Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

INTERIM DECISION

This interim hearing following my interim decision of September 11, 2020 wherein I sought written submissions from the parties on the issue of admissibility of new evidence from both the landlords and the tenants.

The basic facts relating to this application for new evidence were set out in the September Interim Decision:

> [Landlord] TK testified that CNR moved registered and records offices sometime in November 2019 and failed to immediately update this information with BC Registry Services. He testified that he believed CNR updated the information some time in December 2019, but that there may have been some delay between the time CNR provided the updated information to BC Registry Services and when the Company Summary was actually updated.
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> Upon hearing this, JS stated that he was currently in possession of a document which directly refuted this testimony and sought leave to have this document admitted into evidence. SS objected, arguing that the time for submission of evidence has now passed, and the tenants ought to have submitted this document into evidence well before the hearing. JS argued that the document went directly to the credibility of TK and must be allowed to be entered.
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> SS stated that, if the Tenants' New Evidence was admitted, her clients would also seek leave to submit additional documentary evidence that is responsive to it. She did not elaborate on what these documents might be.

The tenants seek to admit the following documents into evidence:

1) Notice of Change of Address of CNR filed July 8, 2020.
2) BC Company Search for CNR current as of February 28, 2020 made September 11, 2020.
3) Notice of Articles of CNR issued July 9, 2020.

(the "**Corporate Documents**")

4) Affidavit of KF sworn September 30, 2020 attaching four exhibits.

(collectively, the "**New Evidence**").

The landlords have not sought to enter any new documentary evidence into the record.

I ordered that the tenants serve the New Evidence on the landlord no later than September 25, at 4:00 pm. The landlord stated, and the tenant does not deny, that the tenants emailed the New Evidence to them on September 25, 2020 at 4:09 pm, and that the affidavit of KF was not sworn. They were served with a sworn copy of the affidavit on October 9, 2020 at 1:43 pm, approximately 2 hours before their written response to the tenants' application was due. I will address the significance of this below.

I also note that the tenants made submissions about the significance of the New Evidence to the overall application. The landlords responded to these submissions. I will not be addressing the merits of these submissions in this decision; I will only determine whether or not the New Evidence is admissible. If it is, the parties may make submissions at the reconvened hearing.

Tenants' Position

The tenants argue that the New Evidence is necessary to rebut TK's testimony at the September 11, 2020 hearing. They argue that "corporate registry records are admissible on their face as evidence in an administrative law proceeding". They stated that upon KT's evidence regarding the location of the registered and records office, it became open to the tenants to challenge that evidence on cross-examination, lest they run afoul of the rule in *Brown v Dunn* (which requires a cross-examiner to give a witness notice of intention to impeach the witness's credibility so the witness may respond and arises as a matter of fairness).

Based on this rule, the tenants argue that the New Evidence must be admitted so it can be put to KT on cross-examination, and so the tenants can then later challenge KT's credibility in closing arguments.

Alternately, the tenants argue that the New Evidence is not late evidence but is "rebuttal evidence" which they have "a right under the rules to offer". They did not reference any such rule in the Residential Tenancy Branch Rules of Procedure (the "**Rules**").

In the further alternative, the tenants argue that, if the New Evidence is late, its admissibility should be governed by the factors set out in *Stone v Ellerman*, 2009 BCCA 294:

> a) whether the plaintiff would suffer prejudice if the use of the document was permitted;
> b) whether there was a reasonable explanation for the failure to disclose the document;
> c) whether excluding the use of the document would prevent the determination of the relevant issue on its merits; and
> d) whether, in the circumstances of the case, the ends of justice require that the use of the document be permitted."

Landlord's Position

The landlords reject the tenants' arguments, assert that the New Evidence is late, and state that its admissibility is governed by the Rules, and not by *Stone v Ellerman*.

Additionally, they argue that:

> The rules of evidence are not engaged in any event, and the authorities of *Houston, Drydgen* and *Brown* above do not apply to this proceeding. The rules of evidence do not apply pursuant to section 75 of the RTA that states:
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> > 75 The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
> >
> > (a)necessary and appropriate, and
> >
> > (b)relevant to the dispute resolution proceeding.

The landlords says that the New Evidence was late as Rule 3.13 requires an applicant to submit all evidence 14 days prior to the hearing. They submitted that the appropriate test for allowing evidence after this time is set out at Rule 3.17:

> **3.17 Consideration of new and relevant evidence**
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> Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5, 3.1, 3.2, 3.10.5, 3.14 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.
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> The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

The landlords argue that the tenants could have submitted the Corporate Documents prior to the start of the first hearing (on May 12, 2020), or any subsequent hearing (July 17 and September 11, 2020).

The landlords argue that the tenants have not provided "reasonable reasons" why the New Evidence is "new" and why those documents were not available at the time their application was made or prior to the September 11, 2020 hearing.

The landlords argue that the affidavit should be excluded from evidence, as a sworn copy was not provided to them until almost two weeks after the landlords' deadline. They rely on *Abboud v Jung*, 2020 BCSC 736, in which the court stated:

> [71] In these reasons, I will not rely on any verbal unsworn statements made by Mr. Abboud at the hearing. Mr. Abboud was advised that he had to prepare affidavits to provide the evidence he wanted to rely upon. While the court may exercise its discretion to accept unsworn statements from self-represented litigants for matters that are of marginal relevance to the matters in issue or where they are uncontroversial, I find that it would not be fair to accept Mr. Abboud's unsworn evidence in the circumstances of this case as it went to the central issues to be resolved in this petition: Brown v. Brown, 2020 BCCA 53 at paras. 27-33.
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> [72] There were some additional problems with the petition record that Mr. Abboud handed up to me. In that petition record, he included copies of affidavits that do not bear the filing stamp and materials that were not properly attached to affidavits. I will not put any weight on the materials that Mr. Abboud added to the back of affidavits and which were not properly attached as exhibits to the affidavits filed, as I find that it would not be fair to the respondent to do so in the circumstances.

