



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LR11010
Order LR11-22**

IN THE MATTER of a request for
review of Order LR11-15 filed by the
Respondent MacCormack Builders and
Apartments Ltd.

BEFORE THE COMMISSION
on Thursday, the 11th day of August, 2011.

John Broderick, Commissioner
Michael Campbell, Commissioner
Peter McCloskey, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of a request for review of Order LR11-15 filed by the Respondent MacCormack Builders and Apartments Ltd.

Order

On June 7, 2011 the Commission issued Order LR11-15 setting out the following:

IT IS ORDERED THAT

1. *The appeal is allowed.*
2. *The Commission hereby reverses Order LD11-112 and orders a conditional continuation of the rental agreement and the occupancy of the Appellants, subject to the conditions that follow.*
3. *The Appellants shall continue to pay the sum of \$730.00 (subject to any increases allowed under the **Rental of Residential Property Act**) rent each month. Such payment may be made in whole or in two installments of \$400.00 and \$330.00 per month.*
4. *The Appellants shall reduce all rental arrears to zero on or before August 31, 2011.*
5. *If any of the above conditions have not been satisfied, the Respondent is entitled to make a new Form 4 application through the Director. However, to expedite matters, the Respondent may, in addition, file a written request for review of the Commission's decision along with evidence pertaining to any alleged breach of the above conditions and the Commission will hear such request for review and may review, rescind or vary this Order pursuant to section 12 of the **Island Regulatory and Appeals Commission Act**.*

On August 4, 2011, the Commission received a written request for review from the Respondent MacCormack Builders and Apartments Ltd. The Respondent submitted that the Appellants Witold Pawlowski and Elizabeth Borczynska had breached Order LR11-15.

The Commission's staff forwarded a copy of the written request for review to the Appellants. The Commission scheduled the matter to be heard on August 10, 2011. Mr. Pawlowski advised that he would not be returning to Prince Edward Island until August 17 to 20, 2011. Commission staff outlined to Mr. Pawlowski three options for participation: 1. Participate by way of speakerphone testimony at the hearing 2. File written submissions 3. Have the Co-Appellant Ms. Borczynska appear. In response, Mr. Pawlowski faxed a copy of two receipts for rent paid to the Respondent.

In evidence before the Commission are receipts for the following rent payments:

June 30, 2011 \$730.00 for May rent
Undated receipt \$730.00 for June rent

Also in evidence are two debit card receipts:

06/30/11 at 22:38:10 \$730.00
08/01/11 at 02:28:53 \$730.00

The Commission notes with interest that the Appellants did not make their May rent payment until the final hour and a half or so of June. While not technically in breach of condition 3 of Order LR11-15, this flies in the face of the spirit of the Commission's Order, an Order which was premised on past good faith exercised by the Appellants:

The Commission requested copies of receipts from both parties and the Appellants appear to be approximately one month behind in their rent. The Appellants have demonstrated good faith in that they continue to make rent payments even after the Respondent set in motion a process to terminate the rental agreement.

The record before the Commission reveals that the Appellants made no rental payment at all in July 2011. This is in breach of condition 3 of Order LR11-15.

The June rent was not paid until the early hours of August 1, 2011. By that time, the rent was two months late, not the pattern of one month late, or a little over one month late, that existed at the time of the May 31, 2011 hearing.

Section 12 of the Island Regulatory and Appeals Commission Act reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it. 1991,c.18,s.12.

In Order LA97-11, *In the Matter of a Request for Review of Commission Order LA97-08 by Keir Clark and Marion Clark* (Order LA97-11 Clark), the Commission set out in some detail the test to be met on an application for a review or reconsideration of Commission decision:

The Commission and its predecessor, the Prince Edward Island Public Utilities Commission, have considered in the past the minimum criteria an Applicant must meet before the Commission will exercise its absolute discretion in the matter of reviewing its decisions under s.12 of the Island Regulatory and Appeals Commission Act, and the identical predecessor to s.12, s.16 of the Public Utilities Commission Act. This test has been interpreted consistently by the Commission in its past decisions.

As noted in previous decisions, the onus rests upon the Applicant to show that a prima facie case exists which will entitle the Applicant to the review. A prima facie case will be shown only where the function of

review should be exercised to correct an error of the Commission or to meet changed circumstances.

Changed circumstances may encompass either a situation which has developed after the decision or where new evidence emerges which was not known or not available at the time the original evidence was adduced. Changed circumstances will dictate a review only if they are material.

Finally, the power to review is discretionary and will be exercised sparingly.

In the present matter, the Commission finds that changed circumstances have occurred. The Appellants did not make any rent payment during the month of July 2011 and this is in violation of condition 3 of Order LR11-15. Further, the Appellants are now further behind in their rent arrears than they were at the May 31, 2011 hearing.

Accordingly, the Commission hereby varies Order LR11-15 and orders that the residential premises be surrendered to the Respondent, and the Sheriff is directed to put the Respondent in possession of the residential premises at 12:00 noon on Wednesday, August 24, 2011.

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Rental of Residential Property Act*

IT IS ORDERED THAT

1. The request for a review of Order LR11-15 is allowed.
2. The Commission hereby varies Order LR11-15 and orders that the residential premises situate at 118 East Drive in Summerside, Prince Edward Island shall be surrendered to the Respondent [lessor] MacCormack Builders and Apartments Ltd., and the Sheriff is directed to put the Respondent in possession of the residential premises at 12:00 noon on Wednesday, August 24, 2011.

DATED at Charlottetown, Prince Edward Island, this 11th day of August, 2011.

BY THE COMMISSION:

(Sgd.) John Broderick

John Broderick, Commissioner

(Sgd.) Michael Campbell

Michael Campbell, Commissioner

(Sgd.) Peter McCloskey

Peter McCloskey, 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.

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141y-SFN(2009/11)