



Order under Section 9(2)  
**Residential Tenancies Act, 2006**

**File Number:** TST-12300-19

**In the matter of:** 309, 295 JARVIS STREET  
TORONTO ON M5B2C2

**Between:** Joseph Da Silva Tenant

**and**

462226 Ontario Ltd. Cob Inglewood Arms Landlord

Joseph Da Silva (the 'Tenant') applied for an order to determine whether the *Residential Tenancies Act, 2006* (the 'Act') applies.

This application was heard by videoconference on April 20, 2021, June 2, 2021 and July 21, 2021.

The Tenant and the Tenant's Legal Representative B. Jowett attended the hearing and the Landlord's Legal Representative M. Tchaboshi and Allen Mernick appeared on behalf of 462226 Ontario Ltd. Cob Inglewood Arms (the 'Landlord') and attended the hearing.

**Determinations:**

1. On November 19, 2019 the Tenant applied to the Board seeking a determination of whether his living accommodation is covered by the *Residential Tenancies Act, 2006*, S.O. 2006, c.17 ('Act').
2. The Tenant takes the position that the accommodation is covered by the Act and the Landlord takes the position that the accommodation is exempt from the Act.
3. The Landlord relies upon subsection 5(a) of the Act which states the following:
  - 5 This Act does not apply with respect to,
    - (a) living accommodation intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period in a hotel, motel or motor hotel, resort, lodge, tourist camp, cottage or cabin establishment, inn, campground, trailer park, tourist home, bed and breakfast vacation establishment or vacation home;
4. In reliance on subsection 202(1) of the Act, the Tenant submits that the Board must look at the true nature of the building and the real substance of the transaction and determine

the nature of the activities, beyond the outward appearance of the building, its use, and signage.

202(1) In making findings on an application, the Board shall ascertain the real substance of all transactions and activities relating to a residential complex or a rental unit and the good faith of the participants and in doing so,

(a) may disregard the outward form of a transaction or the separate corporate existence of participants; and

(b) may have regard to the pattern of activities relating to the residential complex or the rental unit.

### *Background Facts*

#### *Uncontested Facts*

5. The following facts were uncontested by the parties at the hearing:
  - i. The residential complex is licensed as a rooming house with approximately 90 units and has a communal kitchens and bathroom facilities;
  - ii. The Tenant initially rented unit B2 for a short period in September 2009 and then left;
  - iii. The Tenant moved into unit 309 on September 14, 2009, and continues to reside in the that unit ('the rental unit');
  - iv. The Landlord did not enquire of the Tenant how long he would be staying in the rental unit when he began residing there; there was no express termination or vacancy date;
  - v. The Tenant's room was partially furnished when he moved into the rental unit;
  - vi. The Tenant has moved his own furniture and belongings into the rental unit;
  - vii. The Tenant has paid his rent directly to the Landlord and the Landlord has also received rent directly from ODSP; and
  - viii. The Landlord provides cleaning services to residents in the building; the Tenant has never requested or received cleaning services from the Landlord.

#### *The Tenant's Evidence*

6. The Tenant testified that the rental unit is his sole residency since he moved in in 2009. He testified that on the first "stay" at the building he stayed for a short term. He testified that when he returned to the building to rent a room, he intended to move in and stay the long term, "for an indeterminate period" as his personal and primary residence, and that he had explained his situation to Allen Mernick who understood that residing in the rental unit would not be short term. The Tenant testified that he receives his mail at the rental unit and does not own or rent any other accommodations. He testified that the rental unit is his permanent home.

