



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      OPR, MNRL, FFL

### Introduction

The Applicant seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order of possession pursuant to s. 55 after issuing a 10-Day Notice to End Tenancy signed on November 30, 2022;
- a monetary order pursuant to s. 67 for unpaid rent; and
- return of the filing fee pursuant to s. 72.

G.C. and G.S. appeared as agents for the Applicant. A.M. appeared as the Respondent.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

### Preliminary Issue – Res Judicata

The Respondents in this matter have provided me a copy of a previous decision of the Residential Tenancy Branch dated June 27, 2022 in which the Respondents S.S. and A.M. applied to cancel a 10-Day Notice to End Tenancy. The Applicant J.O. was named as the Respondent in the June 27, 2022 decision and two other parties, A.M. and N.M., were named in the previous matter though are not named in this application. That decision found that the Residential Tenancy Branch does not have jurisdiction to adjudicate the dispute, citing that the matter pertained to a dispute between joint-owners for which the *Act* did not apply at all and that s. 4(c) of the *Act* would also apply in any event.

At the outset of the hearing, I requested submissions with respect to the previous decision. G.C. submitted that J.O. was unaware of what had occurred at the previous hearing and that some of the evidence submitted in this matter was not before the arbitrator on June 27, 2022. I was directed to title searches in the Applicant's evidence pertaining to the property in question, in which it was highlighted that neither of the Respondents are not on title. The Respondent submitted that she has filed a civil claim before the BC Supreme Court, with her evidence including a copy of the Notice of Civil Claim filed on October 7, 2022.

The doctrine of *res judicata* prevents parties from bringing claims that have previously been adjudicated. In *Khan v Shore*, 2015 BCSC 830 ("*Khan*"), Fisher J. explored the issue of *res judicata* in the context of multiple notices to end tenancy. The landlord in *Khan* had issued notices to end tenancy for the same cause on previous occasions and those previous notices were cancelled when they were disputed by the tenant. The arbitrator for the original decision in *Khan* upheld the notice to end tenancy and granted an order for possession despite the notice having the same cause as those listed in the previous notices. Ultimately, Fisher J. upheld the arbitrator's decision on the basis that though the notices all had the same cause, the facts that underlined the notices were different.

*Khan* explains the doctrine of *res judicata* as follows:

[30] *Res judicata* today comprises both cause of action estoppel and issue estoppel, described in *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12:

In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[...]

[32] Issue estoppel requires three things: (1) the same question has been decided; (2) the prior judicial decision was final; and (3) the parties to the prior

judicial decision or their privies are the same persons as the parties to the current proceedings or their privies. (See *Erschbamer* at para. [13](#).)

Fisher J. goes on to state that an arbitrator at the Residential Tenancy Branch may consider and apply *res judicata* and that it was previously held by the BC Supreme Court that an arbitrator has no jurisdiction to hear a matter that has already been decided by another arbitrator (see para 35).

The difference between *Khan* and this matter is that in this case the previous findings speak to the fundamental question of whether the Residential Tenancy Branch has jurisdiction at all. The same parties are involved, though there is a different permutation of those that are named. I do not find this distinction to be relevant because the principal issue is the nature of the dispute between the parties, which is unchanged. There may be a new 10-Day Notice, though that is irrelevant as what had been decided was that the *Act* did not apply. It is not my place to overturn the previous findings or act in appeal of that decision, which was final.

I find that issue estoppel applies and that the present application is *res judicata*. The *Act* has previously been found to not apply.

I would further note that even if I were incorrect on the issue of *res judicata*, the Respondent A.M. has filed a civil claim since the June 27, 2022 hearing. The civil claim would arguably trigger the application of s. 58(2)(d) of the *Act*, which prevents the Director from determining disputes that are before the Supreme Court. It would appear that regardless of the finding that *res judicata* applies, this matter cannot be adjudicated by me as it is before the Supreme Court.

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: February 07, 2023

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Residential Tenancy Branch