



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNR, FF

### Introduction

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

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that he received a copy of the landlords' 10 Day Notice posted on his door on March 4, 2013. Landlord KL (the landlord) confirmed that his office received a copy of the tenant's dispute resolution hearing package by registered mail on March 26 or 27, 2013. I am satisfied that both parties served the above documents to one another.

### Preliminary Matters

Although the landlord issued a 10 Day Notice to the tenant on March 4, 2013, subsequent to that date the landlord maintained that this tenancy was a commercial one and not covered by the *Act*. The landlord outlined this position at a March 13, 2013 hearing that I presided over with respect to this tenancy. In that hearing (the original hearing), I considered the tenant's application for a determination regarding his dispute of what he maintained was an additional rent increase by the landlords in excess of what was allowed under the *Act*. In my decision of March 13, 2013 (the original decision), I declined jurisdiction over the tenant's dispute as I made the final and binding decision that section 4(d) of the *Act* excluded the parties' commercial tenancy agreement from the *Act*. I did so as I reached the final and binding decision that the premises in question were primarily occupied for business purposes and were subject to a commercial tenancy. In my original decision, I cited the relevant Residential Tenancy Branch (RTB) Policy Guidelines (i.e., 14 and 27.6), which I referred to and interpreted in the context of the evidence submitted by the parties with respect to this tenancy.

The landlord gave sworn oral testimony and written evidence that the RTB has no jurisdiction to hear the tenant's current application and provided a copy of the original decision in support of this assertion.

At the commencement of the hearing, I asked the parties if they had received a March 26, 2013 review decision of another Arbitrator appointed under the *Act* to consider the tenant's application for review of the original decision. As neither party had yet received the review decision and I found that it would facilitate the current hearing if they were aware of the outcome of the tenant's application for review, I advised them at the hearing that the tenant's application for review had been dismissed.

#### Issues(s) to be Decided

Does the tenant's current application fall within the jurisdiction of the *Act* and can I consider the tenant's current application?

#### Background and Evidence

The original decision outlined the background and evidence to this tenancy as follows:

*The parties agreed that this tenancy for second and third floor space above a commercial establishment commenced in 1978. The most recent tenancy agreement between the parties was a September 1, 2008 Commercial Lease (the Lease) that was entered into written evidence by the tenant. This Lease covered the 24-month period from September 1, 2008 until August 31, 2010. At the expiration of this term, the parties agreed to renew the Lease for a 2 year period at a mutually agreeable amount.*

*The parties agreed that monthly rent as of December 1, 2012 was set at \$1,817.95 plus GST. No security deposit was paid for this tenancy. According to the terms of the Lease, the lessee agreed to accept the premises "as is and/or improvements necessary shall be the responsibility of the Lessee and the Lessor is in no way responsible for such repair, except structural repairs." The Lessee also committed to maintain the premises in accordance with the municipal bylaws and to maintain any necessary business licence.*

*The parties agreed that the landlord advised the tenant in October 2012, that the monthly rent would be increasing to \$3,500.00 plus HST commencing on January 1, 2013. The tenant applied for dispute resolution to limit the landlords to the 3.8% increase allowed under the Act.*

*The tenant maintained that this was a residential tenancy and that the only permitted uses of the second and third floor of this property were for residential*

*use. The tenant testified that, but for a period of time when he was in Bulgaria and when his son stayed in the rental unit, he has been living in the rental unit since 1978. He confirmed that he has also had other living accommodations over some of this period and has lived part-time in other locations in the Lower Mainland. He also testified that he has kept props, equipment and items associated with his movie set business in the premises for much of the time of this tenancy. However, he said that this is and always has been a residential tenancy, which protects him from rent increases of the type requested by the landlords for 2013.*

*The landlords testified that this is, was and always has been a commercial lease, as noted at the top of the signed contract between the parties, which describes this as a "Lease – Commercial." They also testified that they understand that the tenant has always used the leased premises for the storage of his business materials. The landlord identified a number of locations where the tenant has kept his principal residence throughout this tenancy. The landlord noted that inspections conducted by the municipality have repeatedly indicated that the premises were being used for the storage of business materials.*

The landlord issued the 10 Day Notice and the tenant submitted his March 6, 2013 application to cancel that Notice before I heard the tenant's previous application. After receiving my original decision, the tenant was aware of my final and binding decision that this tenancy does not fall within the jurisdiction of the Act. As the landlord referred to my decision in his evidence, accepted that this tenancy is commercial and not residential, and is no longer pursuing the 10 Day Notice, there seems little point in proceeding with the tenant's current application to cancel the 10 Day Notice.

