



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPC, OPR

### Introduction

These hearings were convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by the Applicant on October 25, 2016. The Applicant applied for an Order of Possession as a result of a 1 Month Notice to End Tenancy for Cause (the “1 Month Notice”).

### Preliminary Issues

The parties appeared before a different Arbitrator on December 14, 2016. That hearing was adjourned to reconvene in this hearing. The Arbitrator who conducted the December 14, 2016 hearing explained the reasons for the adjournment in an Interim Decision dated December 22, 2016 issued to the parties. As the previous Arbitrator did not hear any evidence in this case, and was therefore not seized of the matters, the file was scheduled to reconvene at the earliest possible date with me in this hearing.

The Applicant and legal counsel for the Respondent appeared for the reconvened hearing and provided affirmed testimony. I confirmed with the parties that the evidence the Applicant was required to provide was now before the Respondent. The Respondent’s legal counsel confirmed receipt of five photographs prior to this hearing and the Applicant confirmed that she was only relying on these five photographs which she labelled as her digital evidence.

The Applicant also amended her Application on January 3, 2017 to request an Order of Possession based on a notice to end tenancy for unpaid rent. The Respondent’s legal counsel confirmed that while she received the Applicant’s amended Application, the notice to end tenancy for unpaid rent had not been served to either the Respondent or the Respondent’s legal counsel. I also noted that a copy of the notice to end tenancy for unpaid rent was also not provided to the Residential Tenancy Branch by the Applicant with the amended Application.

The hearing process was explained to the parties and they had no questions about the proceedings. At the start of the hearing, the Respondent's legal counsel submitted that there was no tenancy that had been established in this dispute as this was a common law dispute between the parties.

As a result, I first turned my mind to the issue of whether *the Residential Tenancy Act* (the "Act") has jurisdiction in this dispute before I made any legal findings on the Application. As a result, both parties were given a full opportunity to present evidence, make submissions to me, and cross examine the other party on the evidence relating to the issue of jurisdiction in this matter.

### Issue to be Decided

Have the parties established a tenancy that comes under the jurisdiction of the Act?

### Evidence and Background

The Applicant testified that this oral tenancy started in approximately March 2010. No tenancy agreement was signed but the Respondent was required to pay rent in the amount of \$550.00 on the 15<sup>th</sup> day of each month. No security deposit was requested or paid by the Respondent.

The Respondent's legal counsel submitted that the dispute property was purchased by the Applicant and the Respondent together as they were in a common law relationship. The Respondent and the Applicant each put down \$6,000.00 as part of a down payment towards the purchase of the property.

The Respondent's legal counsel submitted that the monthly payment the Applicant refers to is the monthly mortgage that the Respondent pays for the property. The Respondent pays his portion to the Applicant who then in turn pays the bank the full payment after adding in her share.

The Respondent's legal counsel submitted that this is the reason why the monthly mortgage payment is payable in the middle of the month rather than the first month which is typical of most tenancy situations. The Respondent's legal counsel submitted that there was never any intention or indication given to the parties that this was a residential tenancy, rather this is a common law dispute between the parties and the Applicant is using the 1 Month Notice to evict the Respondent out of the home.

The Respondent's legal counsel stated that she did not have sufficient time to gather bank records showing that the payments made by the Respondent were not made towards rent but towards the purchase of the home as mortgage payments.

The Applicant was asked to respond to the Respondent's legal counsel's submissions. The Applicant testified that she was not in a common law relationship with the Respondent but they were friends. The Applicant testified that she brought the property by herself in January 2010 and lived there for two to three months after she purchased it with the Respondent. The Applicant confirmed that for this time they shared the kitchen and bathroom as friends.

The Applicant testified that she worked from a different province and would often come back in the summer months to reside at the property with the Respondent as she liked to go fishing. The Applicant testified that when she planned to come back to the property during the summer months of each year she would just call the Respondent and inform him of the date that she was returning.

### Analysis & Conclusion

Policy Guideline 9 to the Act on Tenancy Agreements and Licences to Occupy explains when a tenancy under the Act has been entered into. It also lists a number of conditions an Arbitrator may consider surrounding the occupation of the premises and what the parties intended in the circumstances. The guideline states that some of the factors that may weigh against finding that a tenancy exists between the parties are as follows:

- Payment of a security deposit is not required.
- The owner, or other person allowing occupancy, retains access to, or control over, portions of the site.
- The occupier pays property taxes and utilities but not a fixed amount for rent.
- The owner, or other person allowing occupancy, retains the right to enter the site without notice.
- The parties have a family or other personal relationship, and occupancy is given because of generosity rather than business considerations.
- The parties have agreed that the occupier may be evicted without a reason, or may vacate without notice.

Furthermore, Section (4) (c) of the Act stipulates that the Act does not apply to living accommodation where the Respondent shares bathroom and kitchen facilities with the owner of that accommodation.

Based on the foregoing provisions of the Act and the factors provided by the policy guideline, I make the following findings using the oral evidence of the parties on the balance of probabilities. The parties did not signed or complete a written tenancy agreement and neither did the parties exchange a security deposit. These factors alone would have weighed heavily in finding that a tenancy had been established in this dispute.

I am not prepared to make any findings on whether the Respondent expressed an interest that went beyond that of landlord/tenant relationship. Certainly, payment made by the Respondent towards a down payment or towards the mortgage on the property would suggest this was the case. However, based on the lack of documentary and supporting evidence provided by the parties to suggest otherwise, I am unable to conclusively determine the ownership issues in this dispute.

The fact that the Applicant retains the right to go back to the property at any time she chooses without giving any prior notice of entry or ending of the tenancy suggests that a tenancy has not been established between the parties. Furthermore, I find that the Act would not apply in this case because when the Applicant does visit the property, the Applicant and the Respondent share kitchen and bathroom facilities. In this case, the Act does not apply to this type of living arrangement.

Based on the foregoing factors, I must decline jurisdiction in this matter. The Applicants are at liberty to seek alternative legal remedies to address their dispute.

### Conclusion

For the reasons set out above, I decline jurisdiction in this matter. This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: January 24, 2017

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Residential Tenancy Branch