IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Hassan v Kirby*, 2023 NSSM 76

Date: 20231105
Claim: 524222
Registry: Halifax

Between:

Burhan Hassan

Appellant

And

Arthur Kirby

Respondent

Adjudicator:	Darrel Pink
Heard:	October 11 & 31, 2023 in Halifax, Nova Scotia
Decision	November 5, 2023
Counsel:	Burhan Hassan – Self-represented Tammy Wohler for the Respondent

By the Court:

Introduction

[1] Since July 2021, the Appellant/Landlord has six times used the residential tenancies process, Small Claims and Supreme Court of Nova Scotia appeals to evict the Respondent from unit #6 at 31 River Road, Spryfield. On each occasion the applications and appeals have been dismissed. This is Mr. Hassan's seventh attempt.

[2] For the reasons that follow, this appeal also fails.

[3] Burhan Hassam has been obsessive in his efforts to evict Arthur Kirby, a long term tenant. Mr. Hassan's disregard of previous rulings is a concern, as he shows little respect for the institutions and processes in the *Residential Tenancies Act (the Act)*, which are responsible for upholding the rights and obligations of both landlords and tenants. His behavior constitutes harassment and must be condemned.

History

[4] The Respondent has lived at 31 River Road since 2009. He initially occupied a one bedroom unit but moved to unit #6, a two bedroom apartment. In 2017, the

Appellant purchased the building and became the landlord. In 2019 the Respondent's lease was terminated. Following a hearing, the Director ordered vacant possession after which the parties agreed to allow the tenant to remain in possession on a series of fixed term leases.

[5] In July 2021, the Appellant applied to the Director of Residential Tenancies (the Director) to terminate the lease. In the Appellant's Form J, among other matters, he stated:

> I don't want to extend any more because this time my Kids need this apartment me and my family living together we are 4 person me my wife my 17 years old son and 14 years old daughter and we have only 2 bedrooms I have to provide bedrooms for my kids.

[6] The Director dismissed the application. Mr. Hassan appealed. Adjudicator Slone in written reasons, dated October 12, 2012, are at *Hassan v. Kirby*, 2021 NSSM 49[1] found starting at para. 25:

> …His own children in Halifax would qualify, but he has not established to my satisfaction that he has an actual plan to move his children into the apartment currently occupied by the tenant.
>
> [26] Like the Residential Tenancies Officer I have some serious questions about the landlord's good faith. I found his evidence to be unconvincing, in part because it was tainted by his strong personal animus against the tenant. I am reluctant to force the tenant out under such circumstances.

[1] https://www.canlii.org/en/ns/nssm/doc/2021/2021nssm49/2021nssm49.html?autocompleteStr=Hassan&autocompletePos=1

> [27] Having said that, if the landlord's drive to bring his mother to Halifax is legitimate and actually pans out, the tenant may well find himself on the receiving end of a Residential Tenancies application that could succeed, and he should be mindful of that possibility.

[7] An appeal to the Supreme Court of Nova Scotia was dismissed on March 7,2022. No written reasons are available.

[8] On November 4, 2022, the Appellant again applied for an order for vacant possession. This Form J referred to issues of good behavior, tenant's insurance, cleanliness and pests as well as:

> Landlord family members need your apartment in good faither we need your apartment for our immediate family members son and daughter need to live in 6-31 River Rd not in 15 Lier Ridge because we discovered high level of Radon gas in 15 Lier Ridge which is danger for health. 487BQ/M3 (Radon causes lung cancer). It is good for Airbnb and income not good for Residential for long term.

[9] The Director dismissed the application on May 26, 2022. In an appeal to the Small Claims Court, on July 20, 2022, Adjudicator O'Hara dismissed the appeal[2]. Noteworthy is that the Appellant's family occupying the unit was not addressed in the appeal reasons. However, what was noted was the 'dysfunctional relationship' between the parties and what the adjudicator

[2] The reasons are not reported.

referred to how the landlord ‘appeared emotional and almost frantic in his demeanor.’ He also found the landlord exaggerated when giving his evidence.

[10] The current matter was initiated by an application on February 23, 2023. The Form J, referred to ‘damages’ but primarily related to an application for vacant possession to allow his son to move to #6-31 River Road. The Form J states:

> In good faith, I have to terminate the tenancy and need vacant possession. Instead of tenant Mr. Arthur Kirby, my 19 years old son Emran and my 15 years old daughter Zarghuna will reside in Apartment 6-31 River Rd., Halifax, NS. We are 4 persons. Me, my wife, daughter and son are temporarily living in our 3 bedroom house. My son and daughter are planning to move into apartment 6-31 River Rd. Halifax on 1-May-2023

[11] On May 25, 2023, the application was dismissed by the Director who found:

> Based upon the testimony and evidence provided by both parties, I find that this Application to Director is a repeat of two previous Applications to Director, File NO 202102213 and File NO 202303783. Both of these Orders of the Director dismissed the landlord’s claims and subsequent appeals also resulted in the landlord’s claims being dismissed….

[12] The Form J was filed two days after the Appellant received a Notice of Violation from the City of Halifax, for a by-law breach relating to ‘bedbugs’ in the Respondent’s apartment. A daily fine of $237.50 was applicable if the matter was not addressed through professional pest control. Mr. Hassan was upset by the Notice because of the potential financial consequences associated with it.

The Facts

[13] Mr. Hassan, his son, Emran, and a friend, Mark Harris testified. Mr. Harris, a pastor and friend, provided no evidence relating to the substance of the hearing. He was present throughout as a support for the Appellant.

[14] The Appellant reviewed the previous proceedings before the Director and the Small Claims Court. He has consistently tried to have Mr. Kirby evicted, based on allegations and his assertion that he requires unit #6 for his son.