7. The Tenant testified that as he intended to stay in the rental unit, he agreed to sign the ODSP Authorization to Make Payment Direct to Landlord form that was provided to him by the Landlord. He testified that the Form was filled in by the Landlord's Agent and he signed it and the direct payment was received by the Landlord from the Province for his rent. He testified that the form states it is to allow direct payment of rent, authorization of payment does not "effect my responsibilities or obligations as a tenant as set out in the Landlord and Tenant Act." (Exhibits 7 and 8) Approval of the payment arrangement was confirmed by correspondence from the Province to the Landlord dated September 17, 2019. (Exhibit 8) The Tenant testified that to his knowledge ODSP does not pay for vacation accommodations.
8. The Tenant testified that he believed that he was treated as a Tenant as he paid his rent monthly, did not pay taxes on top of his rent, and received written notices of entry from the Landlord prior to their entry into his unit, including notices of entry for pest fumigation and questionnaires regarding whether the units had bed bugs. (Exhibit 11)
9. The Tenant testified that he was provided with an email dated February 13, 2020, addressed to his Legal Representative, from Sara Jackson – City of Toronto, Revenue Services, which states that "295 Jarvis Street is not required to remit the Municipal Accommodation Tax" and that "the property does not appear to be registered with the Greater Toronto Hotel Association". Further, the email states, "... the property is a licensed rooming house..." (Exhibit 13)
10. The Tenant testified that he believes that he is a tenant and that his rental accommodations fall under the Act as he and the Landlord knew this was his only and primary residence and there was no agreement that it would be short term when he took possession of his unit, rather the Landlord was aware that his plan was to stay in the unit long term as he had no other residence.

*The Tenant's Witnesses*

11. The Tenant called Wanda Maclean Walker ('WW') as a witness to testify regarding her knowledge of the residential complex. WW testified that her husband had lived in the building for a long term period years ago. She testified that because they knew of the building, she attempted to get her son housing there and she emailed the Landlord. WW testified that on September 18, 2018 she corresponded by email with Allen Mernick, on behalf of her son and his spouse, regarding whether they could book a room at the building and what facilities were available. She provided her email and the responding email from Allen Mernick, which states "This is a rooming house. Not a hotel." (Exhibit 22) WW testified that her son did rent a room from the Landlord and has resided there since 2018.
12. The Landlord's Legal Representative cross-examined WW regarding her evidence and her motives for testifying at the hearing. In her evidence WW confirmed that there had been an argument between her son and Allen Mernick ('AM') in the past and there was a bad relationship with her son.

13. In his direct evidence, AM testified that he knew WW and has had some difficulties with her son. He testified that he had no knowledge of the email she referenced and did not personally send it to her. He testified that many people at the front desk would have access to the emails and may have responded on his behalf, he could not recall. He testified that he had “pleasant dealings” with WW and doesn’t really know her or her husband.
14. The Landlord also called Peter Hardisty (‘PH’), a Manager with the City of Toronto’s Municipal Licensing and Standards – Multi-Tenant Housing Team Investigation Unit to give evidence. PH testified that he investigates rooming houses in the City of Toronto and is familiar with the Landlord and the property. PH testified that since the mid to late 1980s, the property has been licensed by the City of Toronto as a rooming house; it is not a hotel. He testified that the property has had rooming house licenses every year from 1988 to 2021 and there have been inspections every year, with notes taken for the inspections each year, which were put into evidence with the exception of the years 2014 and 2017 as those notes were missing from his files. (Exhibits 23, 24, 26, 27 and 28)
15. PH testified that a building cannot be both a rooming house and a hotel at that same time; they cannot be licensed for both. He testified that that the Rooming House By-law excludes a room in a hotel from the definition of a dwelling room.
16. In the Tenant’s closing submissions, the Tenant’s Legal Representative states that the Landlord’s follows and meets the requirements of the City’s Rooming House By-laws but does not contest that he does not follow the legal requirements of operating a hotel such as: (a) posting room rates inside of the units per the *Hotel Registration of Guests Act*; (b) post notices of limited liability as per the *Innkeepers Act*; (c) collect or pay the 4% Municipal Accommodation Tax as per the City of Toronto By-law 296-2018; and (d) does not collect or remit GST/HST. The Tenant submits that all of the Landlord’s patterns and activities relating to his legal obligations are consistent with the operation of a rooming house not of a hotel.

