THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LR07002
Order LR07-02

IN THE MATTER of an appeal, under Section 25 of the ***Rental of Residential Property Act***, by Deborah Vanneste against Order No. LD07-018 of the Director of Residential Rental Property, dated January 22, 2007.

BEFORE THE COMMISSION
on Monday, the 19th day of February, 2007.

Weston Rose, Commissioner
Norman Gallant, Commissioner
Anne Petley, Commissioner

Order

IN THE MATTER of an appeal, under Section 25 of the *Rental of Residential Property Act*, by Deborah Vanneste against Order No. LD07-018 of the Director of Residential Rental Property, dated January 22, 2007.

Participants

1. **Appellant: Deborah Vanneste**

2. **Respondents: Beverley and Barry Murphy**

Reasons for Order

1. Introduction

Deborah Vanneste (the Appellant) has appealed Order LD07-018 (Exhibit E-7) issued by the Office of the Director of Residential Rental Property (the Director) on January 22, 2007. The Island Regulatory and Appeals Commission (the Commission) received the Appellant's Notice of Appeal (Exhibit E-8) on January 24, 2007.

The Director's Order and the present appeal deal with a Notice of Termination by Lessor of Rental Agreement (Form 4) and an Application by Lessee to Set Aside Notice of Termination (Form 6) concerning residential premises located at 58 Kent Street in Charlottetown (the rental premises).

The appeal was heard in the Commission's Boardroom in Charlottetown, Prince Edward Island on Thursday, February 8, 2007.

2. Background

The Appellant moved into the rental premises in September 2006, with a verbal month to month rental agreement. The rent was $800.00 payable on the twentieth day of each month. A $400.00 security deposit was paid.

Beverley and Barry Murphy (the Respondents) served the Appellant with a Notice of Termination by Lessor of Rental Agreement (Form 4) dated December 28, 2006 to be effective January 18, 2007.

On January 4, 2007, the Appellant filed an Application by Lessee to Set Aside Notice of Termination (Form 6), pursuant to section 16 of the ***Rental of Residential Property Act***, R.S.P.E.I. 1988, Cap. R-13.1 (the ***Act***).

The Director held a hearing on January 12, 2007, pursuant to section 4(2)(d) of the ***Act***. In Order LD07-018, issued on January 22, 2007, the Director determined that the Notice of Termination by Lessor of Rental Agreement was valid. The Application by Lessee to Set Aside Notice of Termination was denied. The rental agreement between the Appellant and Respondents was to be terminated as of January 18, 2007 and the Appellant was required to vacate the rental premises on or before that date.

3. Decision

The Commission allows this appeal in part for the reasons that follow.

In the evidence before the Director, and in the evidence before the Commission, the Respondents offered an audio tape of a conversation between the Appellant and themselves. A transcript of the tape was prepared by the Director and is on file with the Commission as Exhibit E-6.

Is the audio tape admissible evidence?

At the hearing, the Commission considered the admissibility of the audio tape as a preliminary matter. The Commission gave both parties the opportunity to make oral submissions on the issue of the admissibility of this audio tape. The Appellant submitted that the tape should not be admitted as evidence before the Commission. The Respondents submitted that the Commission should admit the tape as part of the evidence.

This audio tape is a standard size cassette tape, technically known as a "Compact Cassette". The tape, and the tape recorder purportedly used to record it, was filed with Commission staff. The tape purports to record a December 23, 2006 conversation between the parties. The Respondents submit that the conversation recorded on the tape supports their position that the Appellant had not paid rent for the month of December 2006.