The tenant's current application sought a re-evaluation of the oral and written evidence he submitted at the original hearing with the objective of obtaining a different finding with respect to whether this was a residential or a commercial tenancy. In his written evidence for this hearing and in his sworn testimony, the tenant asked that consideration also be given to inspection(s) conducted by the municipal fire department which referred to the premises as being a residential dwelling. The tenant also provided written and oral evidence that the landlord did pay for plumbing upgrades during this tenancy, although I note that the written evidence with respect to this item dates back to 2002. As noted during the hearing, I do not find the new evidence submitted as part of the tenant's current application has a significant impact on the issues that factored into my original decision that this tenancy does not fall within the jurisdiction of the Act.

### Analysis

The landlord has accepted that this tenancy is not covered under the *Act* and hence the landlord cannot proceed with seeking an end to this tenancy on the basis of the 10 Day Notice. As noted above, the tenant sought a review of my original decision, but his application was dismissed on March 26, 2013 by another Arbitrator. Under these circumstances, it appears to me that the tenant's sole purpose in proceeding with his current application for dispute resolution is to attempt to revisit my original final and binding decision that this tenancy lies beyond the jurisdiction of the *Act*. I find that the essence of the tenant's application is to re-argue the points he made in his previous application with minimal additions to his evidence and, in this way, to seek a different ruling regarding the application of the *Act* to his tenancy. Although the tenant did provide some limited new oral and written evidence, the tenant's argument is essentially the same as that provided by the tenant at the original hearing.

I recognize that the tenant genuinely disagrees with my determination on March 13, 2013 that his tenancy is commercial in nature and beyond the jurisdiction of the *Act*. However, this does not enable the tenant to obtain a second final and binding decision with respect to whether this tenancy falls under the *Act*.

I find that the nature of the tenant's pursuit of a second application is to reverse my finding regarding the RTB's lack of jurisdiction to consider his tenancy under the *Act*. Separate from my conclusion that the tenant has presented essentially the same argument as he provided during the previous application, I find that the legal doctrine of *res judicata* is of relevance to my consideration of this matter. The doctrine of *res judicata* prevents a litigant from obtaining another day in court after the first lawsuit is concluded by giving a different reason than he gave in the first for the recovery of damages for the same invasion of his right. The rule provides that when a court of competent jurisdiction has entered a final judgement on the merits of a cause of action, the parties to the suit are bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. A final judgment on the merits bars further claims by the same parties based on the same cause of action.

*Res judicata* prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defence to defeat the enforcement of an earlier judgment. It also precludes relitigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

Considered in the context of the tenant's current application, I find that the legal principle of *res judicata* is relevant to the tenant's current application. There is little question that the key issue before me and as argued by the parties at the March 13, 2013 hearing was whether or not this tenancy fell within the jurisdiction of the *Act*. My original decision of March 13, 2013 clearly canvassed the positions taken by the parties and made a final and binding decision that this tenancy fell outside the *Act*. The tenant's application for review on the basis of new and relevant evidence and his pursuit of his current application for the sole purpose of obtaining a different determination to bring him under the jurisdiction of the *Act* raise issues and evidence that could have been raised at the original hearing. There is no doubt that the issue of whether this tenancy was or was not covered under the *Act* was contested during the original hearing, nor is there any question that I issued a final and binding decision that the tenancy does not fall under the *Act*. I find that the legal principle of *res judicata* prevents me from considering the arguments that were made by the tenant to have this tenancy considered within the jurisdiction of the *Act*, as well as any matters which might have been argued at the original hearing.

I find that the principle of *res judicata* prevents me from making a second decision on whether this tenancy falls under the *Act* even if I were inclined, as I am not, to make a different determination than I made on March 13, 2013, on the basis of the oral and written evidence entered by the tenant for the current hearing. I dismiss the tenant's application because I find that a final and binding decision has already been made that this tenancy does not fall within the jurisdiction of the *Act*.

#### Conclusion

I decline jurisdiction over this dispute and refuse to hear the tenant's application as I find that a final and binding decision has already been made in accordance with section 4(d) of the *Act* that this tenancy agreement lies outside 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 *Residential Tenancy Act*.

Dated: April 05, 2013

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Residential Tenancy Branch