#### *The Landlord’s Evidence*

17. Allen Mernick attended the hearing and testified on behalf of the corporate landlord. He testified that he is the sole Director of the corporation, knows the Tenant and has interacted with the Tenant throughout his stay.
18. AM testified that he believed the residential complex falls under the *Inn Keeping Act*, R.S.O. 1990, c. I.7, and when he purchased the property in 1982 it was operating as a private hotel and has consistently operated as a hotel. He testified that the property was registered as a “rooming house” at the request of the City for safety and fire code inspection purposes only and this did not exclude the property from simultaneously being a hotel. He testified that pursuant to Chapter 150.25, the building does not meet the City’s by-law requirements of a rooming house.
19. AM testified that the Landlord is not required to pay accommodation tax. On cross-examination he confirmed that he does not pay tax for the hotel, does not collect HST on

the rents, and that the Landlord is not required to be a part of the Greater Toronto Hotel Association.

20. AM testified that the signage outside of the property states it is the “Ingelwood Arms Hotel” and provides for daily, weekly and monthly rates indicating it is a hotel that offers rooms for the vacationing public. (Exhibit 16) He testified that the building has a front desk reception that is staffed 24 hours a day.
21. AM testified that the building provides short term and long term stays for the vacationing public and is exempt from the Act. AM testified that guests may stay for a day, a week, a month or years as they choose. He testified that out of 90 rooms, 50 to 53 are long term like the Tenant and the rest “come and go in less than 3 months.”
22. AM testified that the Landlord provides furnished rooms, cleaning services and bedding and towels if the guests choose to receive the services. He stated that the Tenant also has a sink in his room. He testified that 24 hour notice for entry into the room is provided not because it is legally required, but rather as a courtesy to the guest. He testified that his guests are also given fumigation notices as a courtesy.
23. AM testified that the rooms are for the vacationing public and are advertised in local newspapers as such, but most of his advertising is word of mouth and flyers he gives to people who come into the building. (Exhibits 14 and 15) He testified that he met with the Tenant at the start of both of his stays at the property and he had the Tenant sign a Guest Registry Card and received proof of identity from him. (Exhibit 4) He testified that the Guest Registry Card clearly states the check in and check out time for their guests. There is no requirement for guests to provide written notice to vacate their rooms. He testified that the Tenant “could leave at any time” and was not bound to a specific notice period to leave, he just had to hand the keys into the front desk.
24. AM testified that he recalled both times the Tenant checked into the building. The first time he said he “split with his wife” and would be there a short time, he prepaid for a week or so and then left and returned a week or two later. He testified the Tenant returned and advised him “it didn’t work out” and he told him he could stay. He testified there was no rental application, no proof of income and did not ask him to have insurance for his belongings. He did not recall whether the Tenant ever said to him that the room was to be rented short term or not.
25. The Landlord testified that he did not ask the Tenant when he was leaving or ending his stay as it “was not his concern or business”. The Landlord’s written closing submissions state that the Tenant “is a traveller given he had left his matrimonial home and understood that IAH is a Hotel given he was not required to provide proof of employment, home, references and a credit report...”
26. AM testified that the Tenant has never asked for linens, towels or soap from the Landlord and he did not recall if the Tenant had ever used the cleaning services offered, but did not recall that he had.

27. AM testified that he believed that he helped the Tenant to obtain his ODSP and the rent was paid directly from ODSP. He believes that his son Aaron filled in the forms for direct payment from ODSP and signed them with the Tenant.
28. AM testified that guests who paid monthly, received a discount on the rent and rent increases were requested due to the cost of expenses going up. He testified that he did not believe that he was required to give notice to increase the rent but did so as a courtesy. He confirmed that in 2019 he provided some of the units in the building with a Notice of Rent Increase form, but due to the Tenant's complaint he did not collect an increase that year.
29. On cross-examination AM confirmed that he was a member of the City's Rooming House Working Group. The 2004 Final Report of group sites him as a member and states the purpose of the group is to "explore rooming houses as affordable housing."