In *R*. v. *Nikolovski*, [1996] 3 S.C.R. 1197, the Supreme Court of Canada considered the issue of the admissibility of videotape evidence in the context of a criminal trial. While the present appeal before the Commission is certainly not a criminal matter, the Commission is of the opinion that the reasoning offered by the Supreme Court of Canada in *R*. v. *Nikolovsk*i offers considerable guidance on the issue of the admissibility of audio and videotape evidence. Justice Cory, writing for the majority of the Court, states in paragraphs 15 and 16:

> *V. The Evolution of the Use of Audio Tapes, Photographs and Videotapes as Evidence in Canada*

> *15 It may be helpful to consider the evolution of the use of audio and video tape evidence in Canada. In R. v. Pleich (1980), 55 C.C.C. (2d) 13, at p.32, the Court of Appeal for Ontario recognized that tape recordings are real evidence that had, as well, many of the characteristics of testimonial evidence. In R. v. Rowbotham (1988), 41 C.C.C. (3d) 1, the use of audio tapes was considered by the same court. It found that it was the tapes themselves that constituted the evidence which should be considered by the jury. It emphasized that the tapes could provide cogent and convincing evidence of culpability or equally powerful and convincing evidence of innocence. It stressed that the members of the jury must have equipment available to them so that they could themselves listen to the tapes and reach their decision as to the weight that should be given to them. It was expressed in this way (at pp. 47-48 and 49):*
>
> > *It is true that the tapes themselves constitute the evidence which should be and must be considered by the jury. It is the tapes which will demonstrate not simply the words spoken by an accused or co-conspirator, but also the emphasis given to particular words and phrases and the tone of voice employed by the participants during the intercepted conversations. Upon hearing the tape, the jocular exclamation will be readily distinguishable from the menacing threat of violence. The tapes may provide cogent and convincing evidence of culpability or equally powerful and convincing evidence of innocence.*
> >
> > *…*
> >
> > *As well the necessary equipment must be available so that the jury may listen to the tapes themselves.* [*Emphasis added (*by the Court.)]
>
> *16 I agree with the reasoning and conclusion on this issue set out in Pleich and Rowbotham. A tape, particularly if it is not challenged as to its accuracy or continuity, can provide the most cogent evidence not only of the actual words used but in the manner in which they were spoken. A tape will very often have a better and more accurate recollection of the words used and the manner in which they were spoken than a witness who was a party to the conversation or overheard the words. As a result of Rowbotham, the trier of fact in Ontario was very properly authorized to use his or her own senses in determining the weight that should be accorded to the evidence of an audio tape. There is no reason why this same reasoning should not be applied to videotapes.*

In paragraph 18, Justice Cory discusses the importance of determining both admissibility and the weight to be given to such evidence:

> *18 Similarly in R. v. L. (D.O.), [1993] 4 S.C.R. 419, L'Heureux-Dube J., in concurring reasons, noted that the modern trend has been to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result. She observed that this is most likely to be achieved when the decision makers have all the relevant probative information before them. She wrote at p. 455, that "[i]t would seem contrary to the judgments of our Court (Seaboyer and B. (K.G.)…) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth seeking process".*

In R. v. Duarte, [1990] 1 S.C.R. 30, the Supreme Court of Canada dealt with a challenge under the *Canadian Charter of Rights and Freedoms*. Justice La Forest, for the majority of the Court, reviewed the matter and concluded:

> *Disposition*
>
> *I would dismiss the appeal. I would answer the constitutional questions as follows:*
>
> *1.Does section 178.11(2)(a) of the Criminal Code, legalizing the interception of private communications with the consent of the originator or intended recipient thereof, without the need for judicial authorization, infringe or deny the rights and freedoms guaranteed by s. 8 of the Canadian Charter of Rights and Freedoms?*
>
> *Section 178.11(2)(a) of the Code does not infringe or deny the rights and freedoms guaranteed by s. 8 of the Charter, but the interception of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, does infringe the rights and freedoms guaranteed by s. 8.*

The Commission reiterates that the present matter is not a criminal trial. Additionally, there is no evidence before the Commission that the recording by the Respondents of their conversation with the Appellant constitutes an "interception of private communications by an instrumentality of the state…"

In the present appeal, there is a dispute as to a key element of the facts. The Appellant states that she paid the December 2006 rent prior to her December 23, 2006 conversation with the Respondents. She also states that she received a receipt for this payment from the Respondents.

