



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LR12031
Order LR13-01**

IN THE MATTER of an appeal under
Section 25 of the Rental of Residential
Property Act by Elizabeth MacBeth against
Order LD12-284 dated October 19, 2012
issued by the Director of Residential Rental
Property

BEFORE THE COMMISSION
on Monday, the 7th day of January, 2013.

Allan Rankin, Vice-Chair
Leonard Gallant, Commissioner
Peter McCloskey, 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 Elizabeth MacBeth against
Order LD12-284 dated October 19, 2012
issued by the Director of Residential Rental
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BACKGROUND

On October 23, 2012 the Commission received a Notice of Appeal dated the same date from a lessee, Elizabeth MacBeth (the Appellant) requesting an appeal of Order LD12-284 dated October 19, 2012 said Order issued by the Director of Residential Rental Property (the Director).

By way of background, on June 27, 2012 the Appellant filed with the Director a Form 9 – Application re Determination of Security Deposit dated the same day to which was attached a Form 8 – Notice of Intention to Retain Security Deposit signed by P. Sherren on behalf of a lessor, Ethos Enterprises (the Respondent) dated June 25, 2012.

The matter was heard by the Director on September 13, 2012. In Order LD12-284 the Director ordered:

“IT IS THEREFORE ORDERED THAT

- 1. The lessor shall receive a payment of \$317.75 from the funds held in trust;*
- 2. The funds shall be disbursed after the appropriate appeal period has expired.”*

The appeal was heard by the Commission on November 15, 2012. The Appellant was present at the hearing and called two witnesses, Shelley MacDonald (Ms. MacDonald) and Veda Valler (Ms. Valler). Pauline Sherren (Ms. Sherren) represented the Respondent.

EVIDENCE

The Appellant told the Commission that when she first rented the apartment in 2005 there was no written or verbal notice that the apartment was non-smoking. The first that she had heard that it was non-smoking was in 2007 when a memo was circulated. That same year non-smoking signs also went up. The Appellant is of the opinion that the invoice for the repainting of the apartment is excessively high. She also noted that the apartment was not repainted during the seven years she lived in it.

Ms. MacDonald is the Appellant's daughter. Ms. MacDonald testified that she assisted the Appellant in finding an apartment in 2005. The apartment was not advertised as a non-smoking apartment and there was no mention that it was a non-smoking apartment when the Appellant agreed to take it.

Ms. Valler is a friend of the Appellant. Ms. Valler testified that she saw the Appellant's apartment after she had moved her possessions out. The apartment was very clean and the only smell she noticed was that of oven cleaner.

Ms. Sherrin testified that she took over the management of the apartment building in 2001. She intended to make the apartment building a non-smoking building and put up non-smoking signs in 2001. The newspaper advertisements normally stated the apartment for rent to be non-smoking. The sample advertisement found in the exhibits must have been an error made by the newspaper. She did not specifically remember telling the Appellant in 2005 that the apartment was non-smoking. She stated that the Respondent retained the Appellant's security deposit because a special paint was required and the paint job would cost more than an ordinary painting of the apartment. Ms. Sherrin noted that other than the smoking issue, the Appellant was a good tenant.

DECISION

After considering all the evidence, it is the Commission's decision to allow the appeal for the reasons that follow.

The Commission finds that in 2005 the Appellant did not know that the apartment was a non-smoking apartment. Although Ms. Sherrin stated that the Respondent's newspaper advertisements promoted available apartments as non-smoking, the one and only newspaper advertisement filed in evidence with the Commission did not specify the apartment to be non-smoking. Ms. Sherrin could not specifically recall telling the Appellant in 2005 that the apartment was non-smoking. The evidence with respect to the posting of signs prohibiting smoking is conflicting. Had there been a written rental agreement between the parties specifying the apartment to be 'non-smoking', the agreement would have provided clear and cogent evidence that the apartment was a non-smoking unit; however, there was no such written rental agreement in evidence before the Commission.

The testimony of the witnesses and the photographs filed as exhibits confirm that the Appellant kept the apartment in very good condition during the seven years she lived there.

While the Commission accepts that the Respondent intended that apartments in the apartment building be non-smoking from 2001 forward, the Commission finds, based on the civil standard of a balance of probabilities, that such intention was not communicated to the Appellant when she commenced the rental of the apartment.

The Appellant rented the apartment in 2005 under an oral agreement between the parties and the Appellant had the understanding that smoking was permissible. While the Respondent clearly communicated a non-smoking policy in 2007, such communication did not retroactively alter the oral agreement between the parties and thus the Appellant should not be penalized for continuing to smoke in her apartment.

Accordingly, the Commission allows the appeal, reverses the decision of the Director in Order LD12-284 and hereby orders that the Appellant [lessee] shall receive a full return of her security deposit plus interest representing a payment of \$317.75 from the funds held in trust.

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. Director's Order LD12-284 is reversed and the Appellant [lessee] shall receive a payment of \$317.75 from the security deposit funds (said amount includes accumulated interest) held in trust.

DATED at Charlottetown, Prince Edward Island, this **7th** day of **January**, 2013.

BY THE COMMISSION:

(sgd. Allan Rankin)

Allan Rankin, Vice-Chair

(sgd. Leonard Gallant)

Leonard Gallant, 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)