



Order under Section 21.2 of the Statutory Powers Procedure Act and the Residential Tenancies Act, 2006

Citation: IPPOLITI v MOODREY, 2023 ONLTB 13469

Date: 2023-01-04

File Number: LTB-L-071507-22-RV
(SWL-47843-20)

In the matter of: 1991 OTTAWA STREET
WINDSOR ONTARIO N8Y1R6

Between: Steven Ippoliti Landlord

And

Jessica Knight Moodrey Tenants
Violet Knight

Review Order

Your file has been moved to the Landlord and Tenant Board's new case management system, the Tribunals Ontario Portal. Your new file number is LTB-L-071507-22.

Steven Ippoliti (the 'Landlord') applied for an order to determine whether the *Residential Tenancies Act, 2006* (the 'Act') applies (A1 application).

This application was heard on October 13, 2022 and resolved by order SWL-47843-20 issued on October 20, 2022. The application was dismissed as abandoned as neither party attended the hearing.

On November 15, 2022, the Landlord requested a review of the order and that the order be stayed until the request to review the order is resolved. The Landlord's request alleges that the Landlord was not reasonably able to participate in the hearing.

On November 16, 2022 interim order SWL-47843-20-RV-IN was issued, staying the order issued on October 20, 2022.

This request was heard by way of videoconference on December 1, 2022. The Landlord's legal representative Trevor Scheib and the Tenants attended the hearing. The Tenants spoke with Duty Counsel prior to the hearing.

Determinations: Review Request:

1. The Landlord's request for review asserts that the notice of hearing for the original hearing stated the wrong hearing date and as such, neither party was reasonably able to attend the hearing.



2. The Board's records indicate that on September 23, 2022, the Board issued notice of hearing stating that the hearing would be held on October 18, 2022. However, the matter was in fact listed on a hearing docket for October 13, 2022. Neither party attended on October 13, 2022, and the application was deemed abandoned.
3. Both the Landlord's representative and the Tenants attended the videoconference on October 18, 2022 as per the notice of hearing received and were advised that the matter had been heard on October 13, 2022.
4. Based on the evidence before the Board it is clear that neither the Landlord nor the Tenants was reasonably able to participate in the hearing held on October 13, 2022 as neither party received proper notice of hearing. As such, the Landlord's request for review is granted and the matter was heard de novo (anew).

Determinations: A1 application

5. The Landlord's application is filed pursuant to section 9(1) of the *Residential Tenancies Act, 2006* ("Act") which states:
 - 9 (1) A landlord or a tenant may apply to the Board for an order determining,
 - (a) whether this Act or any provision of it applies to a particular rental unit or residential complex;
 - (b) any other prescribed matter.
6. The Landlord asserts that the rental unit is exempt from the Act pursuant to section 5(h) of the Act which states:
 - 5 This Act does not apply with respect to,
 - (h) living accommodation located in a building or project used in whole or in part for non-residential purposes if the occupancy of the living accommodation is conditional upon the occupant continuing to be an employee of or perform services related to a business or enterprise carried out in the building or project;
7. At the hearing, the parties confirmed that the Tenants are not employees of the Landlord, nor is there a clause in the tenancy agreement stating that their occupancy is conditional upon providing services in the residential complex. As such, the section 5(h) exemption does not apply to this tenancy.



8. Although not plead on the application, at the hearing I advised the parties that I would consider submissions about whether the rental property is exempt pursuant to section 5(j) of the Act which states:

5 This Act does not apply with respect to,

- (j) premises occupied for business or agricultural purposes with living accommodation attached if the occupancy for both purposes is under a single lease and the same person occupies the premises and the living accommodation.

Evidence:

9. The rental property is a detached dwelling consisting of two units. The front unit is a restaurant, and the rear unit is used for residential occupation. Although connected, both units have their own separate entrances. The Landlord owns the entire rental property.
10. The parties signed a lease agreement on February 1, 2019. The monthly rent is \$2,130.00 per month for the entire property. Paragraph 3 of the lease agreement titled 'use' and the attached 'schedule A' indicate that the rental unit is "commercial with residential use as is". The Landlord entered into evidence a copy of the signed lease agreement (LL exhibit #1).
11. The Tenants are mother-daughter. The Tenant Jessica Knight Moodrey testified that she owns and manages the restaurant portion of the rental property. The other Tenant, Ms. Knight, has no involvement with the restaurant. Ms. Moodrey testified that she does not reside in the residential portion of the property and has her own home with her fiancé and children. The Tenant Violet Knight testified that she does not work or help manage the restaurant unit and resides in the residential portion of the rental property on a full-time basis.
12. The Tenants testified that the Landlord was aware of the Tenant's intention to divide the usage of the property in this manner prior to the commencement of the tenancy. Although the lease agreement lists one total rental charge owing for the entire property, in practice rent payments have been split between the two Tenants for their respective portions of the property. Ms. Moodrey pays \$1,130.00 monthly directly to the Landlord for the commercial unit and Ms. Knight pays \$1,000.00 monthly directly to the Landlord for the residential portion.

Analysis:

13. There is no dispute that the Tenants signed a single lease agreement for a property consisting of a commercial unit (the restaurant) with a residential unit attached. As both Tenants are named on the lease and signed it, this is a joint tenancy.



14. Section 202 of the Act states:

- (a) (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.

15. Therefore, in determining whether the Act applies I need to go beyond mere consideration of the terms of the lease, and examine the actual activities and conduct of the parties.