The Respondents state that they were not paid the December 2006 rent. In fact, they state that they still have not received payment of that month's rent. The Respondents state that they accidentally left a receipt with the Appellant.

Given that this dispute is centred on a key fact which must be determined by the Commission, that is to say whether or not the December 2006 rent was actually paid, the Commission finds that the tape is relevant and probative evidence and therefore is admissible.

Was the December 2006 rent actually paid?

In the Appellant's Application by Lessee to Set Aside Notice of Termination (Form 6), she writes:

> *rent paid by cash to Barry Murphy on Dec 21/06 receipt provided and attached.*

A copy of a receipt dated December 20, 2006 was attached to the Appellant's Form 6. This receipt appears to be signed by Barry Murphy and refers to the receipt of $800.00 "for rent Dec 20 – Jan 20 – 07" Underneath "Dec" the abbreviation "Nov" appears to have been stroked out, and underneath "Jan" the abbreviation "Dec" appears to have been stroked out.

The Appellant also submits a business chequing account statement printed on January 24, 2007. Circled on this statement is a January 22, 2007 $800.00 debit entry with the notation “paid January’s 2007 rent Jan 20 – Feb 20”. Also circled is a January 15, 2007 $800.00 debit entry with the notation “2006 paid December rent Dec 20 – Jan 20”.

The Appellant submits that the January 15, 2007 debit entry is “verification” that she paid the December 2006 rent.

The Respondents reply that the December 2006 rent was never paid.

The Respondents state that Beverley Murphy recorded the tape on December 23, 2006 at the rental premises. The Respondents and the Appellant were present, along with some guests of the Appellant. Ms. Murphy held the tape recorder in her hand. She states that she did not edit or alter the tape. Barry Murphy also states that he did not edit or alter the tape. The Respondents provided the tape and tape recorder to the Director’s Rental Officer in January 2007.

The Appellant advised the Commission that she would not be present during the playing of the tape. The Appellant did leave the Commission’s Boardroom immediately prior to the playing of the tape. Commission staff notified the Appellant when the tape ended and the Appellant returned to the Boardroom.

The Commission listened to the tape during the hearing. The quality of the tape recording was consistent with that of a portable cassette tape recorder with an internal microphone. The clarity of the tape recording was variable: often clear, but with repeated interruptions of background sounds.

Upon listening to the tape, the Commission notes the following. On December 23, 2006 the Appellant acknowledged that she had not yet paid the December 2006 rent for the rental premises. The Appellant explained that she was expecting money but had not yet received it. She offered to give the Respondent Beverley Murphy a “cheque now and I’ll make it for the first of January”.

However, after several minutes of heated conversation, the Appellant’s explanation changes. The Appellant suggested that she had already paid the rent and stated, “OK, well, I’ve got written documentation and you know, I’ll prove it if I have to in a court of law”. After a few more minutes, the Respondent Barry Murphy states to Ms. Murphy “No, I gave her the receipt”.

The Commission finds that the Appellant’s initial explanation was accurate. She did not have the money to pay the rent and needed more time. The Respondent Ms. Murphy relentlessly persisted, and after several minutes a new story emerged. Armed with a receipt, the Appellant then claimed to have previously paid the rent. The tape reveals that the conversation between the parties quickly escalated into a confrontation.

Five days later, the Respondents filed their Notice of Termination by Lessor of Rental Agreement (Form 4). A few days later, the Appellant responded with her Application by Lessee to Set Aside Notice of Termination (Form 6). In her Form 6 the Appellant maintains her position that she already paid the rent. Following the issuance of Order LD07-018, the Appellant filed the present appeal and provided the account statement printed on January 24, 2007.