The landlords argue that it would be similarly unfair to them if the affidavit was admitted into evidence. They submitted that the admission of the New Evidence breaches the principles of natural justice for the following reasons:

> a. at page 2 of the September 11, 2020 interim decision it was submitted by the Applicants that they were in possession of one document not multiple documents including an Unsworn Affidavit;
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> b. the Applicants New Evidence was not submitted in one package or in a cohesive, organized manner, rather it was submitted in multiple emails with numerous attachments that were not clearly labelled;
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> c. certain documents from the Applicants New Evidence that were submitted to the writer were not in accordance with the Orders and Rules of Procedure; and
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> d. the Applicants New Evidence contains unsworn testimony by way of an Unsworn Affidavit in which the exhibits are detached.

The landlords also argue they would suffer prejudice if the New Evidence is admitted:

> The Respondents have incurred more legal costs with a matter that is not material.

> Further, the Respondents have been asked to provide submissions in relation to unsworn testimony that the Respondents say is difficult and prejudicial.

The tenants argue that the unsworn affidavit could serve as a will-say statement and should be admitted as such.

Analysis

I agree with the tenants' submissions that corporate registry records are admissible on their face as evidence in an administrative law proceeding. If the Corporate Documents were submitted into evidence at the time this application was first made, they would without question be admissible. However, this fact does not mean that they are except from the Rules governing the service of documentary evidence.

The issue I must resolve is not whether the New Evidence is inadmissible due to is form. Rather, it is whether it is inadmissible due to the timing of its service of the landlords.

Contrary to the assertion of the tenants, the New Evidence is late. The Rules require that an applicant's evidence be submitted no later than 14 days before a hearing. Any evidence submitted after this time is considered to be late. The first hearing of this matter was May 12, 2020. As such, subject to any order made by me, the tenants' evidence was due not later than April 28, 2020.

In my interim decision following the July 17, 2020 hearing, I allowed for further evidence to be served in accordance with the Rules (August 28, 2020, 14 days prior to the reconvened hearing on September 11, 2020). So, any evidence served after this date is considered "late".

The landlords have properly articulated the appropriate test that must be applied to determine whether the New Evidence is to be admitted. Rule 3.17 applies. Contrary to the assertion of the tenants, there is no rule separate from Rule 3.17 which allows the tenants to submit "rebuttal evidence". Evidence which could be used to rebut the testimony of a witness might be admissible under the Rules, but only if it meets the test set out at Rule 3.17.

The test at Rule 3.17 has two stages:

1) Stage 1
    a. Is the evidence new and relevant evidence; and
    b. Was it unavailable at the time the tenants made their application or when they served and submitted their evidence?
2) Stage 2

a. If the criteria in stage 1 are not met, does the acceptance of late evidence unreasonably prejudice one party or result in a breach of the principles of natural justice?

All of the documents contained in the New Evidence were in existence on or before August 28, 2020. The attachments to the affidavit are copies of various forms of communication involving counsel for the tenants. They were available to the tenants prior to August 28, 2020. The Corporate Documents are publicly available documents which the tenants could have obtained at any time. As such, these too were available to the tenants on August 28, 2020.

Accordingly, stage 1 of the Rule 3.17 test has not been met and I must consider stage 2.

I agree with the landlords that it is unfair that they were required to respond provide submissions in relation to an unsworn affidavit, the contents of which they could not be sure would not have changed upon being sworn. This unfairness was compounded by the fact that, although the affidavit of KF was sworn on September 30, 2020, the tenants waited until October 9, 2020 to provide the sworn copy to the landlords. No explanation was provided by the tenants for this action. I find that such a delay caused uncertainty and difficultly for the tenants and was prejudicial. The late service of the sworn affidavit, in effect, denied the landlords their allotted amount of time to provide a considered response.

Accordingly, I decline to admit the affidavit, or its attachments, into evidence.

KF is entitled to give testimony as to the contents of the affidavit at the reconvened hearing but the exhibits attached to the affidavit, unless they have been provided in evidence packages before, will not be admitted into evidence.

I do not, however, find that the it would be prejudicial or unfair to the landlords to admit the Corporate Documents into evidence. The Corporate Documents relate to the change of CNR's address for service during the course of this dispute. The timing of this change of address may be materially significant as determining when and where certain documents were served will be necessary to adjudicate this case on its merits. Due to the change of address of CNR, the answer to this question has become confused.

The landlords are not significantly prejudiced by the admission of the Corporate Documents into evidence as they were aware of the contents from the moment they were created. They have had ample time to prepare and account for the information contained therein when crafting their response to the tenants' claim.

As such, I admit the Corporate Documents into evidence.

I place little significance on the fact the Corporate Documents were served by the tenants nine minutes late. I do not find that the landlords were significantly prejudiced by this.

At the further reconvened hearing on November 16, 2020, I will not accept any further submissions about the admissibility of any of the New Evidence.

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: November 5, 2020

Residential Tenancy Branch