



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Walkabout Holdings Ltd. and  
[tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OLC, FFT

### Introduction

This hearing was scheduled to deal with a tenant's application for the landlord to comply with the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

### Preliminary and Procedural Matters

At the outset of the hearing, I confirmed that the respondent received the hearing package and the written submissions and evidence provided by the applicant at the time of filing. As such, I admitted those documents into evidence.

I determined that written submissions provided to the Residential Tenancy Branch by the applicant a few days before the hearing had not been served upon the respondent and I did not admit those documents for further consideration.

The applicant had named an individual as the landlord, referred to by initials JB. JB stated the owner of the subject property is a corporation and that he is only one of two shareholders for the corporation. JB was of the position the landlord should be identified as the corporation. The applicant stated that he has only had dealings with JB although he receives "invoices" for rent that name the corporation. JB confirmed that he has had dealings with the applicant with respect to use and occupation of the property on behalf of the corporate landlord. I amended the style of cause to identify the landlord as the corporation and JB as the landlord's agent, both of which meet the definition of "landlord" under the Act.

JB stated the corporation should have been served using the corporation's registered office, which is a law office, and not his personal residential address. JB acknowledged that the only service address ever provided to the applicant is JB's personal address that appears on the "invoices" issued to the tenant for rent payable. Upon review of the invoices for rent, and in the absence of any other documentation issued to the tenant by the landlord with respect to the tenancy, I found JB's address is the address at which the landlord "carries on business as a landlord" which complies with section 89 of the Act.

I also reviewed all of the documentation I had received from the tenant with the landlord's agent and I confirmed that the landlord's agent was in receipt of all of the same documents the tenant had submitted to the Residential Tenancy Branch.

JB pointed out that the tenant is a business, not an individual. The applicant testified that the business to which the landlord refers is his sole proprietorship and that he and his sole proprietorship are one in the same. JB acknowledged that he had no evidence that the business identified as being the tenant on the rental invoices is a corporation or other legal entity. As such, I amended the style of cause to reflect the tenant as an individual and/or his sole proprietorship business name.

I noted that in the details of dispute the tenant indicated the landlord has refused to recognize their tenancy as a residential tenancy to which the *Residential Tenancy Act* (the Act) applies. JB confirmed that landlord maintains the position and that the parties have a commercial tenancy relationship and the Act does not apply to their tenancy agreement. Accordingly, I proceeded to explore whether the relationship between the parties is a residential tenancy to which the Act applies.

#### Issue(s) to be Decided

1. Do the parties have a residential tenancy to which the *Residential Tenancy Act* (the Act) applies?
2. Is necessary and appropriate to issue orders for the landlord to comply with the Act, regulations or tenancy agreement?

#### Background and Evidence

The tenant had been renting the property from the former landlord under an oral agreement since approximately 2016 for the monthly rent of \$1,000.00. In May 2018

the landlord's agent and his wife and another person viewed the property, including the buildings on the property. The property was sold to the current landlord on or about June 1, 2018. The current landlord and the tenant did not execute a new tenancy agreement although the parties have been attempting to renegotiate terms of tenancy recently.

The parties provided a description of the property as including a house with three outbuildings described as sheds or barns, along with paddocks formerly used to house livestock, that are located on several acres.

The house was described as having three bedrooms used as sleeping accommodation on the upper floor, one and a half bathrooms, a living room, dining room, kitchen, laundry room, kitchen; and, an unfinished basement.

The tenant submitted that the house is used as living accommodation by him and his two roommates. The tenant submitted that the utilities at the property (hydro and cable/internet) are in his personal name. The tenant stated he is a freelance videographer who takes video away from the property which he described as filming people doing winter sports or activities, and then he returns to the rental unit where he uploads and edits the video footage from a desk in the living room that measures approximately 5 feet by 2 feet. The desk has a computer and two computer monitors on it.

Since the landlord purchased the property, the landlord has been invoicing the tenant's sole proprietorship for rent. The parties were in dispute as to whether invoicing the tenant's business name was the suggestion of the landlord's agent or the tenant. The invoice includes a charge for Goods and Services Tax ("GST").

The tenant had been paying rent of \$1,000.00 per month since the tenancy started and then of \$50.00 for GST was added when the current landlord acquired the property and began invoicing the tenant's business for rent and the tenant has been paying this sum every month up until September 2019. Starting October 2019, the rent was increased to \$1,200.00 per month, plus \$60.00 for GST. The tenant paid the increased rent and GST for October 2019; however, starting November 2019 the tenant paid the increased amount of rent but did not pay the GST. The payments are sent to the landlord by way of e-transfer sent to email address provided to him by the landlord's agent. The tenant stopped paying the GST as the tenant is of the view that GST is not payable since this is a residential tenancy.

The landlord's agent submitted that the landlord acquired the property, which is 32 acres in total, to develop it. The landlord was aware the house was occupied by the tenant when the property was purchased. As for the tenancy agreement between the tenant and the former landlord, the landlord's agent submitted that the former owner is deceased, and he is unable to ascertain the tenancy terms from the former owner.

