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

Citation: Nynkowski v Mercado, 2026 ONLTB 761
Date: 2026-01-07
File Number: LTB-T-047845-24

In the matter of: 106, 146 Brock Avenue
Toronto Ontario M6K2L4

Between: Eva Nynkowski — Tenant

And

629615 Ontario Inc., doing business as Brock Avenue Studios — Landlord

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

This application was heard by videoconference on November 13, 2025.

The Landlord's Agent, Mohieldin Nigm, the Landlord's Legal Representative, Eric Steiman, the Tenant's Legal Representative, Dan McIntyre and the Tenant attended the hearing.

The Landlord requested that the application be amended to reflect that the sole Landlord was 629615 Ontario Inc., doing business as Brock Avenue Studios as they are the correct current Landlord. The Tenant did not object to this, and on that basis this amendment was granted.

The Landlord filed a Notice of Constitutional Question prior to the hearing. There was some question as to whether this had been properly served on the Attorneys General for this hearing date as required by section 109 of the *Courts of Justice Act*, RSO 1990, c. C. 43. It was unnecessary to make a determination as to the issue of service, as after some discussion of the legal framework and analysis required surrounding the subject matter of this application, the Landlord withdrew their argument as to a constitutional question and confirmed they would not be pursuing it. The matter proceeded on that basis.

Determinations:

1. Based on the evidence before me, I am satisfied on a balance of probabilities that the *Residential Tenancies Act*, 2006 (the "Act") does apply to the rental unit for the reasons below.

2. The Tenant's position is that the tenancy between the Landlord and Tenant has always been a residential tenancy.

3. The Landlord’s position is that the tenancy between the Landlord and Tenant has always been a commercial tenancy.

4. The Tenant testified that they approached the Landlord regarding a residential lease in 2008. At the time the Tenant was dating someone in the building, and had other friends who lived in the building. The Tenant testified that the rental unit was previously rented for residential purposes by a friend who moved to another unit in the building. The Tenant further testified that at the time she moved into the rental unit she believes the majority of the building was occupied for residential use, though she was not aware of the contents of other residents’ lease agreements.

5. The Tenant testified that the Landlord’s previous property manager, who the Tenant dealt with at the time the lease was entered into, was aware that she was seeking the rental unit as a residential space. The property manager told the Tenant that despite this, she would be required to sign their form of lease, which was a commercial lease. The Tenant was directed to fill in something on the lease under the form of business that the Tenant would be conducting and the property suggested filling in the business as “creative writing”.

6. The Tenant testified that the property manager assured her she would not be required to pay HST, and that she has never paid HST in respect of the rental unit.

7. After a new property manager took over for the Landlord, the Tenant received notice that the Landlord intended to start collecting HST in respect of the rental.

8. The Tenant testified that she has never conducted business at the address, with the exception of the rental unit serving as the business address for a few years with respect to a business she ran conducting festivals. In all other respects the rental unit has served only as a residential premises while she has lived there.

9. The Tenant currently lives in the rental unit, which is set up as a two-bedroom apartment, with a roommate.

10. The Landlord submitted that this was a commercial tenancy from the beginning. In support of this they submitted a copy of the lease that is labelled at the top “Commercial Lease”. The Landlord further relied on the provision of the lease that indicates the purpose of rental unit under the lease is for running a business. That provision is included below.

11. The Landlord submits that this provision shows the intention of the parties was that this space was to be a creative writing studio, and not used for residential purposes.

12. I making findings in relation to this application I am compelled to follow section 202 of the Act, which states:

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.

13. Given this, while the contents of the tenancy agreement are evidence as to the agreement between the parties, the tenancy agreement is not in itself conclusive as to whether or not the Act applies. A determination must be made as to whether or not the intention of the parties was actually to enter into a lease for the purposes of residential occupation, or commercial use, and the tenancy agreement forms only part of the evidence in this respect.

14. This is confirmed by the Divisional Court in *Sterling Studio Lofts Incorporated v Clayton Stel*, 2019 ONSC 91 at paragraph 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."*

15. I note that the Landlord also submitted into evidence copies of a lease renewal that identified the tenancy as a commercial tenancy, but that the same reasoning above applies in respect to the lease renewal.

16. The Landlord's Agent submitted that the building is intended for commercial purposes and is zoned only for industrial/commercial use. There are 17 units in the building, 3 of which are vacant. There are 3 units that have either made applications to the LTB or have threatened to as they take the position that the Act applies to their tenancies.

17. The Landlord's Agent did not have information as to the Landlord's original intentions for leasing the building at or before the time the Tenant entered into their lease. Unfortunately, the former principal of the Landlord has passed away, and the property manager that dealt with leasing at the time the Tenant entered into the lease is no longer involved with the property. The Landlord's Agent acknowledged that his position that this property was originally intended as a commercial space is based solely upon the contents of the lease and that when they were brought on to take over the leasing and operations of the building, they were told that the building was leased for commercial purposes.

18. When asked in regard to the status of HST with the rental unit, the Landlord's Agent testified that it has been paid by their offices. When asked whether the Tenant had ever paid HST, the Landlord's Agent answered, "Not to my knowledge."

19. The Landlord submitted that the evidence showed that the tenancy had been treated as a commercial tenancy, given there had been minimal maintenance done by the Landlord over the years.

20. I note that when questioned as to maintenance in regard to the Tenant's unit, or the other units where there are pending or possible cases before the LTB with respect to the Act applying, the Landlord's Agent testified that they would take direction from the Landlord and send someone in if they were told to do so. This differed in the Landlord's Agent's view from the other commercial tenants in the building, where they typically will only send someone in on for annual inspections.

21. When questioned as to why creative writing would require the kind of space the rental unit occupies, the Landlord's Agent indicated that while he didn't know much in regard to creative writing, he assumed it would function as a studio space where there could be classes or group sessions.

22. I note in reviewing the lease term in question, that it does not indicate that the space is being used as a "creative writing studio", merely that the type of business it would purportedly be used for, and not for any other purpose was, "creative writing".

23. The Landlord submitted that I should not find the testimony of the Tenant to be credible as she testified that she was unaware of what businesses were in the building, and that on its face therefore I should find her testimony to be merely self-serving, and not reliable.

24. While I have considered the submissions of the Landlord, ultimately after hearing the evidence from the parties and examining the lease, I find the Tenant's testimony to be credible in regard to the circumstances of her entering into a tenancy with the Landlord. Namely, I find that when the Tenant entered into the lease with the Landlord's property manager in 2008 that the property manager was fully aware that the Tenant was intending to live in the rental unit as a residential unit. I further find that the Landlord was intending to rent it to the Tenant for that purpose despite labelling the lease as a commercial lease.

25. I find on the basis of the above in accordance with section 202(1) of the Act that while the outward form of the lease states that this is a commercial tenancy, that this did not reflect the real substance of the transaction between the parties. I find instead that in substance the parties agreed to a residential tenancy despite the form of lease the parties signed.

It is ordered that:

1. The *Residential Tenancies Act, 2006* applies to this tenancy.

January 7, 2026
Date Issued

Benjamin Seigel
Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

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