*Analysis*

30. Because the Landlord claims that an exemption to the application of the Act applies, the Landlord has the onus to prove on a balance of probabilities that the circumstances fit within the exemption under section 5(a) of the Act.
31. It was uncontested that the Tenant signed a Guest Registration Card when he arrived and did not sign a tenancy agreement with the Landlord. It was also uncontested that cleaning services and linens are available on the premises, but the Tenant never used these services. While these factors may indicate that the accommodations were for the vacationing public, and therefore not subject to the Act, pursuant to subsection 202(1) of the Act and the case law, I am required to look beyond the outward form of the transaction and have regard the activities of the complex and I am also required to look at the intention of the parties when the Tenant began his occupation of the rental unit.
32. There are several cases in which the Courts have spoken to factors to be considered where there is an exemption to the Act claimed.
33. The Court of Appeal in *Matthews et al. v. Algoma Timberlakes Corporation* [2010] O.J. No. 2710 (ONCA), although I find that the facts were not similar to the present case, stated the general principle that the definition of "rental unit" asks whether the premises are used as residential premises, regardless of what other activities are carried on by the person residing the premises. (para 31) The Court of Appeal considered the Act's exemption with regards to "temporary or seasonal occupation" and held that consideration of the actual use and occupation of the premises must be considered.
34. In the case of *Putnam v. Grand River Conservation Authority* 2006 CANLII 18526 the court stated that there must be consideration of the use of the premises, not just the outward appearance. This is tantamount to the section 202 of the Act.
35. Having reviewed the evidence before the Board, on the balance of probabilities I find the following:

- the residential complex is not licensed as a hotel/motel/Inn but is licensed as a rooming house;
  - the Tenant did not set a departure date when he began residing in the rental unit and was not required to check in or out of his unit after he checked in on September 14, 2009. He was not required to “renew” or “extend” his stay in the rental unit with the Landlord for any period of time;
  - the Tenant paid a monthly rent to the Landlord and rent is paid by ODSP;
  - The Tenant resides exclusively in the rental unit, has no other permanent address, and receives all of his mail there;
  - the Landlord sought rent increases and in at least one year served the Tenant with a Notice of Rent Increase form;
  - the Landlord did not charge taxes to the Tenant on the rent payments and did not pay accommodation taxes; and
  - the Landlord only advertised the rental unit locally and did not advertise or post listings for broader vacationing public.
36. It was uncontested that the Tenant moved into the unit and has brought his possessions and furniture in and is not accessing any of the hotel like services from the Landlord; her receives his mail at the rental unit; and his rent is paid directly to the Landlord by the Government at his registered home address. I would also note that the receipt of services would not automatically exclude an accommodation from the Act, as the Act recognizes many services within the definition of “services and facilities”.
37. On the Tenants evidence, and as the Landlord’s evidence was contradictory and on cross-examination he could not recall, I find that the Tenant is residing exclusively in the rental unit for residential purposes, without any other address, and for an undefined/prolonged period of time when he moved in; there was no evidence led to show that the Tenant was vacationing or occupying the unit on a temporary or seasonal basis. Rather the uncontradicted evidence was that the Tenant had no other home and was advised he could stay at the Inglewood.
38. I find that the occupation of the rental unit by the Tenant was intended to be permanent as he stated he did not have anywhere else to live and moved his furniture and belongings into the unit and has remained there. The Tenant testified he brought in cooking appliances which were used in his unit and he was responsible for and carried out his own cleaning. I find that these factors are more indicative of a residential tenancy than a hotel.
39. Although the length of the Tenant’s occupancy of the rental unit would not alone be determinative of a residential tenancy being subject to the Act, I believe it is also a relevant factor that the Tenant has resided in the unit for approximately 13 years. I find that this period of time and the nature of the occupancy is neither seasonal nor temporary.