The landlord's agent submitted that the landlord is renting a "studio" to the tenant for his movie making business and the rental of the property is a commercial transaction between two businesses. As such, the rent is subject to GST according to the landlord's accountant. The landlord's agent stated that he was aware the tenant was using the property to run his business but that there was an agreement that the tenant was free to use the property for whatever else he desired. The landlord's agent stated that he saw a bank of computers in the living room the tenant uses to make movies, but the landlord's agent did not dispute that the tenant also lives in the house. The landlord's agent has seen other people at the house, but he did not know whether they lived there or not. The landlord's agent acknowledged that the three bedrooms contained beds and mattresses.

Both parties provided consistent statements that the basement has been fitted for use as a "workshop". The landlord submitted that the barn has been transformed or use as a workshop as well and a shed has welding equipment. The tenant described using the workshop for wood working projects.

Documentation provided for my consideration included two "invoices" issued by the landlord to the tenant for rent and GST and reproduction of several email exchanges between the tenant and the landlord's agent in October 2019.

In brief, the nature of the emails concerns the tenant raising issue with respect to repairs, allowable rent increases permitted under the Act and GST payable on rent and the landlord's responses including the position that the Act does not apply as the parties have a commercial tenancy.

## Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

Section 2 of the Act provides that the Act applies to tenancy agreements, rental units and residential property except where exempt from the Act under section 4. Section 1 of the Act defines a tenancy agreement to include oral agreements and a rental unit as: “living accommodation rented or intended to be rented to a tenant”. The Act does not define “living accommodation” and it is given its ordinary meaning.

Section 4 of the Act provides for living accommodation that is exempt from application of the Act and includes an exemption to:

- (d) living accommodation included with premises that
  - (i) are primarily occupied for business purposes, and
  - (ii) are rented under a single agreement

Residential Tenancy Branch Policy Guideline 14: *Type of Tenancy: Commercial or Residential* provides information and policy statements with respect to distinguishing between a residential tenancy and a commercial tenancy. The policy guideline provides, in part:

Neither the *Residential Tenancy Act* nor the *Manufactured Home Park Tenancy Act* applies to a commercial tenancy. Commercial tenancies are usually those associated with a business operation like a store or an office. If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction. For more information about an arbitrator’s jurisdiction generally, see Policy Guideline 27 - “Jurisdiction.”

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The *Residential Tenancy Act* 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.

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the “predominant purpose” of the use of the premises is.

Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises.

Sometimes a tenant will rent out a number of rental units or manufactured home sites and re-rent them to different tenants. It has been argued that there is a "commercial tenancy" between the landlord and the “head tenant” and that an Arbitrator has no jurisdiction. This generally occurs in a manufactured home park.

The courts in BC have indicated that these relationships will usually be governed by the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act*. It is the nature or type of property that is regulated by the legislation. If the type of property comes within the definitions in the legislation and does not fall within any of the exceptions in the legislation, the Residential Tenancy Act or Manufactured Home Park Tenancy Act will govern.

[My emphasis underlined]

Residential Tenancy Branch Policy Guideline 27: *Jurisdiction* provides information and policy statements with respect to application of the Act, or exclusion from the Act, with respect to certain types of property and tenancies. The policy guideline provides, with respect to commercial tenancy agreements, the following:

***Commercial Tenancies***

The RTA [Residential Tenancy 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.

Generally, if the primary use is residential, the RTA will apply. For example, if a tenant rents a house to live in, and the house has a detached garage which the tenant runs a small yoga studio out of, the RTA probably applies.

If a tenant rents a shop and small living accommodation under a single agreement and the purpose for renting the property is to run a convenience store, the RTA probably does not apply even if the tenant lives in the accommodation.

An arbitrator may consider municipal by-laws including how the property is zoned in deciding whether the tenancy is primarily residential or commercial.

[My emphasis underlined]

In the matter before me, the tenant is of the position the Act applies to their tenancy agreement since the property is used primarily as living accommodation by him and his roommates and a small portion of the house is used for his business. Whereas, the landlord is of the position the tenancy is a commercial one since the rent is invoiced from one business to another business and the property is used by the tenant for business purposes and whatever else the does with it.

There is no dispute that there the tenancy is governed by one agreement. Rather, it appears clear that there the tenant is required to pay rent in a single amount for use and occupation of the all of the property and buildings included in their agreement. As such, I find the premises are rented under a single agreement and I accept the positions of both parties in finding that the use of the property by the tenant is a mixture of residential and business. Therefore, the issue for me to determine is whether the premises are primarily occupied for business purposes in order to reach a conclusion as to whether the Act applies to the tenancy agreement or is exempt from the Act under section 4(d).