[15] Mr. Hassan has frequently complained about the Respondent's behavior. Mr. Kirby says, Mr. Hassan has called him 'stupid'. Though Mr. Hassan denies this, he has found Mr. Kirby's conduct, as one with a diagnosed illness, challenging. The relationship has been full of conflict as early as 2019, when the first residential tenancies matter, relating to unpaid rent, was heard.

[16] In addressing previous proceedings, he says the findings of the Director and the Small Claims Court were wrong. He suggests the processes mandated by the residential tenancies legislation are 'dictatorial' and 'undemocratic'. He feels the Respondent, who has defended each allegation made by the Appellant is persecuting him. He and he alone should be able to determine what he does with his property and decide where his family will live.

[17] Mr. Hassan is a new Canadian. He works primarily as a taxi driver, often working fifteen hours a day. He has acquired assets sufficient to by property and owns a residential property and a six unit apartment building at 31 River Road in the Spryfield area of Halifax.

[18] He bought 31 River Road in 2017. It was an investment property. It was subject to a mortgage which contained a clause prohibiting the owner from living there. This was crucial to a previous ruling, as it was a ground for not allowing the Appellant's son to occupy an apartment in that building. Since then the mortgage has been released, so the legal restriction no longer applies.

[19] The Hassan family of four – two adults and 2 older teenagers- live in a three bedroom home. Each parent occupies a bedroom; the teenage daughter has her own room; the teenage son had a sleeping area in the living room. There is a Rec Room in the basement. On cross examination, Mr. Hassan adamantly asserted this space could not be converted to an appropriate bedroom for his son. His assertion was a conclusion, not supported by any facts or a detailed explanation.

[20] Emran Hassan, 19, studies Computer Science at Dalhousie University. Both his and his father's evidence was that it is difficult to study with the current

living arrangement. When he moves into River Road, he will be responsible for the building, somewhat like a building superintendent who collects the rent, takes care of the garbage, snow removal and basic maintenance. Some of this he does now as the current Hassan residence is only a few minutes away from River Road. He wants to be in River Road by December, before his university exams.

[21] Emran Hassan testified he had not considered moving into unit #5 if it was available. The option to relocate to Mr. Kirby's apartment, # 6, is the only option that has been considered.

[22] Mr. Hassan stated he plans to move his son into #6 at 31 River Road, after the current tenant moves out. He does not plan to rent to another tenant, 'even if a tenant paid $1900 per month'. His daughter would also move into the same apartment. The timing for that move has not been set though it seems it will likely be when she starts university in a couple of years.

[23] Mr. and Mrs. Hassan also intend to move to the same building to take over #5, the other third floor unit. They have taken no steps to make that move, including notice to the present tenant.

[24] Mr. Hassan said this was part of a plan to buy, renovate and sell properties. He may sell the home in which the family currently resides.

[25] There have been vacancies of other units at 31 River Road. The Appellant advertised at least one vacant apartment in February 2023. The Appellant has chosen not to use one of those vacant units for his son. He says he must live on the top floor so there is no noise coming from an apartment above him.

[26] In his evidence the Appellant addressed additional issues he says merit eviction. These are:

a. A claim for damages because of a plumbing leak - He says in December 2022, the Tenant tried to install a cabinet, damaged a waterline and flooded the unit #4 below. He claims damages of $4930.54 [Ex.1/p.49], which covers these alleged flood damages, pest control expenses and other ‘damages’.

   Mr. Kirby testified following a major storm which damaged the building’s roof, he heard a noise in his bathroom that revealed a leak in a flexy pipe leading from the toilet. He attempted to stop the water flow by turning the knob at the toilet, but it was seized. He did not know there was a plumbing turn-off knob in the kitchen. He stated that work on or installation of cabinets had nothing o do with the leak. He denied the water in apartment #5 was not his responsibility.

   Mr. Hassan did not address the Mr. Kirby’s explanation of the leak in his cross-examination of the Respondent. He called no evidence to refute the Tenant’s explanation.

b. Expenses related to pest control for cockroach and bed bug treatments - He says Mr. Kirby is responsible for the introduction of these pests

into the building. He offers no evidence that associates the their introduction, several years ago, to any activity of Mr. Kirby. He acknowledges there have been other tenants who have moved into the building over the last number of years.

Mr. Kirby has complained about insects in his apartment and about inadequate remediation of them. A Notice of Violation from HRM was issued to Mr. Hassan in February 2023. The Tenant says he has not introduced new bedding, mattresses or clothing to his apartment that might have brought insects into his unit.

c. The Tenant does not properly separate his refuse - He says he has examined Mr. Kirby's clear garbage bags and has found paper and a pill bottle and a 'red pill' inside them, in apparent breach of HRM requirements for garbage separation. He suggested an animal could access the garbage bag, injest the pill and become ill.

   Mr. Kirby explained what steps he takes to comply with all rules about compost, recycling and garbage. He denies any medication or containers were his. He does not say he might not have made a mistake by putting some paper in with garbage, but if he did so it was insignificant.

d. Cleanliness - Mr. Hassan states the Tenant's apartment is not maintained at an appropriate level of cleanliness. He provided no evidence the apartment was not clean or tidy.

   Mr. Kirby introduced photographs that showed his unit was neat and tidy. He spoke of his routine to clean regularly and wash dishes after meal preparation and meals. He related how the Landlord wanted him to have a vacuum clear that he could not afford. One was provided and he paid for it over time.

[27] The latter two items were raised by the Appellant and addressed in the decision of Adjudicator O'Hara in May 2022. There he noted that issues regarding garbage separation was a 'minor matter' (para. 28) and there was no

evidence of a breach of Statutory Condition regarding ‘ordinary cleanliness’ (para/ 29).