40. It was uncontested that the property is licensed as a rooming house and I find that a rooming house is included within the definition of “residential unit” pursuant to section 2 of the Act. I find that the Landlord statement that the property is both a rooming house and a hotel is unlikely on the basis of his own evidence, as the Landlord’s operations do not demonstrate compliance with, or acknowledgement of the requirements for compliance with, the laws governing a hotel or Inn as noted in paragraph 17 above. If the Landlord seeks to be found to be a hotel, the Landlord has the burden to show that they are in fact acting as/operating as if they are a hotel beyond merely checking individuals in and out of the premises and providing some services. The Landlord should show that they conduct themselves in accordance with the legal obligations of a hotel. AM testified that the Landlord has no obligation to pay accommodation tax or charge their guest HST/GST, yet provided no evidence as to why, if they are a hotel, they would be exempt from doing so.
41. I find that AM’s testimony that the Landlord is not subject to Accommodation Taxes and the collection and remittance of HST/GST is contrary to the use of the property as a hotel.
42. AM testified that no lease was signed with the Tenant indicating that no tenancy had been formed. However, the law is clear that a tenancy is more than an application and a signed document; a tenancy can be written, oral or implied. I do not find the lack of an executed tenancy agreement is determinative of the true substance of this transaction or the relationship between the parties.
43. AM testified that no screening was performed on the Tenant or his guests prior to accepting them as guests. However, AM’s testimony was inconsistent and contradictory on this point as he stated both that he does not perform screening on his guests and that he screens guests for the receipt of Ontario Works, as he does not rent to individuals in receipt of Ontario Works.
44. Overall, I found the testimony of the Tenant to be internally and externally consistent. I found the testimony of the AM to be contradictory and inconsistent. In the course of the hearing AM was agitated, took a phone call and left the hearing abruptly for several minutes, and had others in the room with him that were not identified until a female voice was heard speaking to him. As a result, I find that the Tenant’s testimony of his intention to reside in the unit on a long term basis as his primary resident was more credible and on a balance of probabilities was known to the Landlord at the time he rented the room. On this point, as noted above, AM ultimately could not recall.
45. Having considered all of the facts and evidence as outlined above, I find that the real substance of the transaction and the activities in the complex is that of a residential tenancy, not a hotel and hotel guest.
46. On the evidence before me, I find that the Landlord failed to meet the burden of proof that, on a balance of probabilities, the living accommodation is exempt from the Act as it is intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period pursuant to subsection 5(a) of the Act.
47. I would note that in the Landlord’s written closing submissions it is stated that the accommodations should also be exempt pursuant to section 5(f) of the Act as an



“emergency shelter”. No evidence was led by the Landlord in the course of the hearing to support this assertion; it was raised for the first time in the written closing submissions. As there was no evidence to support a finding that the premises are an “emergency shelter” I find that the Landlord has not met the burden of proof to establish this.

48. On the basis of the evidence before me, and having considered the legislation, case law and specifically section 202 of the Act, I find that the Act applies to the living accommodation.

#### Costs

49. In the course of the hearing and by my Interim Order dated June 10, 2021, the parties were advised that submissions on costs regarding the conduct of the Landlord’s Legal Representative in the course of the hearing, were to be received in their closing submissions.
50. The Tenant’s Legal Representative provided written submissions regarding costs and seeks the following costs order: (1) \$200.00 for the adjourned hearing date of April 20, 2021, (2) \$300.00 costs for the Landlord’s Legal Representative’s unreasonable conduct in the hearing, and (3) Board costs in the amount of \$700.00 for the Landlord’s Legal Representative’s unreasonable conduct throughout the hearing.
51. The Landlord’s Legal Representative did not provide submissions as to costs and stated in his closing submissions that he “reserved their submissions as to costs following the decision by the Member.”
52. I would note that by my Interim Order of June 10, 2021 counsel were directed to make submissions as to costs in their closing submissions. That direction and order were not changed or amended, and counsel were not advised that the timing of submissions were optional. As no costs submissions were made by the Landlord’s Legal Representative by the timeline imposed on the service and filing of his written submissions, the decision on costs is made in this order having not received them.
53. Generally, costs may be ordered where a party’s conduct in the proceeding was unreasonable. Subsections 2 and 3 of section 204 of the Act provide that:
- 204(2) The Board may order a party to an application to pay the costs of another party.
- (3) The Board may order that its costs of a proceeding be paid by a party or the party’s paid representative.
54. The Board’s Interpretation Guideline 3 – Costs states that:
- A Member has the discretion to require a party, a party’s agent or a party’s legal representative to pay, as costs, any representation or preparation expenses of another party where the conduct of the party, a party’s agent or a party’s legal representative was unreasonable. Conduct is unreasonable if it causes undue expense or delay and includes the following:

- 5 Any misconduct at the hearing or in the proceeding;
- 6 Raising an issue which is irrelevant to the proceedings and continuing to pursue that issue after the Member has pointed out that it is irrelevant;
- 9 Acting contemptuously toward the Member or showing a lack of respect for the process or the Board;
- 10 Failing to follow the directions of the Member or upsetting the orderly conduct of the hearing; ...

