



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

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## **DECISION**

Dispute Code: OPT

### **Introduction**

The applicant seeks an order of possession under the *Residential Tenancy Act* (the “Act”). Whether the applicant and respondent’s legal relationship in respect of the property in question falls under the jurisdiction of the Act is the primary issue.

Attending the hearing were the applicant, their legal advocate, and the respondent.

### **Preliminary Issue: Jurisdiction of the Act**

### **Background and Facts**

The applicants argue that the property is not a vacation or travel accommodation and thus their dispute falls within the jurisdiction of the Act. Conversely, the respondents argue that the property is living accommodation occupied as vacation or travel accommodation and thus is excluded from the jurisdiction of the Act.

The property is a furnished two-bedroom, one-bathroom condo with a full kitchen. It is located on the shores of beautiful Osoyoos Lake. The property is one of many condominiums and townhouse-like properties contained within a larger resort hotel. There is a shared common area which includes a swimming pool, a hot tub, a conference room, and an entrance lobby.

In the fall of 2021, the applicant contacted the respondent through VRBO, in search of a place to rent. The property was listed on VRBO. The applicant (the daughter M.L.) sent the following inquiry to the respondent through VRBO on October 2, 2021 at 12:27 PM:

Hi [respondent J.R.], I am looking to rent a condo from Nov 1 to May 1 and wanted to know if this one was still available? It would be for myself (45) and my mother (71). We travel to Osoyoos every winter and this looks like it would be suitable for 2 people. We can pay \$45 per night all in, plus the cleaning fee. Please let me know. Thanks in advance, [applicant].

The parties then entered into a contract whereby the applicant rented the property from November 1, 2021 until April 30, 2022. The monthly “rent” was \$1,350.00. There was also a cleaning fee of \$100.00 and a deposit of \$500.00. All of this information was contained on an invoice dated October 15, 2021. The term of the stay is noted on the invoice as “Period covered: November 1, 2021 to April 30, 2022”. The amount to be paid for this period is written on the invoice as “Cost of rental (6 months x 1350.00 per month). At the bottom of the invoice is a statement “Thank you for choosing to stay with us. We know you will enjoy your time in Osoyoos.”

The parties apparently moved their transaction outside of the VRBO system because VRBO requires the entire amount for a rental to be paid at once, and the respondent agreed to allow the applicant to pay the amount monthly. The respondent had “no reason to believe” that the applicants did not want to rent for any reason other than as a vacation rental over the winter. The respondent noted that the applicants began to experience difficulty paying rent in mid-February, and the applicants indicating that they would end up leaving at the end of February.

On March 1, 2022 the applicant asked the respondent (at 7:51 AM) if they could do the walk-through inspection at 1:30 PM. At 10:22 AM the applicant sent another text to the respondent: “I am hoping 1:30 is good then. We are packing up and hope to move everything soon”. Shortly after, the applicant sends a further text in which she then tells the respondent, “Hi [respondent] so we have decided that we are going to stay on as we had agreed. Its too much stress on us to move right now both physically [remainder of text severed].” The respondent answers, explaining that new people are renting the property that evening. After that, the applicant says, “I’m sorry but under the Residential Tenancy Act we are considered renters and we have rights.”

The respondent argued that the property is a vacation or travel accommodation because (1) the property is located in an area zoned for “Tourist Commercial Uses” by the municipality, (2) the property is in a hotel resort, (3) there is a lobby for guests, (4) there is no tenancy agreement, only a booking confirmation, (5) the invoice clearly shows a cleaning fee, (6) there are no keys given, rather, access is by a keypad, (7) the respondent pays GST and operates the property as a vacation rental, (8) the applicant had provided a fixed address when she requested to rent, and (9) the property was listed on a vacation rentals website, namely, VRBO.

The applicant and their advocate argued that factors that weigh in favour of this not being a vacation rental are the length of time. The advocate argued that the period of November to May is longer than a vacation rental period.

The applicant had primary occupancy at the property and did not maintain a residence elsewhere, and the applicant had exclusive possession other than cleaning services. As for the supposed Vernon home to which the respondent said was the applicant's home, the applicant testified that she had no other home. The Vernon address was a mailing address only. The applicant argued that while they initially contacted the respondent through VRBO, and knew it was a vacation rental site, they have used VRBO as their primary method for finding accommodation in this particularly tight housing market.