Although the landlord has “invoiced” the name of the tenant’s sole proprietorship for rent for a “studio”, plus GST, I find the invoicing is not solely determinative. Rather, in keeping with the policy guideline described above, it’s the nature or type of property, and its permitted and actual use, that is determinative. Below, I have analyzed the nature and type of property and its permitted and actual use.

In his written submissions, the tenant submitted that the property has residential zoning and the landlord pays property taxes based on residential classification. The did not offer any evidence to contradict that submission and I accept that it is accurate.

Both parties provided consistent submissions that the premises include a three bedroom, one and a half bathroom purpose built house. Upon hearing a description of the fixtures and contents of the house, which was largely undisputed, I am of the view that the house is used primarily as living accommodation by the occupants (the tenant and two roommates), as evidenced by three bedrooms furnished with sleeping furniture (beds and mattresses), an area to prepare meals and eat (the living room and dining room), bath and do laundry (bathrooms and laundry room) whereas the area designed and set aside for business purposes was a desk with computer equipment and monitors located in a relatively small portion of the living room (5 feet by 2 feet). Based on this unopposed description, I accept that, based on square footage, the house is used primarily as living accommodation.

I heard from the tenant that he ordinarily meets his clients on the filming locating (usually the mountains where he films people engaged in winter sports) and then he returns to the rental unit to upload and edit the footage at the desk located in the living room. I did not hear any evidence from the parties that the tenant meets clients at the rental unit or that the property is fitted with a store front or signage related to the tenant's business. As such, I find the business usage of the house is secondary to its primary purpose which is for residential living accommodation.

Based on everything that is before me, I find the parties have a tenancy agreement for a rental unit to which the Act applies and the living accommodation is not exempt from application of the Act. As such, the Act applies to the parties' tenancy agreement, the rental unit and the residential property.

Having found the Act applies to their tenancy agreement, **the landlord is ordered to comply with the requirements of the Act and the Residential Tenancy Regulations.**

Both parties are encouraged to familiarize themselves with the Act and the Regulations and both parties are required to comply with the Act, the Regulations, and their tenancy agreement.

I heard the parties have engaged in discussions in an attempt to renegotiate their tenancy agreement. The parties are at liberty to renegotiate their tenancy agreement; however, **the existing tenancy agreement remains in effect until such time it is replaced with a new agreement, reached by mutual consent, if ever. Should the**



**parties come to a new agreement, it must be put in writing so as to comply with section 13 of the Act.**

Rent may only be increased in a manner that complies with Part 3 of the Act (sections 40 through 43). Accordingly, rent may only be increased by way of a Notice of Rent Increase, in the approved form, given with at least three full months of advance notice and for an amount that complies with the Act and Regulations. Section 43(5) provides that where a tenant pays a rent increase that does not comply with the Act, the tenant is entitled to recover the overpaid rent by deducting the overpayment from rent otherwise payable.

Having heard the rent increased by \$200.00 starting October 2019 in the absence of a Notice of Rent Increase and the parties have yet to enter into a new tenancy agreement, **I find and order that the rent remains at \$1,000.00 per month** until such time it is increased by way of a proper Notice of Rent Increase or execution of a new tenancy agreement, in writing. **I further find the tenant entitled to recover the \$200.00 increase paid for the months of October 2019 through December 2019 in the sum of \$600.00.**

As for GST on rent, tenants with a residential tenancy that falls under the *Residential Tenancy Act* are not required to pay tax on the rent and a landlord is not permitted to charge or collect tax on rent. The tenant has been paying GST of \$50.00 on the rent for the period of June 2018 through September 2019 and GST of \$60.00 for the month of October 2019. Therefore, **I find the tenant is entitled to recover the payments of GST in the sum of \$860.00** calculated as  $[(16 \text{ months} \times \$50.00) + \$60.00]$ .

With this decision, I provide the tenant with a Monetary Order to recover the overpaid rent described above, plus recovery of the \$100.00 filing fee paid for this application in the sum of \$1,560.00 (calculated as: \$600.00 + \$860.00 + \$100.00). Pursuant to the authority afforded me under the Act, **I authorize the tenant to make deductions from rent otherwise payable until the Monetary Order is satisfied.** If the tenancy ends before the sum is fully recovered, the tenant may enforce the unsatisfied amount by enforcing the Monetary Order against the landlord.

Conclusion

The tenancy agreement and rental unit fall under the *Residential Tenancy Act* (the Act). Both parties are required to comply with the Act, regulations and tenancy agreement and the landlord is ordered to do so.

I have ordered that the rent remains at \$1,000.00 per month until such time it changes in accordance with the Act. There is no tax payable on the monthly rent.

The tenant is entitled to recover overpayments and the fling fee in the sum of \$1,560.00 from the landlord. The tenant is authorized to make deductions from rent otherwise payable until such time this sum is recovered. The tenant is also provided a Monetary Order for this amount to serve and enforce to recover any unsatisfied portion of the award.

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 27, 2019

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Residential Tenancy Branch