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

**Docket LR12028**
**Order LR12-30**

**IN THE MATTER of an appeal under Section 25 of the Rental of Residential Property Act, by Charles Archer against Order LD12-249 dated September 19, 2012 issued by the Director of Residential Rental Property.**

## BEFORE THE COMMISSION

**on Friday, the 30th day of November, 2012.**

**John Broderick, Commissioner**
**Michael Campbell, Commissioner**
**Jean Tingley, Commissioner**

# Order

Compared and Certified a True Copy

(Sgd.) Susan D. Jefferson

Commission Administrator
Land, Corporate and Appellate Services Division

**IN THE MATTER of an appeal under Section 25 of the Rental of Residential Property Act, by Charles Archer against Order LD12-249 dated September 19, 2012 issued by the Director of Residential Rental Property.**

# Order

## BACKGROUND

On October 5, 2012 the Commission received a Notice of Appeal dated the same date signed by a lessee, Charles Archer (Mr. Archer) as representative of the residents of 23 Elena Court, Charlottetown, Prince Edward Island (the Appellant) requesting an appeal of Order LD12-249 dated September 19, 2012 issued by the Director of Residential Rental Property (the Director).

By way of background, on June 7, 2012 Chris Reeves on behalf of a lessor, PEI Housing Corporation (the Respondent), filed with the Director a Form 2 – Application for Enforcement of Statutory or Other Conditions of Rental Agreement.

The matter was heard by the Director on June 26, 2012 and in Order LD12-249 the Director ordered:

***"IT IS THEREFORE ORDERED THAT***

1. *The lessor's application for the discontinuance of the hot water service for the residential premises is hereby approved.*

2. *The change of service for the residential premises shall be effective as of October 1, 2012."*

The Commission heard this matter on October 30, 2012. Daniel Tweel (Mr. Tweel) appeared as legal counsel for Mr. Archer. Mr. Archer was also present. The Respondent was represented by Chris Reeves (Mr. Reeves) and Bill Flemming (Mr. Flemming).

## EVIDENCE

Mr. Tweel submitted that hot water was a service included in the rental agreement. He further submitted that it was "disturbing" that the Respondent was not aware of the fact that each unit had its own water heater. He noted that it is the role of the Respondent to provide affordable housing for people who need such housing, including seniors. He submitted that the residents of 23 Elena Court (the residents) pay 25% of their income for housing and that the benchmark for assisted housing is 25% including hot water. By requiring the residents to pay their own hot water, the residents would be paying in excess of 25% for heat with hot water. He submitted that anything in excess of 25% should be rolled back.

Mr. Archer testified that 23 out of 24 rental agreements, including his own, specifically included hot water. He noted that he presently pays for his hot water through his electricity bill. He does not feel that seniors should have to pay for the Respondent's error.

Mr. Flemming told the Commission that prior to 2007 assisted housing rent was based on 30% of income. In 2007 it was decided to reduce this amount to 25%. He noted that while most assisted housing across the Province is rented to residents on the basis of 25% of their income and that rent includes hot water, some facilities vary from this. Facilities vary in several ways, for instance some have elevators and others do not. Some units are only bed/sitting apartments and the Respondent has a policy allowing the rent for these units to be less than 25% of income. Some facilities are electrically heated and in that case the Respondent pays the total electricity bill and then charges back a portion to residents for the portion of electricity not attributable to heating.

He explained that 23 Elena Court and five other facilities are owned by the private sector, leased by the Respondent and subletted to the residents. A set of specifications was created but the method of providing hot water was not specified. Some developers chose central hot water; others chose individual hot water for each unit. The Respondent made an error on the leases and, once the error became known, applied to the Director to correct the error.

Mr. Reeves stated that he thought that most residents of 23 Elena Court understood that an error was made.

## DECISION

It is the Commission's decision to allow the appeal.

In Director's Order LD-249 it was stated in part on page 3, "… the officer finds that the lessor's application is justified …". The Commission is of the view that any such justification was not explained in the Order or readily apparent. This is quite unusual as most Director's Orders set out a clear line of reasoning and are "transparent" thus allowing a reader or an appellate body to see why the Director reached the decision.

However, Director's Order LD-249 may be explained by the following statement on page 2 of said Order:

> *He [Mr. Reeves] also stated none of the lessor's other rental units include the service of hot water in the monthly rent.*

Such a statement might suggest to a trier of fact that the rental agreements merely contained a typographical error [since none of the other units include hot water] which should be corrected. Indeed, the Commission would be inclined to allow the correction of a mere typographical error and it appears that the Director might have followed a similar approach.

Appeals before the Commission are on a *de novo* basis, that is to say, they are not only an appellate review of a tribunal's decision, but also involve a fresh hearing. Often the reason why the Commission's decision may differ from a lower tribunal, such as the Director, is based on evidence not previously filed, or testimony not previously heard. In this case, it appears that the testimony heard by the Director was very different than the testimony heard by the Commission on one key point: Mr. Flemming testified before the Commission that hot water was included in the rent for many facilities operated by the Respondent. This suggests to the Commission that the 23 rental agreements in question were prepared on the basis of a mistaken assumption held by the Respondent and not a mere typographical error.

The Commission notes that the rental agreements for 23 of the 24 residents specifically noted that hot water was an included service. There is nothing especially novel about providing hot water as an included service within a rental agreement. Sometimes hot water is included; sometimes it is not. The rental agreement was prepared by the Respondent, not the Appellant or the other residents, and there is a duty for the Respondent as a lessor to be familiar with what services are, and are not, provided in the units that it owns, or in this case, that it manages.

In the present situation, the Respondent is leasing the entire complex from a private developer and it appears that the Respondent assumed that the complex had centralized hot water. The Respondent was dealing directly with the developer and could have made inquiries or, if necessary, performed an inspection to ensure the assumption was correct. Unfortunately, that was not done. On the basis of this assumption, leases were entered into and it appears that the mistake was discovered when one or more of the residents received their first electricity bill for their new apartment.

A rental agreement is a type of legal contract and section 5 of the ***Rental of Residential Property Act (the Act)*** makes this clear. The rental agreement for 23 of the residents specified that the Respondent would include the service of hot water and the Commission determines that the Respondent should be held to its obligation under the rental agreement.

As a practical matter, this obligation may be satisfied by reimbursing or crediting tenants for that portion of their electricity bill reasonably attributable to the provision of hot water.

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

# IT IS ORDERED THAT

1. **The appeal is allowed.**

2. **The Respondent lessor shall be required to provide hot water service where such service has been specified as an included service in the rental agreements for 23 Elena Court, Charlottetown, Prince Edward Island.**

**DATED** at Charlottetown, Prince Edward Island, this **30th** day of **November**, **2012**.

**BY THE COMMISSION:**

(sgd. John Broderick)
John Broderick, Commissioner

(sgd. Michael Campbell)
Michael Campbell, Commissioner

(sgd. Jean Tingley)
Jean Tingley, 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)**