



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNR OLC FFT

### Introduction

The tenant applied to dispute a 10 Day Notice to End Tenancy for Unpaid Rent (the “Second Notice”) under section 46 of the *Residential Tenancy Act* (“Act”).

In addition, they applied for an order under section 62 of the Act, and they applied to recover the cost of the filing fee under section 72 of the Act.

Both parties attended the hearing on October 29, 2021, no service issues were raised, the parties were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

### Preliminary Issue 1: Res Judicata

The preliminary issue of *res judicata* must first be addressed. *Res judicata* (Latin: “a thing adjudicated”) is the legal principle referring to an issue that has been definitively settled by a previous judicial decision. It is the principle that prevents a party from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction that could have been, but was not, raised in the first suit.

The principle was addressed in *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#). And, more specifically, that of issue estoppel, at paragraph 23:

Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies [. . .]

In this dispute, the landlord issued, and served upon the tenant, a previous 10 Day Notice for Unpaid Rent (the “First Notice”) on May 1, 2021. The First Notice was issued on the ground that the tenant failed to pay rent in the amount of \$1,066.00 that was due November 1, 2019. The tenant disputed the First Notice, and the matter was dealt with before an arbitrator at a dispute resolution proceeding on June 8, 2021. (See Previous File No as referenced on the style of cause to this decision.)

The outcome of that hearing was the arbitrator’s Decision dated June 8, 2021. The arbitrator in that Decision dismissed the First Notice, as they had found that the landlord had not met the onus of proving the ground on which that First Notice was issued. Namely, that the tenant had failed to pay rent as alleged.

However, despite the findings in that Decision, the landlord then proceeded to issue the Second Notice on July 1, 2021. The Second Notice is nearly identical to the First Notice (the only real difference being the date on which it was issued) and it again states that the ground on which it was served was the tenant’s alleged failure to pay rent in the amount of \$1,066.00 on November 1, 2019.

The issue in the present application is, as it was in the hearing on June 8, 2021, *whether the tenant failed to pay rent on November 1, 2019* in breach of section 46(1) of the Act. The issue was definitively settled by that arbitrator at the hearing on June 8.

Indeed, the only difference between the two dispute resolution hearings is that the landlord has, this time around, been rather more diligent in putting his evidentiary ducks in a row. However, a party to a legal dispute resolution proceeding is required to exercise due diligence in preparing their case at the first opportunity and cannot avail themselves of further opportunities to simply present a better case.

The landlord had every opportunity to present evidence in support of a claim that the tenant failed to pay rent. The evidence would, through diligence, have been available at the time of the first hearing, given that the alleged non-payment occurred almost a year-and-a-half earlier. However, the landlord failed to discharge his onus in proving a non-payment of rent and the issue was settled by the arbitrator.

In applying to the present application, the three-party test as set out by the Supreme Court of Canada, it is my finding as follows: (1) that the issue before me is the same as the issue that was decided upon in the Decision of June 8, 2021; (2) that the prior decision was final; that is, it was not an interim decision, and (3) that the parties in both proceedings are the same.

For these reasons, it must be concluded that *res judicata* generally, and issue estoppel specifically, estop me from making a decision on the same issue already decided.

As the ground on which the Second Notice is the same issue already decided, it follows that the Second Notice is invalid and must be cancelled. The Second Notice is hereby cancelled, and the tenancy shall continue until it is ended in accordance with the Act.

#### Preliminary Issue 2: Application for an Order under section 62

The tenant's application included a request for an order under section 62 of the Act. This order is usually requested when a tenant seeks to have a landlord comply in some manner with the Act, the tenancy agreement, or the regulations.

In the hearing, the tenant explained that she was not entirely sure why she requested this order, other than to comment that an information officer from the Branch suggested it as an option. That said, the tenant did remark that she would like the landlord to stop issuing further notices to end tenancy in respect of the alleged non-payment of rent.

Given my findings above, in respect to *res judicata* and the landlord being barred from further litigation on this matter, an order under section 62 is unnecessary. That aspect of the application is thus dismissed, without leave to reapply.

#### Preliminary Issue 3: Application for Recovery of Filing Fee

Section 72 of the Act permits an order for compensation for the cost of the filing fee to a successful applicant. As the tenant succeeded in their application, in respect of disputing the Second Notice, she is awarded \$100.00 in compensation to cover the cost of the application filing fee.

Pursuant to section 72(2)(a) of the Act, the tenant is hereby authorized to make a one-time deduction \$100.00 from the rent for December 2021 or January 2022.

Conclusion

**The tenant's application is granted, in part.**

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: November 2, 2021

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Residential Tenancy Branch