16. It is clear in the wording of the Act that for section 5(j) to apply, the same person must be occupying **both** the business and residential portion of the rental property. Based on the evidence before the Board, I am not satisfied that either Tenant occupies both the business and residential portion of the rental property.

17. In this case, although there are two Tenants on lease, the evidence before me suggests that one Tenant only occupies the residential portion of the rental unit, while the other solely uses the business portion to operate her restaurant and does not occupy the residential unit or living accommodation attached.

18. The Tenants evidence was uncontested and not disputed by the Landlord, who did not attend the hearing. Therefore, I accept the Tenant's evidence that Jessica Knight Moodrey only operates the business portion of the rental property during normal business hours and does not occupy the residential portion, while the Tenant Violet Knight resides in and solely occupies the residential portion of the property on a full-time basis and does not use the commercial portion of the property at all. I also accept the Tenant's unchallenged testimony that the Landlord was aware of this living accommodation prior to the commencement of the tenancy, that this split living accommodation has existed since the commencement of the tenancy and that the Landlord has even permitted the Tenants to divide the monthly rent amongst themselves in consideration for each unit.

19. I further note that even if the Tenants occupied both the business and residential portion of the rental property, I would still find that the section 5(j) exemption does not apply as the Landlord has not established that the property is being used **predominantly** for business purposes.



20. The Ontario Divisional Court in *Re Hahn et al. and Kramer* 1979 CanLII 2111 (ON SC), 23 O.R. (2d) 689 found that if a premises is used for both business and residential purposes, the business use of the premises must predominate for the tenancy not to be classified as residential. This decision has been regularly followed by the Court and the Board in years since. See: TST-94202-18, EAT-65469-17 and TST-98029-18 . Application of this principle here means that, it must be determined that the main use of the property is for commercial, or business purposes as opposed to residential to trigger the exemption contained in section 5(j) of the Act. I understand “predominant” to mean that over 50% of the usage of the property must be for business purposes.
21. As stated above, the evidence suggests that one of the Tenants occupies the residential portion of the rental property on a full-time basis and has no dealings with the business or commercial portion, while the other Tenant only uses the business portion of the property during their scheduled business hours. As such, the use of the property is evenly split between residential and business purposes. Therefore, it is not predominantly being used for business purposes as required by *Hahn*, meaning the rental property is not exempt pursuant to section 5(j) of the Act.
22. The Landlord’s representative argued that the Board should accept the lease agreement at face value as being “commercial, with residential use”. However, failure to consider the actual usage of the property would be inconsistent with the s.202 of the Act and the relevant jurisprudence. In *Sterling Studio Lofts Incorporated v. Clayton Stel, 2019 ONSC 91 (CanLII)*, the Board and then the Divisional Court rejected a very similar argument made by the landlord that because the tenants had signed commercial lease, the Board must find that there is a commercial tenancy. The Court held that:
- [35] In accordance with s. 202, the terms of the agreement signed by the parties are not determinative with respect to the application of the RTA and, in our view, the LTB was entitled to find upon consideration of all the evidence that the true nature of the agreement was for use as a rented residential premise. To hold otherwise would result in a triumph of form over substance.
23. In consideration of the findings of the Divisional Court as noted above, I find that the form of the lease cannot override the true substance of the agreement of the parties and resulting use of the premises in the matter before me. In this case the Tenants’ evidence suggests that the Landlord was aware at the commencement of the tenancy that the Tenants would be splitting their occupation of the property and that one Tenant would be solely occupying the commercial portion and the other Tenant would be solely occupying the residential portion. The fact that the Tenants have been permitted to divide the rent payments in consideration of their respective occupation of the rental property supports a finding that this is the true nature of the agreement entered into by the parties.



24. Therefore, I am not satisfied that the predominant use of the rental unit is for commercial or business use or that the same Tenant uses both the commercial and residential portion of the unit. As such, I find that the property is not exempt pursuant to section 5(j) of the Act.
25. Given this finding, it is also necessary for me to further consider whether the Act applies to the entire property, or just the residential portion.
26. In my view, the residential portion is subject the Act because it meets the definition of “rental unit” in s.2(1) of the Act:
- “rental unit” means any living accommodation used or intended for use as rented residential premises, and “rental unit” includes,
- (a) a site for a mobile home or site on which there is a land lease home used or intended for use as rented residential premises, and
 - (b) a room in a boarding house, rooming house or lodging house and a unit in a care home;
27. It is clear that the residential portion of the complex is being occupied for living accommodation by the Tenant Violet Knight on a full-time basis. The uncontested evidence also suggests that the Landlord has accepted rental payments in the amount of \$1,000.00 from this Tenant on a monthly basis since the commencement of the tenancy in consideration of being able to occupy the residential unit.
28. Although attached and part of one residential complex, I do not find that the business and/commercial portion of the property (the restaurant) to be subject to the Act. There is no evidence to suggest that this unit is living accommodation used or intended for use as rented residential premises. Therefore, it does not meet the definition of “rental unit” in s.2(1) of the Act. Further, it would not be appropriate for the Board to exercise jurisdiction over a commercial unit.
29. As such, I find that the Act only applies to residential portion of this rental.

It is ordered that:

1. The request to review order SWL-47843-20 issued on October 20, 2022 is granted. The order is cancelled and replaced with this order.
2. The *Residential Tenancies Act, 2006* applies to the residential portion of the rental property.



LTB-L-071507-22-RV
(SWL-47843-20)

December 21, 2022
Date Issued

Fabio Quattrociocchi
Member, Landlord and Tenant Board

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