

27. Jurisdiction

Jan-04

This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This Guideline may be revised and new Guidelines issued from time to time.

The issue of the jurisdiction of an arbitrator appointed under the *BC Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation) can arise in two ways:

A. Constitutional Jurisdiction: Does the provincial legislature under the *Constitution Act* have the constitutional authority to enact a statute which can affect the relationship between the parties who are before the arbitrator?

B. Statutory Jurisdiction: Does the statute confer upon the arbitrator the statutory authority to hear the dispute between the parties or to make the requested order?

A. CONSTITUTIONAL JURISDICTION

The first issue is complex and, for the most part, beyond the scope of this guideline. The only issue which will be addressed in this guideline, as a matter of constitutional authority, is Indian Lands. A brief discussion of the basis of the jurisdiction follows: In 1982 the *Constitution Act* continued the rights and powers originally enacted under the *British North America Act* of 1867, except that the *Constitution Act* added the Charter of Rights and Freedoms. Those statutes provide that Canada is a federal state with multiple levels of government. Each level of government has its own powers and responsibilities as set out in sections 91 and 92 of the *Constitution Act*. With some exceptions, one level of government cannot legislate within the sphere of the other level, except to "incidentally affect" that other level of government's power. If a level of government purports to legislate within the other's sphere, the courts will hold the legislation either invalid or inapplicable to the facts in dispute.

1. Indian Lands

Section 91 of the *Constitution Act* confers the jurisdiction over federal lands to the federal government. The Legislation are acts of the provincial legislature. The case law makes it clear that provincial legislation cannot affect the "use and occupation" of Indian Lands because that power belongs to the federal government under section 91.

The Legislation governs residential tenancy agreements within British Columbia. Since a tenancy agreement is an interest in land, any part of the Legislation which affects the use and occupation of Indian Lands does not apply to the rental unit or manufactured home site which is in dispute. Examples of sections in the *Residential Tenancy Act* which could affect the use and occupation of Indian Lands, and therefore may not apply to premises on Indian Lands, are sections 27 (order respecting a service or facility), 44 (notice to end the tenancy agreement) and 54 or 55 (order of possession). Equivalent sections in the *Manufactured Home Park Tenancy Act* are sections 21, 37 and 47 or 48.

27. Jurisdiction

Jan-04

The situation is less clear for disputes which do not affect the use and occupation of Indian Lands but which are nonetheless governed by the Legislation. A monetary claim for damages or rent arrears under the Legislation may not affect the right to the use and occupation of Indian Lands, particularly if the tenancy agreement has ended. In one case a landlord and tenant in dispute over a monetary claim were found to be subject to the BC *Residential Tenancy Act*. Worth noting, however, is that both the landlord and tenant were non-Indians. In another case a dispute over a rent increase was found not to affect the use and occupation of Indian Lands.

Until the issue respecting monetary claims is clarified by the courts, parties to arbitration are cautioned that an arbitrator may refuse jurisdiction if the arbitrator finds that the nature of the dispute could affect the use and occupation of Indian Lands.

B. STATUTORY JURISDICTION

The Legislation does not confer upon an arbitrator the authority to hear all disputes regarding every type of relationship between two or more parties. The arbitrator only has the jurisdiction conferred by the Legislation over landlords, tenants and strata corporations. There may be a problem with the arbitrator's jurisdiction in the following relationships between the parties:

1. EXCLUDED JURISDICTION

a. Generally

The *Residential Tenancy Act*¹ provides that the Act applies to tenancy agreements, rental units and other residential property. The definition of tenancy agreement in the *Residential Tenancy Act* provides that the Act applies to a license to occupy. Section 4 of the Act contains a list of accommodation and agreements to which the Act does not apply. An arbitrator will therefore decline jurisdiction, and refuse to hear the dispute, if the accommodation or agreement is listed in section 4.

The *Manufactured Home Park Tenancy Act* does not include a license to occupy a manufactured home site in the definition of a tenancy agreement. See Guideline 9 for information regarding a license to occupy as distinct from a tenancy agreement.

b. Hotel Tenants

Occupancy of a hotel is a license and if occupied pursuant to a tenancy agreement, the *Residential Tenancy Act* assumes jurisdiction and confers power upon the arbitrator over certain hotels and hotel tenants. An arbitrator will therefore hear the dispute if the tenant is a hotel tenant under a tenancy agreement.

The Act would not apply to living accommodation owned or operated by an educational institution and provided to students or employees of the institution because they would

¹ *Residential Tenancy Act*, s. 2

27. Jurisdiction

Jan-04

be excluded by section 4. In addition, a hotel is not a facility in which the owner of that accommodation shares kitchen or bathroom facilities because they are also excluded from the *Residential Tenancy Act* by section 4.

