Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Disute Codes: CNL

Introduction
This is an application by the landlord for a review of a review decision rendered by on October 21, 2013, (the original decision), with respect to an application for dispute resolution from the tenants to cancel a 2 Month Notice to End Tenancy for Landlord's Use (the 2 Month Notice). The original decision allowed the tenants' application and cancelled the 2 Month Notice issued on August 30, 2013, which is of no force or effect.

An Arbitrator may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the Arbitrator should be set aside or varied;

Issues
Division 2, Section 79(2) under the *Residential Tenancy Act* says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

The landlord applied for a review on the basis that she had new and relevant evidence that was not available at the time of the original hearing, the second of the grounds outlined above.

Facts and Analysis
Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Arbitrator;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the Arbitrator.

Only when the applicant has evidence which meets **all five** criteria will a review be granted on this ground.

It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be entered into evidence.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place. Evidence that "would have had a material effect upon the decision of the Arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

The application for review form asks the applicant to "List each item of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant." Rather than completing this form, the landlord chose to submit a cover letter in which she outlined her reasons for requesting a review. She also attached supporting documents to her application. At the conclusion of her letter, she identified the following desired outcome she was seeking:

> *…I am hereby requesting the Director to issue and (sic) Order of Possession of said rental unit pursuant to Section 55(1)(a) of the Act to the (tenants) to vacate the premises no later than October 31, 2013. I hope that your decision can be made as soon as possible in order for this matter to be resolved…*

I first note that the outcome the landlord requested is not one that can be provided on the basis of an application for review. The original decision is final and binding, subject to the review provisions outlined in the *Act*. On an application for review, I cannot simply overturn the original decision and issue the outcome that the unsuccessful party in the original hearing is seeking. The other party would need to be notified of my Review Consideration Decision if it were to have the effect of reopening the matters decided by the original Arbitrator. Even if the landlord's application for review were successful, a Review Hearing would need to be scheduled in which both parties would have a full opportunity to present their positions and respond to the evidence provided by the other side in the dispute. Given that the landlord's October 25, 2013 application is seeking a complete reversal of the findings reached by the original Arbitrator, there is no possibility that the landlord's application could be considered, a Review Consideration Decision issued in her favour, a Review Hearing scheduled, a Review Hearing conducted, and a decision issued in her favour in time to meet the landlord's stated need to obtain vacant possession by October 31, 2013 on the basis of the landlord's 2 Month Notice. In her application, the landlord stated that she needed to obtain vacant possession by that date in order to accommodate her daughter whose property was being sold. I also note that the information submitted by the landlord shows that he daughter's property has been sold, but the date when she is to yield vacant possession of that property is November 28, 2013.

Turning to the landlord's application for review, the landlord identified the following evidence, which she maintained was new and relevant to the issues before the original Arbitrator.

- Copies of Air Canada itineraries which demonstrated that both she and her husband, who represented her at the original hearing, were in Asia from September 20, 2013 until October 20, 2013, and thus in no position to obtain the relevant documents to support their position at the original hearing held at 1:00 p.m. on Monday, October 21, 2013.
- The landlord provided details regarding the circumstances of her daughter who is "under a doctor's care for mental issues" and is not working. She noted that her daughter is separated from her husband, the co-owner of her daughter's home, and is in the process of divorce proceedings to end that marriage.
- The landlord provided copies of an October 15, 2013 Petition to the Supreme Court of B.C. by the bank holding the mortgage for her daughter's home.
- As the mortgage is in default, the landlord also supplied documents to confirm that the jointly owned property was listed for sale by a realtor on October 15, 2013, and has been sold as of November 27, 2013.

- The landlord also maintained that at the time of the hearing her husband "was not aware that I had spoken earlier in the day to a Ms. VB. because after hearing several urgent messages asking for references about the (tenants)." The landlord stated that she spoke with VB who identified herself as a landlord who had received a cash damage deposit from the tenants for a new tenancy that they were apparently commencing on November 1, 2013. The landlord maintained that "At the conference call, I was instructed that I was not allowed to speak during the call and that's why this important information was not given."
- The landlord also advised that her husband visited the rental unit after the October 21 hearing concluded and discovered that the tenants "had packed much of their property and had packaging boxes outside their suite." She maintained that the female tenant refused her husband's request to clarify whether the tenants were moving to the townhouse owned by VB.

