



**THE ISLAND REGULATORY AND  
APPEALS COMMISSION**

Prince Edward Island  
Île-du-Prince-Édouard  
CANADA

**Docket LR15040  
Order LR16-01**

**IN THE MATTER** of an appeal under Section 25 of the Rental of Residential Property Act, filed by Jason Heisler and Terri Lee Phillips against Order LD15-441 issued by the Director of Residential Rental Property dated December 17, 2015.

**BEFORE THE COMMISSION**  
on Friday, the 22nd day of January, 2016.

John Broderick, Commissioner  
Ferne MacPhail, Commissioner  
Peter McCloskey, Commissioner

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# Order

Compared and Certified a True Copy

(Sgd.) Susan D. Jefferson

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Commission Administrator  
Corporate Services and Appeals

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## BACKGROUND

On December 29, 2015 the Commission received a Notice of Appeal from two lessees, Jason Heisler and Terri Lee Phillips (the “Appellants”), requesting an appeal of Order LD15-441 dated December 17, 2015 issued by the Director of Residential Rental Property (the “Director”).

By way of background, on December 8, 2015 Steven Malayny (“Mr. Malayny”) the representative of a lessor, 100018 PEI Inc. (the “Respondent”) filed with the Director a Form 2 – Application for Enforcement of Statutory or Other Conditions of Rental Agreement. A copy of a Notice of Termination by Lessor of Rental Agreement dated November 12, 2015 was attached to the Application.

The matter was heard by the Director on December 16, 2015 and in Order LD15-441 the Director ordered:

***“IT IS THEREFORE ORDERED THAT***

- 1. Possession of the residential premises (mobile home lot located at 25 Heritage Trailer Park, Summerside, PE) be surrendered to the lessor and the Sheriff is directed to put the lessor in possession of the residential premises at 12:00 noon, Tuesday, December 29, 2015.”*

The matter was heard by the Commission on January 11, 2015. The Appellants were present and represented themselves. The Respondent was represented by Mr. Malayny and Tara Walker Malayny.

## EVIDENCE

The Appellants told the Commission that they had believed that they had reached an agreement with the Respondent’s representative. They noted that they have been in arrears before but always paid their rent eventually. In December they made two payments: \$300.00 and \$700.00. They believed that those payments had eliminated the arrears of rent.

The Respondent's representatives advised the Commission that the current rent for the mobile home lot is \$134.00 per month, due on the first day of each month. Mr. Malayny, on behalf of the Respondent, had filed a Form 4 Notice of Termination on November 12, 2015. The Appellants did not pay the arrears within ten days and thus Mr. Malayny applied for an order terminating the rental agreement. The Appellants did pay the Respondent the sum of \$300.00 on December 8 and \$700.00 on December 14, 2015.

Mr. Malayny testified that rent payments are to be paid at his business office. On December 14, 2015 Jason Heisler (Mr. Heisler) made the \$700.00 payment at Mr. Malayny's home. Mr. Malayny stated that Mr. Heisler asked him to cancel the hearing before the Director. Mr. Malayny stated that he did not agree to Mr. Heisler's request. Mr. Malayny stated that he told Mr. Heisler that he would call him the next day. Mr. Malayny also testified that he did not call Mr. Heisler and never intended to call him.

## DECISION

The Commission allows the appeal and reverses Director's Order LD15-441 for the reasons that follow.

The evidence before the Commission indicates that the Appellants did not pay the arrears of rent within ten days of receiving the Form 4. The evidence further demonstrates that the Appellants did not apply to the Director to set aside the Form 4 Notice of Termination by Lessor of Rental Agreement. Section 16 of the **Rental of Residential Property Act**, R.S.P.E.I. 1988, Cap. R-13.1 (the **Act**) reads as follows:

16. (1) *A lessee who has received notice of termination for any of the reasons set out in section 13, 14 or 15 may apply to the Director for an order setting aside the notice.*
- (2) *An application under subsection (1) shall be made by a lessee not later than ten days after being served with the notice.*
- (3) *Where the lessee does not bring an application to set aside the notice, he shall be deemed to have accepted the termination on the effective date of the notice.*
- (4) *The lessee shall serve the lessor with a copy of an application of the lessee under subsection (1). 1988,c.58,s.16; 1990,c.53,s.6.*

