



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR FF

### Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed on October 14, 2016 and corrected/amended on October 31, 2016. The Applicant filed seeking an order to cancel a notice to end tenancy for unpaid rent and to recover the cost of the filing fee.

The hearing was conducted via teleconference and was attended by the Applicant; two Agents for the Respondent (the Respondents); and the Respondent's legal counsel (Counsel). I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure.

The named Respondent's middle name was spelled incorrectly on the Residential Tenancy Branch (RTB) documents. Both parties confirmed the correct spelling of the Respondent's middle name. Accordingly, the style of cause was amended to show the correct spelling, pursuant to section 64(3)(c) of the Act.

The Applicant confirmed receipt of the Respondents' volume of evidence. No issues or concerns were raised regarding service or receipt. As such I considered the Respondents' submissions as evidence for this proceeding.

Counsel confirmed receipt of the application for Dispute Resolution and Notice of Hearing documents from the Applicant. However, he stated that no evidence was received from the Applicant. The Applicant confirmed he had not served his evidence upon the Respondents or Counsel.

The hearing package contains instructions on evidence and the deadlines to submit evidence, as does the Notice of Hearing provided to the Tenants which states:

1. *Evidence to support your position is important and must be given to the other party and to the Residential Tenancy Branch before the hearing. Instructions for evidence processing are included in this package. Deadlines are critical.*

Rule of Procedure 3.1 provides, in part, that to ensure fairness and to the extent possible, the applicant must serve each respondent and the Residential Tenancy Branch with copies of their evidence.

To consider documentary evidence that was not served upon the other party would be a breach of the principles of natural justice. Therefore, as the Applicant's evidence was not served upon the Respondents I declined to consider that documentary evidence. I did, however, consider the Applicant's oral submissions and the copies of his documents which were also submitted in the Respondent's evidence.

Both parties were provided with the opportunity to present relevant evidence and to make relevant submissions regarding jurisdiction.

#### Issue(s) to be Decided

- 1) Does this matter fall within the jurisdiction of the *Residential Tenancy Act* (the Act)?

#### Background and Evidence

The parties entered into a written agreement titled "*Commercial Lease Agreement*" which commenced on July 1, 2015. The lease included, in part, as follows:

*... 15. The Tenant will use and occupy the Premises only for the Permitted Use and for no other purpose whatsoever. The Tenant will carry on business under the name of [business name] and will not change such name without the prior written consent of the Landlord, such consent not to be unreasonably withheld...*

[Reproduced as written]

The Respondent(s) submitted a copy of a Supreme Court Petition into evidence. That petition was filed with the Court Registry on October 21, 2016.

The Applicant initially testified that they attended Supreme Court the week prior to this hearing and the Judge told him that the matter had to be heard by the Residential Tenancy Branch first before they could proceed with the Supreme Court action.

Counsel submitted they appeared in Supreme Court Chambers on November 30, 2016, during which the Applicant requested an adjournment so the Applicant could obtain a lawyer. Counsel stated the Supreme Court matter was scheduled to reconvene on December 15, 2016.

The Respondents stated the property in question was zoned for commercial use and was approximately 6000 square feet in size. The property was previously operated as a corner store. Afterwards it was occupied by a beautician who operated tanning booths in tanning rooms prior to the Respondent's agents entering into the commercial lease with this Applicant.

The Applicant asserted that he entered into the commercial lease to operate his business which was a mobile tire company. He said there was a house with seven bedrooms located on the property. He stated that house occupied approximately 1/3 of

the total size of the property and included some office space. He argued that he did not agree to have a store front for his business in that house. He said he had tire trucks, equipment, tools, and tires that he stored on the property. The Applicant argued the municipal by-law department allowed one caretaker to occupy the property and that he had set up a kitchenette on the property where he has lived since the onset of the lease. Therefore, he was of the opinion that this matter fell within the jurisdiction of the *Act*.

Counsel argued the lease was a commercial lease and the RTA did not apply as per section 4 of the *Act*. He noted that the Tenant had written a letter to the municipality stating there was no residence on the property which confirmed their submissions that the lease was commercial.

The Applicant confirmed he had written the aforementioned letter to the municipality. He argued that he was told that there could not be a residence on the property but that one caretaker could occupy the property. He later changed his submission stating that no one could live on the property until the fire safety requirements were done. The Applicant asserted that he told the Respondent's agent that he had to reside on the property prior to signing the lease and that agent agreed for him to live on the property. He stated that he was not aware if the written commercial lease included a term that he could reside on the property.

The Respondents denied entering into an agreement, verbal or otherwise, that included a residential tenancy as part of the lease. Rather, they asserted the lease was strictly for commercial purposes only.

### Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Section 4(d) of the *Act* states that this *Act* does not apply to living accommodation included with premises that are primarily occupied for business purposes, and are rented under a single agreement.

Section 58(2)(c) of the *Act* stipulates that if the director receives an application the director must determine the dispute unless the dispute is linked substantially to a matter that is before the Supreme Court.

Notwithstanding the Applicant's submissions that he has occupied the property as a caretaker, the undisputed facts were that the Applicant entered into a written commercial lease for the purpose of operating his business on the subject property. That written agreement does not include a residential tenancy provision. The property is zoned for commercial use and by the Applicant's own submission he was occupying a

building which included office space and that covered only 1/3 of the property; leaving 2/3 or the majority of the property for commercial use.

After careful consideration of the totality of the evidence before me I accept Counsel's submissions that this matter is excluded by the *Act*. Accordingly, I declined to hear these matters for want of jurisdiction, pursuant to sections 4 and 58 of the *Act*.

### Conclusion

I declined to hear these matters for want of jurisdiction.

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: December 13, 2016

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Residential Tenancy Branch