[28] Though not part of his Application to the Director, the Appellant raised a further issue relating to what have been longstanding complaints about the Respondent’s behavior. In late September 2023, when this appeal was awaiting a hearing, Mr. Hassan advised the tenant he had to change the battery in his smoke detector. After he had done so, he says the tenant began to use abusive language. The Appellant then began to record the exchange with his cell phone. The brief video was introduced as evidence. Mr. Kirby did not approve of this and asked Mr. Hassan to stop and to leave his apartment. Mr. Kirby became angry because Mr. Hassan did not stop or immediately depart. Mr. Kirby walked away, took an obvious deep breath to calm down, and quietly asked his landlord to leave.

[29] Mr. Hassan says at that point, with the recording stopped, Mr. Kirby threatened him by saying ‘You son of a bitch – You will die soon.’ He states that Mr. Kirby then removed his pants and exposed himself to Mr. Hassan.

[30] Mr. Kirby denies that any part of this exchange occurred.

[31] The next day, on October 1, Mr. Hassan sent the following text message to Mr. Kirby:

> Yes I came to replace the smoke detector yesterday at 6:40pm you insulted me you used abusive language you yelled on me you hollered on me I will show your video to judge in your hearing with all other complaint and evidence and claim hope this time judge evict you from my property also I will report the laundry room incident.

[32] Mr. Hassan does not refer to any threats or an indecent act. Mr. Hassan did not call the police regarding any alleged threat, though he had involved them previously when he believed the relationship warranted it.

[33] The Appellant did not introduce evidence regarding a 'laundry room incident'.

[34] On October 25, during an adjournment, at the request of Respondent's counsel, the resumption of the evidence had to be rescheduled due to Mr. Kirby's health, Mr. Hassan sent the following email to the Court:

> Really tenant has the zoom in his cell phone also he has laptop and he is familiar with zoom very well I know him very well compared to others if he doesn't like zoom you can continue with telephone conference instead zoom no problem tenant can talk from anywhere.
> In my experience always respondent making some excuse to postpone the hearing and earn more time and save money from rent it is a kind of fraud and fraud is criminal offence we know that. It is several times since July 2021 to date either tenant or his representative postponed my scheduled hearing it was more then normal range we know that but I never and never postponed my hearing date. At

> this time my expectation is to continue the hearing on 26 Oct if the tenant is not available his representative is available if tenant is not agree with your decision tenant can appeal your decision in Supreme Court we are at emergency situation we have to evict the tenant and reside my son because he should study hard his University otherwise my son will fail to his exam we can not wait anymore it is enough

[35] In his testimony he stated Mr. Kirby had a computer and that he was a 'gamer', suggesting he frequently played video games. He suggested Mr. Kirby was technologically proficient.

[36] Arthur Kirby testified he has lived in the building at 31 River Road since 2009. He had a good relationship with the previous building superintendent. Under that tenancy he relocated from a one bedroom to a more spacious two bedroom unit.

[37] Mr. Kirby has schizophrenia. It is managed with medication and peer support. Though not currently employed, he maintains relationships in the community through Halifax Connects, an organization that operates in the Spryfield area. He has family and friends in the neighbourhood.

[38] Mr. Kirby acknowledges that he has had conflicts with Mr. Hassan since he acquired the apartment building in 2017. Some of these conflicts lead to matters before the Residential Tenancies Office, which resulted in findings that had caused him to change his behavior. He acknowledged that though previously

there were communication issues with Mr. Hassan, since findings of the Director he knows, he must respond to his landlord's communications promptly. In reflecting on his health, he acknowledges that whereas he once would have become angry and perhaps lost control due to his illness, he now has coping mechanisms to deal with the extreme stress caused by the ongoing dispute with Mr. Hassan and involvement of the Director and the Court.

[39] The prolonged conflict with the Appellant has taken a toll on the Respondent. He avoids his landlord. In the building he keeps largely to himself. The continuous conflict has been stressful. His every move and conduct appears to be watched by Mr. Hassan.

[40] Mr. Kirby's receives a rent supplement and has not been in arrears in his rent for several years. He says he could not afford market rents in the area he now lives. He does not want to move from the area where he has family and friends.

[41] Mr. Kirby says does not have a computer. He could not access to Zoom (a video technology used by the Court) hearing, even if he wanted to. He does not play video games. His telephone has all the technology he uses. He does not know why Mr. Hassan would suggest otherwise.

Findings

[42] Mr. Hassan's spoken and written English, as is evident from his testimony, his engagement with the Court and his written materials, is proficient. He engaged with the Court, counsel for the Respondent and witnesses with a demonstrated understanding of the processes with which he was involved.

[43] Since 2019 the Appellant has raised and prosecuted through the Director and this Court at least seventeen complaints or issues against the Respondent. As in this hearing, some related to conduct after he filed a Form J. Except for the requirement the Respondent pay $51.20 in 2019, all issues his complaints have been dismissed and found to be without merit or were determined to so minor, such as a complaint about not wearing a mask during the Pandemic, as not to merit the Court's consideration.

[44] Despite these findings, the Appellant has repeated some of his previous complaints, such as about cleanliness or the Respondent's behavior, as if by alleging them again they took on currency. Raising stale and unfounded issues reflects poorly on the Appellant and suggests he has a single-minded determination to get rid of the Respondent as a tenant even in the face of rulings he has no legal right to do so.

[45] The Appellant wants his son to live in his own apartment. Though both the Appellant and his son say that only Unit #6 will meet Emran's needs, they provided no explanation of why they take that position or addressed no alternative, such as the other top floor apartment, #5. The evidence and arguments supporting a move are largely the same as they have been in previous hearings where this issue was considered, though unlike the matter addressed by Adjudicator Slone, there is not assertion that living accommodations are required for other family members.

