

## **DECISION**

Dispute Codes      CNL, FF

### Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, seeking to cancel a two month Notice to End Tenancy for the Landlord's use of the rental unit and to recover the filing fee paid for the Application.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

At the outset of this Decision I wish to commend legal counsel from both parties for their clear, insightful submissions, and their respective legal arguments in this matter. Nevertheless, as this hearing involved a substantial amount of documentary evidence and three hours of oral evidence, testimony and submissions, I have addressed only the evidence relevant to my determinations herein.

### Issues(s) to be Decided

Is there jurisdiction under the *Act* for this matter?

Is there a tenancy between the parties?

Is the Notice to End Tenancy valid or should it be cancelled?

### Background and Evidence

This dispute involves a rental unit located on property near sacred Aboriginal burial grounds. The Landlord has issued a two month Notice to End Tenancy to the Tenant indicating the Landlord wants to convert the rental unit into a unit for the use of a caretaker employed by the Landlord, with an effective vacancy date of December 31, 2009, (the "Notice").

The rental unit is located on a portion of a large tract of land which covers the Arrow Lakes region of the province. The peoples claiming this territory as ancestral land are variously known as the Lakes Tribe, Arrow Lakes Indians or the Arrows Lakes Band.

The Landlord represents a society with the purpose of advancing and preserving the rights of the Arrows Lakes first peoples along with 12 other aboriginal tribes.

At the start of the hearing the parties outlined their positions regarding whether or not there is jurisdiction under the *Act*, or if the land was under the jurisdiction of the federal government of Canada as Indian Lands, pursuant to section 91 of the *Constitution Act*.

Legal Counsel for the Tenant argued that there is a Supreme Court of British Columbia Writ and Statement of Claim, wherein the Tenant and others are asking the court for a declaration that there is Aboriginal Title to the lands. Legal Counsel for the Tenant made the additional argument that the Tenant is not a Tenant as defined in the *Act* and that there is no tenancy agreement between the Tenant and the Landlord. (I note that throughout the hearing the Advocate for the Tenant referred to the parties as the “alleged Tenant” or the “alleged Landlord”.)

The Respondent is not a party to the Tenant’s Supreme Court action, however, I am informed the Respondent is making a similar claim in a different action also in the Supreme Court.

Regardless, the issues related to the dispute over the Notice are not matters before the Supreme Court.

Legal Counsel for the Landlord argued that the property is not under federal jurisdiction as it is *fee simple* property owned by a non-profit society, and is therefore not Indian Lands as defined under the applicable federal legislation.

Both parties also made submissions on whether or not the Tenant was an employee of the Landlord, and whether or not the property was held in trust for the benefit of the Tenant by the Landlord. I note that as I have no jurisdiction in equitable trusts, I have not addressed the trust issue in this determination.

### Summary of the Tenancy

The Tenant is the leader or “head man” of the Sinixt Nation. He first came to the property in or about 1985, at the behest of the elders of his tribe. The elders dispatched the Tenant to these grounds as the grave yards were being desecrated by persons digging up, collecting or selling the remains of their ancestors. The Tenant described seeing a driveway in the area lined with the skulls of his ancestors when he first arrived.

The Tenant testified that he is one of the last remaining people to speak his language. He teaches the language to other people and due to this and other expertise, is the only one who is able to perform the sacred ceremonies regarding the reburial of these remains and conduct the aboriginal ceremonies of his people.

There is a dwelling house, a cabin and some other structures on the property. The property was purchased in 2001, by a extra-provincially registered company associated with the economic interest of the Colville Tribes in the United States. In 2008, this company transferred the property to the Landlord, which is an extra-provincial non-profit society representing 12 tribes of first nations' people.

The Legal Counsel for the Tenant submitted that while the Landlord's confederacy of 12 tribes purports to include the Sinixt Nation, the people of the Sinixt Nation consider themselves to be autonomous and not part of this confederacy.

The Legal Counsel for the Tenant argued that this dispute is more rightly identified as a political dispute between the parties over which has the rightful aboriginal claim to the property and to manage it for the benefit of the aboriginal collective.

The Legal Counsel for the Landlord rejected this position and argued that the Landlord was simply asserting its rights to control private property. The evidence of the Landlord is that it is currently in the process of looking for a caretaker to hire to live in the rental unit and to care for the property.

The Landlord asserts that the Tenant, if found to be an employee, has acted against the Landlord's interests in the property. Apparently the Tenant wrote a letter to the provincial taxation authority, without the prior knowledge or consent of the Landlord, to dispute a claim that the Landlord was making for a reduced tax assessment on the property. The Landlord also asserts their significant concern that the Tenant explicitly rejects the Landlord's claim to be the representative of the Lakes' peoples' interests.