The landlord asserted that the tenants were in the process of vacating her rental unit to move into VB's property by November 1, 2013. She stated that "This information was not provided to the Arbitrator during the course of the conference call by the (tenants) which I consider critical to this matter." She maintained that "This evidence supports my position that my daughter and grandson will have no home to live in and therefore must move into the premises occupied by (the tenants)…starting November 1, 2013."

In considering the landlord's application, I first note that the Arbitrator's decision makes no reference to the landlord attending at this teleconference hearing. Instead, her husband, identified in the original decision as the "Owner's spouse" was identified as representing the landlord, the applicant for review. In the original decision, the Arbitrator provided a thorough description of the process followed at the hearing, which read in part as follows:

> *...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, respond to each other's testimony, and to provide closing remarks...*

Based on the above description, I find on a balance of probabilities it very unlikely that the landlord was in attendance at the hearing **and** was specifically told by the Arbitrator that only her husband, who was not identified as a Respondent in the tenant's application, would be allowed to speak. Furthermore, I find that the landlord's submissions show that she and her husband were scheduled to arrive at an international airport not far from their residence some 28+ hours in advance of this hearing. Given that the landlord had returned from their trip more than one full day

before this hearing was held, I find on a balance of probabilities that the landlord had ample time to return VB's call and discuss the impact on the tenants' application with her husband in advance of this hearing. I do not accept that the landlord had no time to inform her husband who was representing her at this hearing that the tenants had made arrangements to move to VB's property by November 1, 2013. If this indeed occurred, then I find that the landlord did not exercise due diligence in ensuring that her representative at this hearing had a full knowledge of this information she had recently learned. For these reasons, I find that the landlord's application for a review hearing based on the new information she received from Landlord VB was in existence at the time of the original hearing and could have been conveyed to the Arbitrator at that hearing.

I have also considered the landlord's claim that she had little time to prepare for this hearing because she and her husband were out of the country from September 20, 2013 to October 20, 2013. In this regard, I note that the landlord issued the 2 Month Notice to the tenants on August 30, 2013, well in advance of the landlord's scheduled trip abroad. Based on the sworn testimony provided by her husband and the information the landlord provided in her application for review, it is clear that obtaining the tenants' rental unit as accommodation for her daughter was very important to the landlord. However, based on the undisputed sworn testimony provided by the female tenant as reported in the original decision, the landlord was clearly aware that the tenants were very reluctant to vacate this rental unit due to their own personal circumstances.

Owning a rental property and assuming the responsibilities of a landlord is a business and should be treated as such. When a landlord is planning to be unavailable for a lengthy period, a landlord should leave someone in charge of their rental properties in case of an emergency. I also note that there is evidence in the original decision that the landlord and possibly her husband own a number of rental properties. The landlord and her husband were planning to be out of the country for a one month period and knew that the tenants were not happy with the landlord's 2 Month Notice. The landlord also very clearly attached great importance to securing suitable accommodations for her daughter and grandson during this difficult time for them. For these reasons, I find that the landlord's lack of preparedness for the original hearing and failure to provide any supporting documentation is directly related to the landlord's apparent failure to leave someone in charge of her rental properties who could deal with the tenants' potential dispute of the landlord's 2 Month Notice.

When she issued the 2 Month Notice, the landlord was aware that the tenants had the opportunity to seek a cancellation of that Notice. Rather than take any meaningful steps

to prepare for the possibility that the tenants would apply to cancel her 2 Month Notice or empower someone to act as her agent in her absence on such matters, the landlord relied solely on her husband's sworn oral testimony at the hearing. As set out below, the Arbitrator's decision clearly noted the landlord's husband's opinion that they had no intention at that point in providing anything more than sworn oral testimony to support the 2 Month Notice:

> *...The Landlord confirmed that no documentary evidence was provided to support the matters pertaining to his wife's daughter's situation. He stated that no evidence will be provided because this is a private family matter...*

The Arbitrator also noted that there was "evidence that the Landlord and owner manage two other duplexes in the same city; however, no testimony or evidence was provided to indicate why these other units were not considered for eviction." The landlord chose to provide documentary evidence, some of which did not exist at the time of the original hearing, once The Arbitrator allowed the tenants' application to cancel the 2 Month Notice.