[46] This is the third time this issue has been addressed by the Director and the Court. It is noteworthy, for the Appellant, only one unit in the building will suffice.

[47] The Form J initiating the current process was filed immediately after receiving a Notice of Violation relating to bedbugs. Other than this, which bothered Mr. Hassan, there was nothing that gave a basis for a new Form J application. The timing of the application, given the previous history between the parties, was retaliation against Mr. Kirby for bringing the City and bylaw enforcement officers to his apartment. Mr. Hassan provided no explanation that would refute this conclusion.

[48] Expenses incurred from water leaking from Mr. Kirby's apartment to Unit #4 below him were not caused by the Respondent. Mr. Kirby did not know where the shutoff valve was for water and when he went to turn the valve in the bathroom to stop the water flow, it was seized and did not work. The Tenant is not responsible for any damage that resulted.

[49] There is no evidence to support the other assertions of breaches of the Tenant's obligations. Contrary to the Landlord's assertion there is no evidence the tenant does not maintain a clean and tidy apartment. Though the photos presented could have reflected the unit was staged for them, the video taken on September 30 also showed a well kempt living area. I find the Appellant had not provided any evidence to prove the Respondent has breached any obligation regarding ordinary cleanliness under the Act.

[50] There is no evidence the Respondent has any responsibility for bedbugs or cockroaches. In this Court, insect infestations are commonly an issue. I can take judicial notice that usually insects come into a building through new tenants or when old furniture, such as bedding or sofas, are moved into an existing residence. They do not simply appear in residences of longstanding tenants unless someone else has introduced them to the building. I find the Appellant

has provided no evidence to prove the Respondent has any responsibility for bedbugs or roaches in 31 River Road.

[51] Though the Respondent might have erred in some garbage separation, it was so minor as to be insignificant. Given that finding was made previously and given there is no standard of perfection expected from the HRM rules on garbage separation, Mr. Hassan's vigilance regarding this issue verges on spying on the Respondent. In the scheme of things, given that garbage is taken away by the City, without comment or sanction for small violations, a regular examination of an individual tenant's bags of refuse borders on obsessive behavior that is inappropriate. There is no harm to anyone if minor errors occur in waste separation.

[52] Mr. Hassan's obsession with the Respondent is a concern, as he has used significant resources to repeatedly pursue issues that have been found to be without merit. He appears to be incapable of accepting that independent, unbiased and experienced decision-makers have made findings against time. By rejecting every previous decision, he has put considerable strain on Mr. Kirby, as he has become the victim of Mr. Hassan's wrath.

[53] The extent to which Mr. Hassan will go to besmirch Mr. Kirby became evident in his fabricated evidence regarding the death threat and exposure after the video was taken. Recording an exchange between a landlord and a tenant without permission is inappropriate. That is bad enough. To then suggest in evidence that criminal behavior followed is both inappropriate and akin to defamation.

[54] I am satisfied, based on his testimony and demeanor, he has used inappropriate language, such as ‘stupid, to describe the Respondent. During the hearing he frequently interrupted and failed to heed warnings about his language and aggressive attitude, especially when questioning the Respondent.

[55] Had a threat been made or had Mr. Kirby done what Mr. Hassan suggested at the time of the phone video, he would have been the first one to call the police. He did not do so, because the incidents did not occur. Then at the hearing, given he felt the video would make his case, when it became clear Mr. Kirby’s behavior was not inflammatory or inappropriate, Mr. Hassan added allegations, that if believed, would be devastating. The Court finds the allegations to be false. They are particularly problematic because they were made by Mr. Hassan giving evidence under oath.

[56] Further evidence of Mr. Hassan's ill will towards Mr. Kirby and his willingness to make up facts is evident from his email to the Court in response to what was an innocuous request by the Respondent's counsel for a short adjournment due to health. Suggesting that Mr. Kirby was familiar with Zoom was simply not true. To go on an conflate the request with criminal 'fraud', even if the word was used in an unsophisticated way, was inappropriate. While the first assertion was untrue, the second was an exaggeration that suggests Mr. Hassan has lost his perspective.

[57] It is clear The Appellant will say anything to advance his case, even if what is says is incorrect or untrue.

[58] Looking at the history of involvement of the Director and Court over the past four years, I conclude Mr. Hassan has maintained a campaign against Mr. Kirby, with the sole aim of having him removed by order from his rental unit. The combination of exaggeration, untruths, rejecting previous findings, and repeatedly engaging the residential tenancies processes, after negative findings have been made, constitutes a form of harassment this Court condemns.

[59] One need only use the definition of 'harass' from the *Human Rights Act,* R.S.N.S. 1989, c 214, to assess Mr. Hassan's conduct. There "harass" means to

engage in a course of vexatious conduct or comment that is known or ought reasonably to be unwelcome. (Empasis added)

[60] His repeated use of the Residential Tenancies and Court process in the face of findings against him, his repeated mischaracterization of Mr. Kirby's behavior, his fabrication of facts to cast aspersions on Mr. Kirby constitute harassment. Below I will consider what remedy, if any, is provided in the Act.

Issues

[61] This appeal raises these issues:

1. Is the appeal barred by virtue of application of the principle of *res judicata*?
2. If not, what is the result on the merits?
3. Do recent amendments to the Act preclude an owner from using the provisions of the Act for owner occupation in buildings of over four units?
4. Does the evidence support a finding of retaliation under the Act?
5. Can or should costs or other compensation be awarded?