### Analysis

Based on the foregoing, the relevant evidence and testimony, and on a balance of probabilities, I find as follows:

### Analysis: Jurisdiction

As to the issue regarding jurisdiction in this matter, I find that the Landlord owns the property in fee simple and the property is not currently a reserve, or covered by treaty,

or self governing legislation, or otherwise controlled by the Federal Government on behalf of first nations people. Therefore, I find that the provincial legislation in the *Act* applies to residential tenancies on the property and I have jurisdiction under the *Act* to make this determination.

#### Analysis: Tenancy

As to the issue of whether or not there is a tenancy, I find that the parties have established an implied tenancy agreement (as defined in the *Act*), through their actions.

Neither the Tenant nor the Landlord had clear evidence on how or when the Tenant came to be in possession of the rental unit. It appears the Tenant came to reside in the rental unit through an arrangement with a third party no longer in possession, however, there is insufficient evidence before me to make any conclusion on this.

In the recent past, the Landlord offered the Tenant a formal written tenancy agreement and requested the Tenant begin paying the sum of \$500.00 a month in rent.

More importantly, the Landlord has acknowledged several times in the past that the Tenant's care of the property was sufficient consideration in exchange for the tenancy.

The Tenant has been providing caretaking, and something similar to protection of the property, and has performed sacred duties and ceremonial rites including the reburial of remains of ancestors at the property. It also appears that the Tenant has taken good care of the buildings and the appearance of the property.

The Landlord did not try to end or alter the tenancy when it first knew of the Tenant having possession of the rental unit. Until recently the Landlord was satisfied that the Tenant was providing sufficient consideration in exchange for the tenancy.

I also find that the Tenant is not an employee of the Landlord as contemplated under the *Act*. While he did caretaking type work in exchange for tenancy, this is distinguished from the situation contemplated in the *Act* where an employee caretaker is provided a rental unit as part of the employment arrangement with an employer/landlord. Here the Tenant's payment of "rent" (as defined in the *Act*), was the value of his services in caring for the property in exchange for the right to possess the rental unit. In other words, the Landlord continually allowed the Tenant to possess the rental unit in exchange for this form of rent payment.

Analysis: Notice to End Tenancy

The Notice was issued pursuant to section 49(6)(e) of the *Act*, which requires the Landlord to have all necessary permits and approvals, and a good faith intention, to use the unit for the stated purpose, i.e., convert the unit for use by a caretaker/employee of the Landlord.

Guidance for the interpretation of this section of the *Act* comes from other decisions, case law and the policy guideline.

The relevant Policy Guideline is section 2, and states, in part:

The "good faith" requirement imposes a two part test. First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

For example, the landlord may intend to occupy or convert the premises as stated on the notice to end. That intention may, however, be motivated by dishonest or undisclosed purposes. If the primary motive for the landlord ending the tenancy is to retaliate against the tenant, then the landlord does not have a "good faith" intent...

If the "good faith" intent of the landlord is called into question, the burden is on the landlord to establish that he/she truly intends to do what the landlord indicates on the Notice to End, and that he/she is not acting dishonestly or with an ulterior motive for ending the tenancy as the landlord's primary motive.

The Tenant here has called into question the good faith of the Landlord in issuing the Notice.

I find the Landlord is still in the process of recruiting someone to employ as a caretaker/employee (as contemplated in the *Act*). There was no clear indication from the Landlord how long this would take, and it appears from the spare submissions on this issue, that finding a suitable caretaker may take several months, if not longer.

Furthermore, there is evidence before me that the Landlord issued the Notice in part as a response to the Tenant opposing the Landlord's claims to represent his people, and in part because the Landlord was displeased that the Tenant interfered with the Landlord's attempt to have a lower tax assessment of the property before the taxation authority.

While there are provisions in the *Act* for ending a tenancy when a tenant jeopardises a lawful right or interest of a landlord, this is not the reason given for ending the tenancy in the Notice issued to the Tenant. (I also make no determination on whether or not these other provisions would have been a valid notice to end the tenancy.)

Therefore, I find that since the Landlord has not hired a caretaker to occupy the rental unit, and since the Landlord's motives are in good part retaliatory for perceived interferences or rejections of the Landlord by the Tenant, that the Landlord is attempting to end this tenancy in bad faith.

**Based on these findings, I find that the two month Notice to End Tenancy issued in this matter is not valid and I order it to be cancelled. The Notice is of no force or effect and the tenancy will continue until ended in accordance with the *Act*.**

Lastly, I also allow the Tenant the **\$50.00** filing fee for the Application, and order the Landlord to pay the Tenant \$50.00, forthwith.

#### Conclusion

I find that the *Act* applies to this rental unit and that I have jurisdiction in this matter.

I find that the parties have established a tenancy agreement under the *Act*.

I find that the Notice issued to the Tenant was not issued in good faith, and I order that the Notice is cancelled.

The Landlord must pay the Tenant the \$50.00 filing fee for the Application.

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: December 15, 2009.

---

Dispute Resolution Officer