55. Guideline 3 provides guidance on when it is appropriate to order Board costs. Although I am not bound by the Guidelines of the Board, I find them to be helpful and choose to apply them in the present case. Guideline 3 provides considerations for ordering Board costs against a party or their legal representative and states:

The Board expects parties and their paid representatives to act reasonably in pursuing their applications or defending their positions. This includes bringing applications only when there are substantial grounds. It also includes taking all required procedural steps, not taking unnecessary ones and acting in a courteous and orderly way at a hearing.

56. The Tenant seeks costs for the delay incurred for lack of prior notice of the Landlord's adjournment request on April 20, 2021, for the Landlord to seek accommodation. Although I find that the Landlord should have sought an adjournment earlier, and not waited until the day of the hearing, I accept the evidence that it was not predicted that the Landlord would not be available that day due to his on-going health issues and, although the evidence was not substantial, I find it was sufficient to demonstrate the need for an adjournment. The request for costs for the adjournment request is denied.
57. The recording confirms that the Landlord's Legal Representative was argumentative in the proceeding and failed to follow my direction and instructions, caused substantial delay by spent extensive time on repeating questions and issues that were determined by me to not be relevant to the proceedings.
58. Although the Landlord's Legal Representative has a right to make objections to rulings and make appropriate objections in the course of the opposing party's evidence, he is expected to respond accordingly to rulings and directions of the Board.
59. I find that the Landlord's Legal Representative's conduct caused delay in the proceedings by raising irrelevant issues, which he continuing to pursue after I determined they were irrelevant, that he failed to follow my directions numerous times in the course of the hearing and behaved unreasonably with a lack of respect for the Board's processes. This was demonstrated by his insistence in pursing matters that were determined to be irrelevant, by arguing with me in the course of the hearing and stating that if "the decision was not in his favour" he would be appealing the decision. The Landlord's Legal Representative's determination that he would make costs submissions "after the decisions was rendered" rather than in accordance with my order, was another example of his disregard for my direction in the hearing and for my Interim Order.

60. The Landlord's Legal Representative was warned of his inappropriate conduct, the Tenant's Legal Representative raised issues in the course of the hearing regarding the Landlord's Legal Representative's failure to follow direction and resulting delay and he was warned that if it continued and there was continued delay in the proceedings unnecessarily it would result in costs and Board costs being ordered against him. As noted above the Landlord's Legal Representative was told in the hearing and was confirmed in my interim order, that he would be given the opportunity to respond to the request for costs and an order for Board costs in his written closing submissions. However, he chose not to do so.
61. I find that the Landlord's Legal Representative's behaviour was disrespectful to the Board's processes as he refused to follow reasonable direction with respect to the orderly conduct of the hearing. The Landlord's Legal Representative acted without reasonable excuse and wasted Board time and the opposing party's time by causing delay and extending the length of the hearing.
62. I find the Landlord's Legal Representative's behaviour at the hearing was unreasonable conduct and find it a reasonable exercise of my discretion to make an award for costs. Costs to the Board is awarded in the amount of \$150.00.
63. The Tenant seeks cost of the unreasonable conduct of the Landlord's Legal Representative in the course of the hearing due to the delay in the length of the hearing. For the reasons outlined in the preceding paragraphs, costs will be also awarded to the Tenant in the amount of \$150.00.

**It is ordered that:**

1. The Act applies.
2. The Landlord's Legal Representative shall pay to the Tenant the amount of \$150.00 in cost, on or before October 18, 2021.
3. The Landlord's Legal Representative shall pay to the Board the amount of \$150.00 in costs, on or before October 18, 2021.
4. If the Landlord's Legal Representative does not pay the full amounts owing on or before October 18, 2021, the Landlord's Legal Representative shall start to owe interest. This will be simple interest calculated from October 19, 2021 at 2% annually on the balance owing.



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Nicola Mulima  
Member, Landlord and Tenant Board

**October 7, 2021**  
**Date Issued**

Toronto South-RO  
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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.