Res Judicata

[62] When parties bring an issue before a tribunal or a court, they expect the decision, subject to appeal, will be final. The principle of finality is fundamental to the justice system so matters, once determined, are not re-litigated. Doing so is costly in time and expense to parties and the publicly funded justice system.

[63] These principles were spelled out by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44[3]:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings arc to be avoided.
>
> 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re- examination of some basic principles is warranted.
>
> 20 The law has developed a number of techniques to prevent abuse of the decision- making process. One of the oldest is the doctrine estoppcl *per rem judicatum* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 1894 CanLII 72 (SCC), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or

[3] https://www.canlii.org/en/ca/scc/doc/2001/2001scc44/2001scc44.html?autocompleteStr=Danyluk%20v%20Ainsworth%20Technologies%20Inc&autocompletePos=1

> action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G.D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21§17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: (Citations omitted)

[64] The main issue pursued by the Appellant in this appeal, providing a place for his son to live, has been adjudicated previously – twice by the Director, twice by this Court, and once by the Supreme Court, on appeal.

[65] On that basis is the Appellant precluded from bringing this matter forward for determination on appeal from an order of the Director? This question raises the issues of issue estoppel and *res judicata*.

[66] In *JPMorgan Chase Bank v. Petrovici*[4], 2007 NSSM 33, Adjudicator Barnett succinctly set out the principles and approach for considering these issues. His analysis starts at para 49:

> [49] **DISCUSSION**: (A) *Res Judicata*: Justice Cromwell dealt with *res judicata* at length in his decision for a unanimous court in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153 (CanLii), [1997] N.S.J. No. 430 (C.A.). He stated, at para. 21, as follows:

[4] https://www.canlii.org/en/ns/nssm/doc/2007/2007nssm33/2007nssm33.html?searchUrlHash=AAAAAQAMcmVzIGp1ZGljYXRhAAAAAAE&resultIndex=5

> "Res judicata is mainly concerned with two principles. First, there is a principle that '…prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.': see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This '…prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.': ibid at 998."

[50] In the *Hoque v. Montreal Trust* decision, Justice Cromwell referred to the Supreme Court of Canada case of *Angle v. M.N.R.* (1974), 1974 CanLii 168 (SCC), 47 D.L.R. (3d) 544 in which Justice Dickson (as he then was) identified the two main branches of *res judicata*, both of which require that the previous court decision be final and be between the same parties or their privies for *res judicata* to apply.

[51] The first branch is cause of action estoppel. It concerns circumstances where a person brings an action against another when that same cause of action has already been determined by a court of competent jurisdiction in earlier proceedings between the parties.

[52] The second branch is issue estoppel. It concerns circumstances where a person attempts to "re-litigate" some point or issue that has already been decided by a court of competent jurisdiction.

[53] In this case, both branches of *res judicata* are potentially applicable.

….

[56] The real issue to be determined is whether or not the Order of Adjudicator Parker dated November 27, 2006, is a "final" order. If it is, then the current Claim must be dismissed by reason of the application of the principle of *res judicata*.

[57] In *Lienaux v. 2301072 Nova Scotia Ltd.*, [2005] N.S.J. No. 247 (C.A.), Justice Roscoe wrote a decision (in which Justice Freeman concurred) in which she cited The Doctrine of Res Judicata, 2nd ed., Spencer Bower and Turner, Butterworths, London, 1969, at page 132 for the meaning of a "final" order:

> "A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain,

> and when it is not lawfully subject to subsequent recission, review, or modification by the tribunal which pronounced it. This definition involves the existence of two distinct types of non-finality, which it is proposed to examine separately: one, in which the judicial decision on the face of it is imperfect, provisional, conditional, indefinite, or ambiguous, and the other in which the judicial decision, though ex facie, purporting to be final, is by the English, or (as the case may be) the foreign, law applicable, liable to be afterwards rescinded, re-opened, or varied by the originally adjudicating tribunal."

[58] Justice Roscoe also referred to The Doctrine of Res Judicata in Canada, Donald J. Lange, Butterworths, 2000, page 77:

> "The decision must be a final decision. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties."

[67] Mr. Hassan applications have sought to evict Mr. Kirby, based on section I 0(8)(f)(i) of the Act.

[68] Section l0(8)(f)(i) of the *Residential Tenancies Act* provides that a landlord may give a tenant notice to quit where:

> (f) **the Director is satisfied** that it is appropriate to make an order under Section 17A directing the landlord to be given possession at a time specified in the order, but not more than twelve months from the date of the order, where
>
> > (i) the landlord in **good faith requires** possession of the residential premises for the purpose of residence by himself or a member of his family

[69] The decision of Adjudicator Slone dealt definitively with whether there was a good faith intent by the Appellant to use and occupy the Respondent's

apartment. He found there was not. Adjudicator Slone determined there was ‘a strong personal animus against the tenant (para. 26) that motivated his action.

[70] In the next Application, the Appellant again raised personal use and sought eviction. It was noted in the Director’s Order that ‘The claims to terminate based on personal use was simply an attempt, while there was an active appeal, to relitigate the same issue. This is dismissed.’ That finding was not addressed by Adjudicator O’Hara in his reasons dismissing the appeal and thus the Director’s Order was a final order on that issue.

[71] On both branches of the test for *res judicata*, action estoppel and issue estoppel, the Appellant fails as he seeks to have the **same issues addressed**, even though they have been the subject of a **previous final determination**. On the facts almost nothing has changed vis-a-vis the intent to have the son move to unit # 6. Though he is now a year older and there is some vague description of a future intention the daughter may also move into the same apartment, these do not amount to new facts that would allow or justify a reconsideration. The findings regarding ‘good faith’ are based on findings of an animus, described by Adjudicator Slone and ‘hostility’ between these parties, noted by Adjudicator O’Hara.