So, for example, if the facility is operated by a university and provided to students of the university, the tenant who is a student of that university may otherwise meet the requirements of the Act, but the arbitrator will likely decline jurisdiction and refuse to hear the dispute. This is because the relationship between the parties has been excluded by section 4. On the other hand, rental accommodation operated by the university but not provided to students or employees of the university would be included in the Act.

On the other hand, if the tenant resides in shared accommodation, which is a license to occupy, the arbitrator will assume jurisdiction and hear the dispute if the tenant satisfies the requirements of section 2.

c. Travel Trailers and Recreational Vehicles

If the residential premises consist of a travel trailer or a recreational vehicle in a recreational vehicle park, the agreement between the parties may well be included in the *Residential Tenancy Act* if they meet the requirements of section 2. Each case will turn on its particular circumstances and it is possible that the relationship is not a tenancy and not included in the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (see Guideline 9).

A similar question arises where the dispute is between the owner of the floating home and a person who has rented the floating home from the owner. The issue will be whether the parties have entered into a tenancy agreement included in section 2 of the *Residential Tenancy Act*. Such rental agreements are a license to occupy. While a license to occupy is included in the *Residential Tenancy Act*, a floating home does not meet the definition of a "rental unit" in section 1 of that Act. Since the rental of a floating home is a license to occupy, the *Manufactured Home Park Tenancy Act* would not apply.

2. VACATION ACCOMMODATION

The *Residential Tenancy Act*² provides that the Act does not apply to vacation or travel accommodation. However; the Act would apply to summer cottages and winter chalets that are rented other than on a vacation or travel basis. For example, a winter chalet rented for a fixed term of one year is not rented on a vacation basis.

3. COOPERATIVES

If the landlord is a cooperative and the tenant is a member of the cooperative, the *Residential Tenancy Act*³ would not apply to a dispute which arises between them.

² RTA, s. 4

³ RTA, s. 4(a)

4. TENANCY AGREEMENTS EXCEEDING TWENTY YEARS

The *Residential Tenancy Act*⁴ excludes from the Act tenancy agreements with a term longer than twenty years. Two or more agreements which provide for a total term exceeding twenty years may be an agreement exceeding twenty years.

If the landlord complies with the steps set out in the sections referred to above, that does not mean that the *Residential Tenancy Act* applies to the relationship between the parties. It means only that the landlord has complied with the statutory requirements to enter into a valid agreement. For historical reasons, the Act does not otherwise apply to residential tenancy agreements with a term exceeding twenty years and the arbitrator will likely decline jurisdiction over any dispute between the parties.

5. TRANSFER OF AN OWNERSHIP INTEREST

If the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply as the parties have not entered into a "Tenancy Agreement" as defined in section 1 of the Acts. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are changing hands are part of the purchase price, a tenancy agreement has not been entered into.

Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Acts, is the right to possession of the residential premises. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In such a case the arbitrator may again decline jurisdiction because the Acts would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Acts may apply and the arbitrator may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

6. COMMERCIAL TENANCIES

The *Residential Tenancy Act*⁵ provides that the Act does not apply to living accommodation included with premises that

- (i) are primarily occupied for business purposes, and
- (ii) are rented under a single agreement

4 RTA, s. 4(i)

5 RTA, s. 4(d)

27. Jurisdiction

Jan-04

Where the premises are used primarily for residential purposes and the tenant operates a home-based business from the premises, this does not mean the premises are occupied for business purposes. The distinction is whether the premises are business premises which includes an attached dwelling unit or whether the premises are residential in nature with a lesser business purpose. The bylaws of a city may be a factor in considering whether the premises are primarily occupied for a business purpose.

For example, if a tenant uses part of the residential premises as an art studio, or operates a bookkeeping business from the home, the Act would apply as the premises are not primarily used for business purposes. However, if the primary purpose of the tenancy was to operate a business, then the Act may not apply and the arbitrator may decline jurisdiction over the dispute. See also Guideline 14 on this topic.

7. OPTING OUT NOT PERMITTED

The Legislation⁶ provides that the parties must submit to arbitration any dispute which is covered by the Acts. Under section 5 of both Acts, the parties may not contract out of or avoid the Acts or their regulations.

If the Legislation does not apply then the parties must pursue their claims in Supreme or Provincial Court.

8. POWER OF THE ARBITRATOR

The power and authority of the arbitrator is derived from the Legislation. The arbitration process does not create a court and so an arbitrator does not have inherent powers arising under the common law which are possessed by a judge. For example, an arbitrator does not have jurisdiction in "equity" to grant some forms of relief that a court may grant.

Similarly, the monetary limit of the arbitrator's jurisdiction is limited to the same amount as the provincial court, the sum of \$10,000 as of the date of the guideline. A claim for money that exceeds that amount must be heard in Supreme Court. An applicant, however, may abandon part of a claim to come within the jurisdictional limits of the arbitrator. In addition, an arbitrator does have the power to hear a claim for the return of goods the value of which exceeds \$10,000.