The Commission finds that the information provided in the account statement does not provide "verification of paid rent" for the month of December 2006. Rather, it establishes that the Appellant paid $800.00 to her credit card company. Although the Appellant has attempted to explain that this was to repay an advance from her credit card to obtain cash to pay the rent in December, the Commission finds this evidence to stretch the limits of credibility. Nowhere in evidence is a statement showing a withdrawal or an advance of $800.00 on or about December 20, 2006. The abrupt and dramatic change in the Appellant's story captured on the tape serves to undermine her credibility on the key issue of the payment status of the December 2006 rent.

The events of December 23, 2006 were very unfortunate. Two days before Christmas, the Respondents confronted the Appellant as she was three days overdue on her December rent. The Respondents were fully entitled to do this. The Appellant offered an initial explanation, quite possibly a sincere one. The Respondent Ms. Murphy persisted and the conversation escalated into confrontation. Unfortunately, the Respondents showed no tact in vigorously pressing the matter with the Appellant in front of her guests.

The Commission finds that the December 2006 rent for the rental premises was not paid prior to December 23, 2006 and it remains unpaid.

The Commission notes that the Appellant has paid her January 2007 rent on time.

The appeal is allowed in part. Although the ingredients for a termination of the rental agreement, with a requirement to vacate, do exist, they exist within an extraordinary backdrop.

The Commission will allow the appeal in part, set aside Order LD07-018 and set aside the Notice of Termination, provided **all** the following conditions are met:

1. That the Appellant pay the sum of $800.00 to the Respondents for rent owed for the month of December 2006 within **seven days of the date of issuance of this Order**; and

2. That within **seven days of the date of issuance of this Order** there is no outstanding rent for any month.

If **any** of these conditions are not met, or if any payment is rendered void by NSF cheque or by any other means, the rental agreement will be **immediately** terminated and the Appellant will be required to **immediately** vacate the rental premises.

The Respondent will be required to accept payment and issue a receipt for payment.

IN THE MATTER of an appeal, under Section 25 of the *Rental of Residential Property Act*, by Deborah Vanneste against Order No. LD07-018 of the Director of Residential Rental Property, dated January 22, 2007.

Order

WHEREAS Deborah Vanneste (the Appellant) has appealed against Order No. LD07-018 of the Director of Residential Rental Property, dated January 22, 2007;

AND WHEREAS the Commission heard the appeal in Charlottetown on February 8, 2007;

NOW THEREFORE, for the reasons given in the annexed Reasons for Order;

IT IS ORDERED THAT

The Commission will allow the appeal in part, set aside Order LD07-018 and set aside the Notice of Termination, provided **all** the following conditions are met:

2. That the Appellant pay the sum of $800.00 to the Respondents for rent owed for the month of December 2006 within **seven days of the date of issuance of this Order**; and

3. That within **seven days of the date of issuance of this Order** there is no outstanding rent for any month.

If **any** of these conditions are not met, or if any payment is rendered void by NSF cheque or by any other means, the rental agreement will be **immediately** terminated and the Appellant will be required to **immediately** vacate the rental premises.

The Respondent will be required to accept payment and issue a receipt for payment.

DATED at Charlottetown, Prince Edward Island, this 19th day of February, 2007.

BY THE COMMISSION:

Weston Rose, Commissioner

Norman Gallant, Commissioner

Anne Petley, Commissioner

NOTICE

Sections 26.(2), 26.(3), 26.(4) and 26.(5) of the ***Rental of Residential Property Act*** provide as follows:

> *26.(2) A lessor or lessee may, within fifteen days of the decision of the Commission, appeal to the court on a question of law only.*
>
> *(3) The rules of court governing appeals apply to an appeal under subsection (2).*
>
> *(4) Where the Commission has confirmed, reversed or varied an order of the Director and no appeal has been taken within the time specified in subsection (2), the lessor or lessee may file the order in the court.*
>
> *(5) Where an order is filed pursuant to subsection (4), it may be enforced as if it were an order of the court.*

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