File #10-10902

IN THE MATTER between **CARL MALMSTEN**, Applicant, and **BRIAN SUTHERLAND AND VENTURE CANADA NT LTD.**, Respondents;

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a Hearing before, **HAL LOGSDON**, Rental Officer, regarding the rental premises at **YELLOWKNIFE, NT.**

BETWEEN:

CARL MALMSTEN

Applicant/Landlord

- and -

BRIAN SUTHERLAND AND VENTURE CANADA NT LTD.

Respondents/Tenants

ORDER

IT IS HEREBY ORDERED:

1. The application is dismissed.

DATED at the City of Yellowknife, in the Northwest Territories this 13th day of July, 2009.

Hal Logsdon
Rental Officer

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Respondents/Tenants

REASONS FOR DECISION

Date of the Hearing:	**July 7, 2009**
Place of the Hearing:	**Yellowknife, NT**
Appearances at Hearing:	**Carl Malmsten, applicant** **Garth Wallbridge, representing the respondents**
Date of Decision:	**July 13, 2009**

REASONS FOR DECISION

The applicant alleged that the respondents had breached the tenancy agreement by failing to repair damages to the premises, failing to pay for the full cost of fuel during the term of the tenancy agreement and failing to pay for the maintenance of the heating system. The applicant sought relief totalling $5335.24.

The respondents' representative argued that the matter should be dismissed because it had already been determined at a previous hearing and an order issued (file #10-10785, filed on May 4, 2009). The respondents' representative further argued that the application was not filed within the time limit set out pursuant to section 68(1) of the *Residential Tenancies Act* and that it would not be fair to extend that time limitation.

The previous matter involved an application from the tenant pursuant to section 18(5) requesting that the security deposit and accrued interest retained by the landlord be returned. The landlord had issued an estimated statement of the repairs but had not issued a final statement as required by section 18(4) of the Act at the time the matter was heard. The landlord was ordered to return the full security deposit and accrued interest to the tenant.

The respondents' representative argued that the doctrine of *res judicata* applies to this matter and cited the Court's decision in *Yellowknife Housing Authority v. Bisson and Bisson* where the Court declined to stay the order previously issued by that court or to rehear the matter. Citing the

doctrine of *res judicata*, the Justice noted that the remedies sought by the applicant must be pursued through an appeal of the original order rather than an application to the same court that issued the order. He noted that even though the current application was filed under sections 42 and 45 while the tenant's previous application was filed pursuant to section 18, the issues were the same, similar to "two sides of the same coin".

The respondents' representative also argued that since the tenancy agreement between the parties was terminated on October 1, 2008 and the landlord's application filed on June 15, 2009 the time limitation of six months set out in section 68(1) of the Act had been exceeded. He argued that it would not be fair to extend this limitation.

In The Law of Evidence in Canada by Sopinka, Lederman and Bryant the concept of *res judicata* is outlined and at p. 997 the authors state:

> . . . a plaintiff asserting a cause of action must claim all possible relief in respect thereto and prevents any second attempt to evoke the aid of the courts in the same cause. It is sometimes called "merger" because the plaintiff's cause of action becomes "merged" in the judgment. The judgment actually operates as a comprehensive declaration of the rights of all parties in respect of the matters in issue. As a result the rule applies equally to a defendant who must put forward all defenses which will defeat the plaintiff's action and the defendant who does not will be debarred from raising them subsequently. This principle prevents the fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation but which properly belonged to it.

I note that in the current application, the applicant has included a final statement of the repair costs which were only estimates when the respondent's application was heard on April 22, 2009. Many of these repair costs are documented in the present application with dated invoices which

substantiate the costs incurred. Most of these invoices indicate that the costs incurred were known to the applicant on April 22, 2009. This includes the utility costs and maintenance costs which can not be deducted from a security deposit. Therefore, the applicant failed to put forward evidence regarding final costs which were central to the determination of the matter when that evidence appears to have been readily available to him. He can not now put that evidence forward when he should have done so previously.

In my opinion, the applicant's request for the utility costs and maintenance costs could possibly have been considered had the application been made in a timely manner as these costs can not be deducted from a security deposit and should properly be the subject of an application by the landlord. However, these costs were known by the applicant well before the expiry of the six month time limitation. I find no compelling reason to consider an extension.

For the above reasons, the application is dismissed.

Hal Logsdon
Rental Officer