[72] Applying the applicable principles, I find the appeal and the Application to Director that gave rise to it are barred because the Appellant seeks to relitigate the same issues on the same facts that have been previously decided by final orders.

Section 10(8)(f)(i)

[73] If I am wrong on this finding, I will consider the merits of the appeal and determine if the Appellant meets the requirements of s. 10(8)(f)(i).

[74] There are two requirements under this section.

1. The Director must be satisfied it is ‘appropriate’ to make an order that terminates the lease of a tenant.

2. Before the Director considers the matter, the Landlord must prove that in goof faith he requires the residential premises for use by his family.

[75] The severance of a long term tenancy is not something that the Director should so lightly. Built into the Act is the concept of security of tenancy.

[76] In her written submissions counsel for the Respondent described the policy underlying the Act’s protection of tenants who have acquired security. I accept these submissions as they outline both the law and the policy behind it.

[77] The *Act* has evolved over the last number of years, to increase security of tenure and to ensure landlords have sufficient grounds to seek vacant possession. The most recent examples include significant amendments to "renoviction" clauses and the introduction of the Interim Residential Rental Increase Cap Act 2021, c. 22. Interpretation of the Act must consider this context.

[78] Prior.to November 14, 2012, the *Act* did not provide security of tenancy. It permitted a landlord to terminate a tenancy with sufficient notice (in the case of a periodic, year-to-year lease, three months' notice sufficed).

[79] Bill 119 amended the *Act* to safeguard security of tenancy for periodic tenants, absent specific exceptions as set out in section 10 of the Act.

[80] Tenants with a periodic lease now have security of tenancy, providing them with stable and secure housing. Landlords can no longer evict at will, based simply on notice. These have also evolved over the years.

[81] The *Act* sets obligations and limitations on the circumstances in which landlords can provide tenants with a notice to quit, to sever the security of tenancy. These **limitations are intended to balance the rights and interests**

of landlords with rights and interests of tenants. They demonstrate that terminating security of tenancy is to be considered an exception.

[82] When considering a matter under s.10(8), the Director must address the policy behind security of tenancy and in determining if it is appropriate to sever a tenancy, the Director must be satisfied there are compelling reasons to do so. Using a standard of 'compelling reasons' recognizes the high barrier a landlord must cross when it proposes to evict long term tenants under this section.

[83] The second part of the Director's process involves a determination if 'landlord in **good faith requires** possession of the residential premises for the purpose of residence by himself or a member of his family.'

[84] There are two parts to the Director's analysis here. First is a determination of good faith on landlord's part. The second is to determine if the landlord 'requires' the residential unit for personal use.

Good Faith

[85] The Director and the Small Claims Court (upheld on appeal to the Supreme Court) have ruled the Appellant was not acting in good faith when he sought to take possession of the Respondent's apartment.

[86] "Good faith' is used in the Act as a basis for determining a landlord's intent. See 10(8)(f)(i) and 10AB (3). The phrase is not defined.

[87] Recently Adjudicator Barnett analyzed the phrase in *4375421 Nova Scotia Ltd. v. Clements*, 2023 NSSM 38[5], where he stated:

> [30] I previously discussed the concept of "good faith" in the context of Section 10(8)(f)(i) of the *Residential Tenancies Act*: *D. Jockel Holdings, supra.* In that case, the question was whether the landlord required, in good faith, the termination of a tenant's tenancy for the purpose of occupying the tenant's apartment. The requirement of good faith was simply described as a genuine intention on the part of the landlord to occupy the apartment.
> [31] I believe that the same interpretation of the term "good faith" should be brought to Section 10AB (3). The factual question to be determined is whether the landlord has a genuine intention to reclaim residential premises for the purpose of carrying out renovations. In other words, does the landlord actually intend to carry out the renovations and, further, is vacant possession being sought because of the intended renovation work?
> [32] The previously mentioned *Aarti Investments* case refers to a British Columbia Residential Tenancy Policy Guideline that attempts to define "good faith" and the case also refers to another British Columbia case (*Gallupe v. Birch*, [1998] B.C.J. No. 1023 (S.C.)) where there are discussions about the extent to which a landlord's motivations behind a stated intention should be considered in similar circumstances.
> [33] In my view, it is unwise to attempt to tightly define the meaning of "good faith". The term "good faith" is an abstract and amorphous concept. It is probably fair to say that it is easier to recognize when "bad faith" is present – the antithetical of the concept of "good faith" – than it is to explain the meaning of "good faith."
> [34] For example, if a landlord seeks vacant possession because of a tenant who is perceived to be troublesome and renovations are merely a pretext, one would say that the landlord does not in good faith require vacant possession for the purpose of renovations – the purpose is to evict the tenant.
> [35] By way of further example, if it can be determined that a landlord is presenting information indicating that it intends to carry out renovations but, in fact, it does not actually intend to carry out renovations after vacant possession is granted and the tenant and other occupants leave the leased residential premises, then there is also an absence of good faith on the part of the landlord.

[5] https://www.canlii.org/en/ns/nssm/doc/2023/2023nssm38/2023nssm38.html?searchUrlHash=AAAAAQAMImdvb2QgZmFpdGgiAAAAAAE&resultIndex=1

> [36] Beyond these observations, it seems best to allow leeway for Residential Tenancy Officers (and Adjudicators of the Small Claims Court) to consider the specific circumstances at hand in any particular case in deciding whether the landlord is acting in good faith or in bad faith as the case may be.

[88] Adjudicator Barnett's approach is helpful, but there is value in providing a framework for determining if there is 'good faith' in the Landlord's decision-making. The Supreme Court of Canada has ruled in two recent decisions[6] on the application of 'good faith' in contractual relationships. The principles applicable in commercial contracts and the landlord-tenant contractual relationship are analogous, and the Supreme Court's approach can be applied when evaluating a landlord's decision making.