In terms of recent events, the respondents sought to enforce their rights under the *Hotel Keepers Act*, RSBC 1996, c. 206. They changed the access keycode to the property and have essentially expelled the applicants from the property. The applicants have, since July 14, been living elsewhere in a hotel.

## **Analysis**

Section 4(e) of the Act states that "This Act does not apply to [...] living accommodation occupied as vacation or travel accommodation".

*Residential Tenancy Policy Guideline 27. Jurisdiction*, (version July 2021) states the following in respect of vacation or travel accommodation:

The RTA does not apply to vacation or travel accommodation being used for vacation or travel purposes. However, if it is rented under a tenancy agreement, e.g. a winter chalet rented for a fixed term of 6 months, the RTA applies.

Whether a tenancy agreement exists depends on the agreement. Some factors that may determine if there is a tenancy agreement are:

- Whether the agreement to rent the accommodation is for a term;
- Whether the occupant has exclusive possession of the hotel room;
- Whether the hotel room is the primary and permanent residence of the occupant.
- The length of occupancy.

Even if a hotel room is operated pursuant to the Hotel Keeper's Act, the occupant is charged the hotel room tax, or the occupancy is charged a daily rate, a tenancy agreement may exist. A tenancy agreement may be written or it may be oral.

While the parties have included previous Residential Tenancy Branch decisions dealing with vacation rentals, I need not consider those and do not making any findings of law based on those decisions (see section 64(2) of the Act).

In this dispute, the applicant contacted the respondent through the website of a business whose sole purpose is providing bookings for vacation and travel accommodations: VRBO. That is, “**Vacation Rental** By Owner.” (My emphasis.) The property was listed on a travel and vacation rental website. The applicant’s inquiry of October 2, 2021 conveyed that the applicant was looking to rent a condo for a specific period of time, and that “We travel to Osoyoos every winter”. The applicant offered to pay a per nightly rate of \$45. Plus, they offer to pay a cleaning fee.

The invoice sent to the applicants also makes it clear that the property being rented is travel accommodation. The cleaning fee is included. The applicant’s notation on the invoice whereby the “cleaning fee of \$100, this was not an agreed upon term and was added by the landlord after without notice” is, I find, rather suspect, given that the applicant herself offered to pay a cleaning fee in her initial inquiry.

It is not until the period of the rental is at its end do the applicants make a complete turn (within a matter of hours) and only then attempt to assert their supposed rights as tenants under the Act. I find this eleventh hour conduct on the applicants’ part an attempt to avoid their obligations under the contract to vacate the property at the end of their rental period. Moreover, at no point at any time before then do the applicants assert that the vacation property is anything but a vacation rental.

The applicants initially agreed to rent the accommodation for a term of six months. They expressly indicated that they “travel to Osoyoos every winter” which suggests the six-month term coincides with their “travel to Osoyoos.” The reference to winter further suggests it is a vacation rental. Indeed, the respondent could have come to no other conclusion that the applicants intended to rent the property as any other vacationer. Despite what previous Residential Tenancy Branch decisions may have found, the expressed intentions of the parties at the formation of the contract are important and they must be considered.

The applicants had possession of the property, but they did not, I find, have *exclusive* possession. The applicants’ advocate submitted that they have exclusive possession “other than cleaning.” This would suggest that, as is the case with any other vacation or travel hotel-like accommodation, cleaning maids have almost-unrestricted access to the property.

This type of access is not consistent with the type of restricted access found in sections 29 and 30 of the Act in residential tenancies.

While both parties disputed whether the applicants had some other permanent residence (the respondent believed it to be in Vernon, while the applicants remarked that this was a mailing address only), I do not find this factor to be determinative of whether the property is a vacation or travel accommodation.

Last, I do not find that the length of the rental period of six months is a determinative factor. The applicants' advocate argued that a period of six months is "longer than a vacation" period of time but provided no basis on which this would be found to be the case. Indeed, the applicants themselves indicated to the respondents that they "travel to Osoyoos every winter", again suggesting that they would not, therefore, be settling into any sort of permanent occupation of the property.

In short, it is my finding that the living accommodation for which the applicants seek an order of possession are living accommodation occupied as vacation or travel accommodation. As such, pursuant to section 4(f) of the Act, the contractual relationship between the parties in respect of the living accommodation is not governed by the Act.

### Conclusion

For the reasons given above, it is my finding that I am **WITHOUT JURISDICTION** to consider the application for dispute resolution.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: August 26, 2022

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Residential Tenancy Branch