



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      OPT

### **Introduction**

This expedited hearing dealt with the applicant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- an order of possession of the rental unit pursuant to section 54; [OPT]

All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The applicant testified, and the respondent confirmed, that the applicant served the respondent with the notice of dispute resolution form and supporting evidence package. The respondent testified, and the applicant confirmed, that the respondent served the applicant with her evidence package. I find that all parties have been served with the required documents in accordance with the Act.

### **Procedural History**

The hearing was originally convened by telephone conference call on August 18, 2022 at 9:30 a.m. and was attended by the applicant and the respondent. All testimony was affirmed. The hearing was subsequently adjourned when the respondent testified, she did not receive the Notice of Dispute Resolution Proceeding Package and the applicant's accompanying evidence. The first she was made aware of the hearing was from an email she received from the RTB. She then quickly uploaded her documents prior to the hearing.

This application is under Rule 10 of the Rules of Procedure for an expedited hearing to be heard on short notice to the Respondent. Expedited hearings are for emergency matters, where urgency and fairness necessitate shorter service and response times.

Rule 10 sets out the rules for service by the applicant in applications of this type. Within one day of the Notice of Dispute Resolution Proceeding Package being made available by the RTB the tenant must serve the landlord with stated documents including the Notice of Dispute Resolution Proceeding and evidence.

The applicant in his application under "notice of delivery method" wrote "posted on the door". At the hearing, the applicant testified that he put the documents in the mailbox of residential address (M) despite testifying that the respondent did not live at the address. He stated that she was regularly at address (M) and delivered the mail to the occupants

in person. The applicant did not provide a witnessed Proof of Service of Expedited Hearing on the prescribed RTB form.

I was not satisfied based on the evidence provided that the respondent received the hearing package. I did not find the applicant's testimony about service compelling because the applicant could not provide clear and consistent testimony about what was served when or how. The application evidence suggested the applicant posted the information on the door, but the applicant testified he placed it in the mailbox.

The hearing was adjourned, and the applicant was directed to provide the respondent with his evidence package within 48 hours from the date of the adjourned hearing. Both parties were cautioned that no new evidence was to be submitted nor would it be accepted. Both parties were notified that a notice of adjournment would be attached to the interim decision detailing the new date and time for the rescheduled hearing.

### **Preliminary Issue: Jurisdiction**

Jurisdictional issues were brought up at the outset of these proceedings by the respondent. The respondent testified that she owns two (2) properties (M) and (CBW): the property where the applicant was living (M) and a condo where her boyfriend lives (CBW) and she stays two (2) to three (3) days per week.

The respondent argued that the RTB does not have jurisdiction to adjudicate this dispute because she resides at the house located on (M).

In a written submission dated August 14, 2022, the respondent writes:

Considering I am sharing the access, kitchen and living rooms with A. our dispute shall not be discussed under BC Tenancy Act. Please refer to the Appendix A for the photos of my shoe cabinet and washrooms at (M) for the photo of the shard kitchen. Appendix C shows the gas bill under my name. Appendix G shows a statement of another roommate living with me and A at (M).

I had a boyfriend whom I spent 2-3 days a week with. However, I lived at (M) more than half time per week.

In addition to the letter, the respondent submitted a signed statement from one of the roommates at the (M) property confirming that the "kitchen and living rooms were shared by A, YZ and me." The respondent submitted pictures of a shoe rack showing women's shoes; a bathroom with various products on the vanity; and pictures of a fully functioning kitchen at property (M) as additional evidence that she lives at the (M) address.

The respondent submitted a Fortis bill in her name at that address. A text message exchange between the respondent and applicant prior to the start of the tenancy submitted into evidence by the applicant reads as follows:

“Utiliss and Wi-Fi all included” [applicant] [reproduced as written]

“need gas....gas, Yes, in winter, everyone pays  $\frac{1}{4}$  of the gas, two people upstairs, you and I split the four....gas....all included...In addition to gas all included....” [respondent] [reproduced as written]

The applicant argued that some of the text messages only referenced two people upstairs and himself as sole occupants of the (M) address and the respondent never mentioned that she also lived at the (M) address; however, the text about the gas bill in the chain of text messages is clear that the gas bill is split equally 4 ways: between the three (3) occupants and the respondent. Further, the respondent counter argued that since she was the owner, not a renter, she did not include herself as a ‘renter’ in the earlier text message chain. She only referenced the two roommates that rent upstairs rooms from her and the applicant.