The provincial court does not have jurisdiction over residential tenancy disputes except in respect of enforcement of monetary orders issued by an arbitrator. The Supreme Court, however, may by order, assume jurisdiction over a residential tenancy matter, in which case the arbitrator loses jurisdiction over that dispute. If the dispute is linked substantially to a Supreme Court action then the arbitrator may decline jurisdiction.

⁶ RTA, s. 58; *Manufactured Home Park Tenancy Act*, s. 51

9. STANDING

a. Strata Corporations

The *Strata Property Act* contains procedures for carrying on and ending a residential tenancy in a condominium development and for the arbitration of disputes.

The *Strata Property Act* contains arbitration provisions in sections 175 to 189. Importantly, the arbitration provisions in the *Strata Property Act* do not apply if the arbitration provisions of the *Residential Tenancy Act* apply. The *Residential Tenancy Act* would apply to disputes between the landlord and the tenant. Similarly, the arbitration provisions of the *Strata Property Act* do not apply if the *Residential Tenancy Act* does not apply and the parties agree that the *Commercial Arbitration Act* will apply.

If the landlord or the strata corporation is ending the tenancy under section 47 of the *Residential Tenancy Act*, as provided by sections 137 and 138 of the *Strata Property Act*, then the arbitration provisions of the *Residential Tenancy Act* would apply. Section 58 of the *Residential Tenancy Act* includes disputes under section 68 which confers the ability of a tenant to apply to set aside a notice to end the tenancy delivered under section 47.

However, under section 177, a dispute between a strata corporation and an owner would be subject to the arbitration provisions of the *Strata Property Act* and an arbitrator under the *Residential Tenancy Act* would likely decline to hear that dispute. Section 177 also provides that a dispute between an owner or tenant and the strata corporation or with another owner or tenant may be heard by arbitration under the *Strata Property Act*. In all cases a dispute can only be referred to arbitration under the *Strata Property Act* if the dispute concerns one of the topics set out in section 177(3). Consequently, if the dispute concerns one of the topics in section 177(3), the arbitration would proceed under the *Strata Property Act*. If the dispute is otherwise within the jurisdiction of the *Residential Tenancy Act*, such as between the landlord and the tenant, an arbitrator under that Act may hear the dispute. The topics listed in section 177(3) are as follows:

- the interpretation or application of the *Strata Property Act*, the regulations, the bylaws or the rules
- the common property or the common assets
- the use or enjoyment of a strata lot
- money owing, including money owing as a fine under the *Strata Property Act*, the regulation, the bylaws or the rules
- an action or threatened action by, or decision of the strata corporation, including the council, in relation to an owner or tenant
- the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

If the arbitration provisions of the *Strata Property Act* apply then the arbitration proceeds under sections 175 to 189 of that Act. If the *Residential Tenancy Act* applies then sections 58 to 78 of the *Residential Tenancy Act* apply.

27. Jurisdiction

Jan-04

Some disputes may arise and be heard by an arbitrator under the *Residential Tenancy Act* which arise from the *Strata Property Act*. Disputes which would fall within the jurisdiction of an arbitrator under the RTA arising from the *Strata Property Act* include:

- A claim by a tenant against the landlord for moving expenses under section 67 of the *Residential Tenancy Act* pursuant to sections 145 or 146 of the *Strata Property Act*.
- An application to set aside a notice to end the tenancy delivered by either a landlord or a strata corporation under section 47 of the *Residential Tenancy Act* pursuant to sections 137 or 138 of the *Strata Property Act*.

If an owner of a strata lot fails to perform repairs as ordered by a local public authority, including an arbitrator under the *Residential Tenancy Act*, the strata corporation may perform the repairs under sections 84 and 85 and look to the owner for repayment. However, since the jurisdiction of an arbitrator under the *Residential Tenancy Act* arises from the tenancy agreement, an arbitrator under the *Residential Tenancy Act* does not have jurisdiction to order a strata corporation to perform repairs to common property.

The Supreme Court also has jurisdiction under sections 164 and 165 of the *Strata Property Act*, on application brought by a tenant or an owner of a strata lot, to make an order against the strata corporation.

b. Guarantors

If a person guarantees the performance of the tenancy agreement as a signatory to the agreement, the other party may pursue the guarantor on the tenancy agreement by filing an Application for Arbitration against that person. The other parties to the tenancy agreement may be, but need not be, joined in the application.

If, however, the guarantor signs a separate document of guarantee and is not therefore a party to the tenancy agreement, the Legislation does not apply to claims in debt arising under the separate document and therefore outside the tenancy agreement. The arbitrator would not have jurisdiction to hear that claim.

Worth noting is that the *Law and Equity Act*⁷ requires that, to be enforceable, a guarantee must be evidenced in writing and signed by the guarantor

⁷ *Law and Equity Act*, s. 58(6)