[89] In *C.M. Callow Inc. v Zollinger* the Court outlined an approach to determining a contracting parties good faith:

> [44] … I recall that the organizing principle of good faith recognized by Cromwell J. is not a free-standing rule, but instead manifests itself through existing good faith doctrines, and that this list may be incrementally expanded where appropriate. In this case, Callow invokes two existing doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. In my view, properly understood, the duty to act honestly about matters directly linked to the performance of the contract — the exercise of the termination clause — is sufficient to dispose of this appeal. …
>
> [45] While these two existing doctrines are indeed distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. Cromwell J. explained that good faith contractual performance is a shared "requirement of justice" that underpins and informs the various rules recognized by

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1.1 [6] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 and *Bhasin v. Hrynew*, 2014 SCC 71

> the common law on obligations of good faith contractual performance (*Bhasin*, at para. 64). The organizing principle of good faith was intended to correct the "piecemeal" approach to good faith in the common law, which too often failed to take a consistent or principled approach to similar problems and, instead, develop the law in this area in a "coherent and principled way" (paras. 59 and 64).
>
> [46] By insisting upon the thread that ties the good faith doctrines together — expressed through the organizing principle — courts will put an end to the very piecemeal and incoherent development of good faith doctrine in the common law against which Cromwell J. sought to guard. While the duty of honest performance might bear some resemblance to the law of misrepresentation, for example, in a way that good faith in other settings may not, *Bhasin* encourages us to examine how other existing good faith doctrines, distinct but nonetheless connected, can be used as helpful analytical tools in understanding how the relatively new duty of honest performance operates in practice.
>
> [47] The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party, … have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow. To be sure, **this requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. But by the same token, those rights and obligations must be exercised and performed, as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily where recognized by law. This requirement of justice, rooted in a contractual ideal of corrective justice, ties the existing doctrines of good faith, including the duty to act honestly, together. The duty of honest performance is but an exemplification of this ideal.** …

[90] I find it helpful bring 'the requirement of justice' and the need to act 'honestly and reasonably and not capriciously or arbitrarily' into the analysis of 'good faith' in the *Act*. This allows the Director and this Court to look at a variety of factors in valuating a landlord's motives, behavior and conduct as well as the consequences of a decision. By adding the 'justice' component to the analysis, the impact on the tenant is brought into the equation, as the

Supreme Court did when evaluating the termination of a commercial contract. It is noted this is what Adjudicator Slone did implicitly in his recent decision *Shahisavandi v. Ballantyne*, 2023 NSSM 22[7].

[91] Applying this approach, there is little to show the Appellant acted in good faith. His single-minded desire that his son move into Unit #6, and no other, shows he was being unreasonable. There are five other apartments in the building and one of those is on the top floor. If he was being reasonable, he would have taken advantage of a vacant unit to relocate his son there. Even if that was not ideal or perfect, it would address what he considered to be inappropriate living arrangements in their current home. It would have been a reasonable place to start.

[92] His overall relationship with the Respondent and his willingness to fabricate issues regarding the Respondent's behavior signify dishonesty towards Mr. Kirby in every way. His high degree of vigilance, akin to spying, indicates he desired to catch the Respondent in the most minor or inconsequential breaches of the rules he imposed. This is detailed in the decision of Adjudicator O'Hara.

[7] https://www.canlii.org/en/ns/nssm/doc/2023/2023nssm22/2023nssm22.html?searchUrlHash=AAAAAQAMImdvb2QgZmFpdGgiAAAAAAE&resultIndex=4

[93] The Appellant's attitude and conduct towards the Respondent were capricious and arbitrary. He created an extensive list of arbitrary rules and then waited for his tenant to break them so he could apply to evict him. His general attitude to Mr. Kirby, where he suddenly changed his view or became angry or hostile was capricious.

[94] The justice component of the analysis requires an examination of the effect of the landlord's taking over a tenant's unit. The security of tenancy factor looms large here, because it would require extraordinary circumstances to justify the ending of a long term leasehold. The options offered by a landlord through compensation, alternate rental arrangements and timing for relocation are factors to be considered. None of these were part of Mr. Hassan's approach.

[95] Mr. Hassan has not demonstrated or exhibited good faith in his decision-making that would result in the dislocation of Mr. Kirby.

"Requires"

[96] The second part of the s. 10(8)(f)(i) test for the Director is to determine if the landlord 'requires' the specific apartment. In using the word 'requires' the Act is clear that more than a desire, a wish or a preference is involved. "Requires'

suggests necessity. This is consistent with the dictionary meaning of 'requires", which is 'cause to be necessary' or 'specify as compulsory'.[8]

[97] If an owner wishes or desires to move into a rental unit because it would be convenient, that does not meet the threshold of 'requires' set in the *Act*. That is a logical conclusion because the legislation is authorizing the termination of a contractual relationship and doing so cannot be done on a whim or frivolity. Significantly more is required. By setting the standard as 'requires' the Act is saying it is essential or mandatory that the landlord dislocate the tenant in the present circumstances – there are almost no other options.

[98] The Appellant need not move his son into Unit #6. That is his preference, but it is far from a necessity or a requirement. Not only are there possible alternative arrangements that could be made in the Hassan's current home, but there are also other units in the building that would adequately meet a nineteen year old university student's requirements.

[99] The Appellant does not require the Respondent's apartment for personal use.

