

Residential Tenancies Tribunal

Application 2024-0263-NL

Seren Cahill
Adjudicator

Introduction

1. Hearing was held on 6-May-2024 at 9:07 am.
2. The applicant, [REDACTED], hereinafter referred to as the landlord, was represented by [REDACTED], who attended via teleconference.
3. The respondent, [REDACTED], hereinafter referred to as the tenant, was represented at the hearing by [REDACTED] of [REDACTED], who attended via teleconference.

Preliminary Matters

4. Counsel for the landlord raised as a preliminary issue the matter of jurisdiction, citing s. 3(4)(c) of the *Residential Tenancies Act 2018* (The Act), which reads as follows:

3.(4) This Act does not apply to

- (c) living accommodation used or occupied by a person for penal, correctional, rehabilitative or therapeutic purposes or for the purpose of receiving care;

He explained that his client used the property for use as a residential placement home under s. 71 of the *Children, Youth and Families Act*. A copy of their license under this act was provided (see landlord's exhibit 6). S. 71(4) of the *Children, Youth and Families Act* reads as follows:

71. (4) A residential placement provider licence authorizes a person to

- (a) establish and operate one or more residences where 24 hour care and supervision is provided by employees of the licensee to children or youth who are in the care or custody of a manager;
- (b) hire and train employees to provide care and supervision to children or youth in the residences; and
- (c) monitor and assess the day to day operations of the residences.

5. The landlord's representative submitted that in February 2023 the landlord ceased using the premises for the housing and care of children or youth and began using the premises for the housing of transient workers. However, he was unable to pinpoint if the alleged damages occurred before or after this change. Regardless, counsel for the respondent took the position that a change of use of the property could not bring a tenancy agreement under the *Act* if the initial nature of the lease was outside of the jurisdiction of the *Act*.
6. A copy of the rental agreement was provided by the tenant. It is in the standard form produced by the Residential Tenancies Office for the use of the public in drafting residential tenancy leases. It refers to the *Act* throughout and includes the mandatory provisions prescribed by the *Act*. Counsel for the respondent correctly pointed out that parties cannot by mutual agreement contract in violation of the *Act*, and that the excluded uses listed under s. 4 therefore apply regardless of the parties' intentions. I still find the form of the agreement to be a relevant factor in considering the issue of jurisdiction.
7. Section 4(c) of the *Act* states that it does not apply to living accommodations used or occupied by a person for "penal, correctional, rehabilitative or therapeutic purposes or for the purpose of receiving care." There was no suggestion that the purpose of the tenancy agreement was penal, correctional, rehabilitative, or therapeutic. The question therefore becomes whether use under s. 71(4) of the *Children, Youth and Families Act* constitutes the "purpose of receiving care" under s. 3(4)(c) of the *Act*.
8. "Care" is not defined under the *Act*. It must therefore be understood by reading it in the entire context and in the grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the legislation. The *Children, Youth and Families Act* s. 2(c) defines care as "the physical daily care and nurturing of a child or youth." The purpose of the *Children, Youth and Families Act* is stated under s. 8, which reads as follows:

8. The purpose of this Act is to promote the safety and well-being of children and youth who are in need of protective intervention by offering, where available and appropriate, services that are designed to maintain, support and preserve the family where it is in the best interests of children and youth.
9. The physical daily care and nurturing of children or youth is commonly provided by parents and guardians on a daily basis in many homes governed by the *Act*. Was 4(c) of the *Act* meant to exclude every tenancy agreement signed by parents whose primary purpose is to find a suitable home in which to raise their child? The answer is plainly no. This answer also accords with the rest of 4(c), which lists "penal, correctional, rehabilitative, and therapeutic purposes." These are all specialized services provided for people with specialized needs. In this context, "care" ought to be understood as a similarly specialized service. In contrast, "care" as defined in the *Children, Youth and Families Act* is a need universal to all children and youths.

10. Based on the above, I conclude that the use of the word “care” in each piece of legislation has a distinct and separate meaning. In the present case, I do not find that s. 4(c) of the Act applies to exclude this case from the jurisdiction of this tribunal.
11. Another preliminary issue raised by counsel for the tenant is the issue of settlement privilege and bias. He directed my attention to *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, for an overview of settlement privilege, and submitted that several of the items submitted by the applicant (tenant’s exhibit’s 21 and 25), as well as some of the applicant’s remarks at the hearing, were in violation of that privilege. He further submitted that the appropriate remedy would be to have those items removed from the evidence list and have another hearing set before another adjudicator.
12. It is clear on the face of the matter that settlement privilege has been violated. The impugned documents are clearly labeled “without prejudice” and offer a concrete sum in exchange for a formal release of liability. They are exactly the sort of documents settlement privilege is meant to exclude. Further, the applicant described the contents of one or more of these documents during arguments regarding the issue of jurisdiction.
13. The purpose of settlement privilege is to encourage settlements. If claimants were allowed to use offers of settlement as evidence in hearings, respondents would be strongly discouraged from ever offering a settlement for fear of the offer being used as evidence against them. This would lead to fewer matters being settled, which would increase the burden on courts and administrative tribunals like this one.
14. I put it to counsel for the tenant that it might be a sufficient remedy to refuse to allow these documents into evidence, as well as to disregard the impugned comments by the applicant. This tribunal has an evidentiary gatekeeping function and routinely determines whether or not evidence is admissible and is expected to be able to disregard excluded evidence notwithstanding the fact that the decision maker has, in fact, seen it. Counsel responded that even knowing that there were settlement discussions could potentially prejudice my decision-making, and that proceeding with the matter would deprive his client of their right to procedural fairness. At this point, the applicant made another remark which referred to the content of one of the impugned documents.
15. I accept the submissions of the respondent’s counsel.

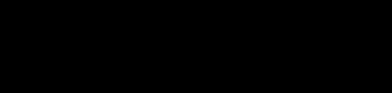
Decision

16. The respondent’s motion to dismiss the application for want of jurisdiction is denied.
17. This hearing is to be set over before another adjudicator.
18. The landlord’s exhibits 21 and 25 are to be struck from the exhibit list and will not be provided to the adjudicator referred to above.

19. The applicant is advised that further reference to the contents of these documents during the hearing could lead to his claim suffering further delay or dismissal, subject to the adjudicator's ruling.

4-July-2024

Date


Seren Cahill
Residential Tenancies Office