In considering the five criteria that all must be met in order to enable me to set aside the original decision and order a Review Hearing, I find that some of the evidence presented as new was actually in existence at the time of the original hearing. For example, both the Petition to the Supreme Court of B.C. and the listing of the home of the landlord's daughter occurred on October 15, 2013. Certainly, the details outlined in the landlord's October 25, 2013 letter surrounding the circumstances of her daughter and her need for housing could have been included in a written submission had the landlord or an agent given responsibility to look after her affairs attended to this matter after receiving the tenant's application for dispute resolution. As noted above, at the hearing, the landlord's husband asserted that the landlord had no intention of submitting such documentation and, as reported in the original decision, "they have the right to evict any tenant if their family is moving in." I find much of the landlord's application for review is in the nature of an attempt to re-argue the case that was before The Arbitrator, with the benefit of documentary evidence that the landlord's own agent at the hearing maintained was unnecessary and would not be provided because this was "a private family matter." While I respect the prerogative of the landlord's husband to maintain privacy over what he and the landlord then considered to be a family matter, I find that much of the landlord's current application is designed to reverse that decision and have additional documentary evidence that the landlord did not produce for the original hearing considered. It is not the purpose of the review process to enable a party to change their mind as to what they wish to have considered by the Arbitrator if they do not receive the decision they were seeking.

I have also reflected on whether the evidence attributed to Landlord VB is credible and whether it was truly relevant to the issues that were before the original Arbitrator. Although the landlord has provided Landlord VB's telephone number, she has supplied no copy of any written statement from VB, security deposit receipt issued by VB or copy of a Residential Tenancy Agreement between the tenants and VB. While the landlord's sworn testimony may have been sufficient to call into question the tenant's intentions in pursuing a cancellation of the 2 Month Notice, the issue before The Arbitrator was whether the landlord had issued the 2 Month Notice in good faith. She identified a two part test which required the landlord to demonstrate that:

1) The landlord must truly intend to use the premises for the purposes stated on the notice to end tenancy; and
2) The landlord must not have an ulterior motive as the primary motive for seeking to have the tenant vacate the rental unit.

While the landlord's new evidence may have been relevant to the first of the two parts to this "good faith" test, I do not see how the landlord's new evidence from VB would have had any impact on the second of these tests. As such, I find that the new evidence attributed to VB would not have been relevant to whether the 2 Month Notice issued by the landlord was issued in good faith.

Finally, I have also considered whether the original Arbitrator would have come to a different decision had the new information submitted by the landlord been available to her. Sworn testimony regarding the tenants' plans to vacate the rental unit and relocate to VB's property may have called into question the sincerity of the tenants in pursuing their application to cancel the 2 Month Notice. However, as noted above, I find that the "good faith" test outlined by The Arbitrator in her decision and the landlord's need to meet that test in order to establish grounds for issuing the 2 Month Notice would not have been affected by whether or not the tenants planned to abide by the effective date to end their tenancy identified by the landlord in the 2 Month Notice.

For these reasons, I find that the landlord has failed to meet at least two and as many as four of the five criteria outlined above that would enable me to grant her request for a review of the March original decision. Much of the landlord's application for review appears more in the nature of an attempt to re-argue the matters that were before the Arbitrator at the original hearing, based on written submissions that were not submitted at that hearing. I dismiss the landlord's application for review on the basis that the application discloses insufficient evidence of this ground for review. The original decision is therefore confirmed.

As a final observation, I note that if the landlord's information regarding the tenants' plans to move to Landlord VB's property is correct, the landlord may already have possession of the rental unit by the time that the landlord receives this decision.

Decision

The decision made on October 21, 2013 stands. 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: October 31, 2013