Although the applicant stated that he “never” saw the respondent in the (M) residence, yet he left the Notice of Dispute Resolution package either in the mailbox or posted to the door of the (M) address. He testified he did so because the respondent regularly delivered the mail to the occupants. This information contradicts the applicant’s testimony that he “never” saw the respondent at the (M) residence. Further, the respondent explained that she is a consultant who regularly does business in China. The time difference requires that she often remain in her office in the evenings and into the early morning hours. She stated that the reason the applicant did not see her at the residence often is because she arrives in the early morning hours, goes to sleep, and wakes up after the applicant has left the residence.

When asked, the respondent confirmed that the address on her driver’s licence is her other property/residence (CBW), the one she shared with her boyfriend; however, due to her office hours and not wanting to disturb her boyfriend who works during the day, she decided to live primarily at the (M) residence. She only stays at CBW two (2) to three (3) times per week.

According to the text messages between the respondent and the applicant, access to the kitchen facilities were limited to the fridge and microwave. “Everyone can cook without the kitchen and use the refrigerator and microwave oven.” [emphasis added]

To assist me in determining if the limitations referenced in the text message precluded defining the shared space as a “kitchen”, I reviewed the municipal zoning bylaw. The zoning bylaw defines a kitchen as follows:

Kitchen means a space with facilities for the preparation or cooking of food, and includes any room containing counters, cabinets, plumbing or wiring which taken together, may be used for the preparation or cooking of food.

While I am not bound by the municipality's definition of "kitchen", I am guided by the definition and find the definition reasonable. The applicant and respondent confirmed the applicant had access to the microwave oven and refrigerator and a place to prep food. The respondent submitted a photo of the kitchen facilities into evidence. I find the applicant had access to a kitchen: a space utilized and intended for the preparation or cooking of food.

Taking into careful consideration the oral testimony and documentary evidence before me and applying the law to the facts, I find on a balance of probabilities that the respondent has met the onus of proving that she (as owner) and the applicant shared living accommodations with common kitchen facilities as defined under s. 4 (c) of the Act. I do not have the jurisdiction to resolve disputes between an owner, who resides on the premises, and an occupant who share kitchen and/or bathroom facilities.

### **Analysis**

Section 4 (c) of the Act, outlines a tenancy in which the Act does not apply:

- 4** This Act does not apply to
  - (c) living accommodations in which the tenant shares a bathroom or kitchen facilities with the owner of that accommodation,

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. In other words, under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

It is undisputed that the respondent owns the rental unit. I find that the respondent proved, on a balance of probabilities, that she lived at the same address as the rental unit. Even if the respondent stayed at other residences during the tenancy, her belongings were at the house, and she paid ¼ of the gas bill. While submitting the Fortis bill in and of itself is less persuasive of proof of residence, this evidence taken in concert with the text messages between the applicant and respondent about how the gas bill is parceled, persuades me that the respondent resides at the (M) address.

I have also considered the respondent's simple acknowledgement that her driver's licence lists her primary residence as (CBW) but that circumstances required her to relocate to (M). The respondent's driver's licence was not uploaded into evidence, but

the respondent answered honestly and provided a plausible explanation for the discrepancy.

I accept the respondent's testimony that her work hours are such that when she arrived home, the applicant was asleep and when the applicant left for the day, she was asleep. I find the respondent is not required to be cooking or in the kitchen or awake at the same time as the applicant to prove she lives there.

The respondent's residency is further supported by the written letter of another occupant of the house confirming that the respondent lives at that address.

The Act specifically excludes the owner of a rental unit who shares kitchen and/or a bathroom with occupants. Taking into careful consideration the oral testimony and documentary evidence before me and applying the law to the facts, I find on a balance of probability that the respondent has met the onus of proving that she (as owner) and the applicant shared living accommodations with a common kitchen facility. Accordingly, I find that I am without jurisdiction and unable to consider the applicant's application as it is excluded by section 4 (c) of the Act.

For the above reasons, I find that this is not a matter within the jurisdiction of the Residential Tenancy Branch. Accordingly, I decline jurisdiction over the applicant's application.

**Conclusion:**

I decline jurisdiction over the applicant's application. I make no determination on the merits of the applicant's application.

Nothing in my decision prevents either party from advancing their claims to a different forum of competent jurisdiction to settle the dispute.

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: August 29, 2022

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Residential Tenancy Branch