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[8] https://www.google.com/search?q=requires+meaning&rlz=1C1RXQR_enCA936CA936&oq=requires+meaning&gs_lcrp=EgZjaHJvbWUyCQgAEEUYORiABDIICAEQABgHGB4yCAgCEAAYBxgeMggIAxAAGAcYHjIICAQQABgHGB4yCAgFEAAYBxgeMggIBhAAGAcYHjIICAcQABgHGB4yCAgIEAAYBxgeMggICRAAGAcYHtIBCTEzOTE3ajFqN6gCALACAA&sourceid=chrome&ie=UTF-8

[100] The Director's Order based on s. 10(8)(f)(i) is correct and the appeal is dismissed.

Does s. 10AA (2) preclude a landlord from evicting a tenant when the landlord wants the unit for personal use?

[101] Counsel for the Respondent has raised a novel issue I will note. Given my findings, I need not decide if s. 10AA (2) has any applicability in the present situation, but I am copying counsel's submission so others may consider it when the facts make it appropriate to do so.

[102] Ms. Wohler's submission states:

> **The *Residential Tenancies Act,* when read as a whole, did not intend to permit owners/landlords of buildings with more than 4 (four) units to evict tenants for personal use.**
>
> As noted above, a new owner of a building containing more than 4 (four) units cannot seek vacant possession for family use. Mr. Hassan did not have the right to evict any tenants to allow for personal use by himself or a family member when he first purchased the building in 2017. He could not have availed himself of section 10 AA (2):
>
> > (2) A landlord of a residential complex that contains **no more than four residential premises** may end a tenancy in respect of residential premises in the residential complex if
> >
> > (a) the landlord enters into a purchase and sale agreement in good faith to sell the residential complex;
> >
> > (b) all the conditions, unrelated to the title, on which the sale depends have been satisfied;
> >
> > (c) the purchaser is an individual; and
> >
> > (d) the purchaser
> >
> > (i) asks the landlord, in writing, to give notice to end the tenancy on the grounds that the purchaser, or a family member of the purchaser, **intends in good faith** to

occupy the residential premises, and

(ii) provides to the landlord an affidavit sworn by the purchaser that the purchaser, or a family member of the purchaser, **intends in good faith** to occupy the residential premises.

[Emphasis added]

It is inconsistent and disingenuous to interpret section 10(8)(f)(i) of the Act in a manner that permits the purchaser, having now obtained title to the 4-plus unit building and willingly placing themselves in the role of landlord, to now evict existing tenants from units at will.

Such an interpretation would effectively eliminate the protection provided by s. I0AA, rendering the number of units in a residential investment property inconsequential. There would be no protection for tenants of larger buildings; owners with large families could evict entire buildings, ostensibly to use for family members.

Does the evidence support a finding of retaliation under the Act?

[103] The Courts authority to address retaliation by a landlord is found in s. 20 of the Act.

Consequence of retaliatory action by landlord
20 The Director or the Small Claims Court may refuse to exercise, in favour of a landlord, the powers or authorities under this Act or may set aside a notice to quit if the Director or the Small Claims Court is of the opinion that a landlord has acted in retaliation for a tenant attempting to secure or enforce the ten-ant's rights under this Act or the Rent Review Act. R.S., c. 401, s. 20; 1997, c. 7, s. 9; 2002, c. 10, s. 31.

[104] The Appellant filed the Application that initiated these proceedings the day after he received a Notice of Violation from the City of Halifax regarding bedbugs in Mr. Kirby's apartment. Given his history with the Respondent, his frequent episodes of anger, and his previous complaints, I find the initiation of this proceeding was retaliatory. Mr. Hassan was displeased that his tenant

brought city by-law inspectors to his property to investigate bedbugs. He was displeased that he would be potentially liable for a daily fine. His attitude was magnified by his unfounded and unproven view it was Mr. Kirby who was responsible for bed bugs in the building.

[105] Though I conclude that, s. 20 does not enable the Court to sanction the Appellant, as I have dismissed his appeal on the merits and based on the principles of *res judicata*. I have indicated Mr. Hassan's behavior towards the Respondent merits condemnation.

[106] If I had not already made findings against the Appellant, I would have set aside his Notice to Quit and dismissed his appeal under s. 20.

[107] The appeal is dismissed and the Order of the Director is confirmed.

Conclusion

[108] It is not clear why the Appellant has the attitude he does toward the Respondent. As my adjudicator colleagues have noted previously, the relationship is fraught with anger, animus and perhaps conduct that breaches the Human Rights Act. It is not within the power of this Court to order substantial compensation for the Respondent who has endured years of inappropriate

harassment, vitriol and bad behaviour by his landlord. Mr. Hassan's repeated use of the application procedures under the Act and appeals to this Court have become vexatious and abusive

[109] A tenant is entitled to quiet enjoyment of leased accommodations. Implicit in that is the Landlord will not repeatedly abuse the process by raising unfounded, insignificant and fictitious allegations and issues including those that have been found against him.

[110] There is no power in this Court to Order the Appellant not to file another application involving Mr. Kirby. There is no power to sanction him for his failure to heed the results of this Court's previous determinations. If this was a civil process, there would be an opportunity to consider if Mr. Hassan is a vexatious litigant and deal with him accordingly. That option is not available under the Act.

[111] I have considered if it would be appropriate to make an order against the Appellant under s. 17A (h). Though Mr. Kirby should receive compensation for the grief he has been caused by the irrational and unreasonable conduct of the Appellant, I do not believe that section is intended for this purpose. I decline to do make an order with financial consequences.

[112] It is the Court's hope that Mr. Hassan, given the findings I have made, will seek some assistance that will allow him to avoid escalating, repetitive and fruitless conflict with Mr. Kirby. His relentless pursuit of this tenant with an abusive zeal must stop.

Darrel Pink, Adjudicator, Small Claims Court