landlord to pursue available options is a relevant consideration supporting the use of my discretion.

I find that the circumstances giving rise to the duplication of proceedings, as stated by both parties, is the landlord's failure to properly prepare for the August 26, 2022 hearing. I find that the landlord should not be granted a second opportunity to pursue the same eviction that was dismissed in the August 26, 2022 Decision. I find that to do so would be substantially unfair to the tenants. The tenants have a right to rely of the previously decided binding decision rendered by the Residential Tenancy Branch which was between the same parties, involved the same rental property and the same reason

to end the tenancy. I find that the potential injustice to the tenants outweighs the benefit of giving the landlord a second opportunity to prove their case.

Pursuant to my above findings, I elect to exercise my discretion. I find that the matter of the Four Month Notice to End Tenancy for Conversion of a Rental Unit is res judicata and cannot be re-heard.

As the tenants were successful in this application for dispute resolution, I find that they are entitled to recover the $100.00 filing fee from the landlord.

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenants are entitled to deduct $100.00, on one occasion, from rent due to the landlord.

Conclusion

The Four Month Notice to End Tenancy for Conversion of a Rental Unit dated September 22, 2023 is of no force or effect as the matter is res judicata and was previously decided.

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: January 24, 2023

Residential Tenancy Branch