Pursuant to subsection 16(3), the Appellants would ordinarily be deemed to have accepted the termination as they did not file a Form 6 Application by Lessee to Set Aside Notice of Termination with the Director. However, subsection 18(2) of the **Act** sets out requirements for a notice of termination:

- 18(2) *A notice to terminate*
  - (a) *shall be signed by the person giving the notice, or his agent;*
  - (b) *shall identify the premises in respect of which the notice is given;*
  - (c) *shall state the date on which the notice is to be effective; and*
  - (d) *where notice is given by the lessor, shall state the reasons for the termination. 1988,c.58,s.18.*

Director's Order LD15-441 was made pursuant to a Form 2 Application for Enforcement of Statutory or Other Conditions of Rental Agreement dated December 5, 2015 and this Form 2 was filed with the Director on December 8, 2015. Accompanying the Form 2 was a Form 4 dated November 12, 2015. The reason for termination of the rental agreement was set out in the November 12, 2015 Form 4 as:

I am terminating our rental agreement for the following reason: (Check the appropriate reason.)  
 (a)  You have failed to pay your rent in the amount of \$ 994.39, which was due on the \_\_\_\_\_ 1st day  
 of \_\_\_\_\_ May \_\_\_\_\_ 20 15, [YOU ARE ADVISED OF YOUR RIGHT TO INVALIDATE THIS NOTICE BY  
 PAYING ALL RENT DUE WITHIN TEN DAYS OF RECEIVING THIS NOTICE] (s.13 of Act);

On the fourth page of Exhibit E-13 filed by the Respondent at the hearing before the Commission, it was specified that as of May 2015 the sum of \$191.39 was owing.

A Form 4 is a powerful document. If a lessee pays the stated arrears within ten days of service, the Form 4 is invalidated. Otherwise, if the lessee does not file a Form 6 to apply to set the Form 4 aside within ten days, the lessee is then "deemed to have accepted the termination on the effective date of the notice."

Clause 18.(2)(d) of the **Act** requires the lessor's notice to terminate to state reasons for the termination.

In the present appeal, a reason for the termination was stated but that reason was in error. A review of Director's Order LD15-441 makes no mention of the error in the November 12, 2015 Form 4.

Given that a Form 4 is a strict document complete with a deeming provision with the potential to terminate a rental agreement without a hearing, the Commission finds that a Form 4 must be accurate. Instead, the Form 4 contained an inaccuracy which undermined the authority of the document. The onus is on a lessor, who possesses, or ought to possess, an accurate record of a lessee's statement of account to accurately indicate the arrears for a specific date and fill in the Form 4 correctly.

This error was also made against a backdrop of numerous Form 4s filed over the years which were ultimately waived by the lessor following large lump sum 'catch up' payments made by the lessees. There is no evidence on file that the lessor took steps to advise the lessees that it had changed its policy prior to issuing the November 12, 2015 Form 4 and was now prepared to fully enforce the arrears.

While it could be said that the error in the November 12, 2015 Form 4 was merely of a technical nature, it was nonetheless an error in a document that was filed in an effort to terminate the rental agreement. The Commission has reviewed the earlier Form 4s and notes that a similar error was made when compared to Exhibit E-13. This pattern suggests that the error was not a mere word processing error. It appears that the lessor was operating on the assumption that the date should represent when the arrears commenced. However, the date required is the date on which the stated arrears were accumulated. As an example, in the most recent Form 4, the arrears may have commenced in May 2015 but the stated arrears of \$994.39 was not reached until November 1, 2015.

Accordingly, the Commission finds that the November 12, 2015 Form 4 is void due to an error in the stated reason for termination. As the Form 4 is void, the Commission hereby allows the appeal and Director's Order LD15-441 is reversed.

**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 November 12, 2015 Form 4 is void due to an error in the stated reasons for termination.**
3. **Director's Order LD15-441 is hereby reversed.**

**DATED** at Charlottetown, Prince Edward Island, this **22nd** day of **January**, 2016.

**BY THE COMMISSION:**

(sgd. John Broderick)

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John Broderick, Commissioner

(sgd. Ferne MacPhail)

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Ferne MacPhail, Commissioner

(sgd. Peter McCloskey)

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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)