



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LR18046
Order LR18-43**

IN THE MATTER of an appeal filed under Section 25 of the Rental of Residential Property Act by Linda Carty against Order LD18-322 dated October 19, 2018 issued by the Office of the Director of Residential Rental Property.

BEFORE THE COMMISSION

on Wednesday, the 14th day of November, 2018.

John Broderick, Commissioner
M. Douglas Clow, Vice-Chair
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Susan Jefferson

Commission Administrator
Corporate Services and Appeals

IN THE MATTER of an appeal filed under Section 25 of the Rental of Residential Property Act by Linda Carty against Order LD18-322 dated October 19, 2018 issued by the Office of the Director of Residential Rental Property.

Order

BACKGROUND

On October 23, 2018 the Commission received a Notice of Appeal from a lessee, Linda Carty (the “Appellant”), requesting an appeal of Order LD18-322 dated October 19, 2018 issued by the Director of Residential Rental Property (the “Director”).

By way of background, on October 3, 2018, the Appellant filed with the Director a Form 6 – Application by Lessee to Set Aside Notice of Termination. Attached to the Form 6 was a Form 4 – Notice of Termination by Lessor of Rental Agreement dated September 24, 2018 to be effective October 24, 2018 signed by a lessor, Weymouth Properties Ltd. (the “Respondent”).

The matter was heard by the Director on October 17, 2018 and in Order LD18-322 the Director ordered:

“IT IS THEREFORE ORDERED THAT

- 1. The lessee’s application to set aside the Notice of Termination (Form 6) dated October 3, 2018 is dismissed.*
- 2. The Notice of Termination (Form 4) dated September 24, 2018 to be effective October 24, 2018 is valid.*
- 3. The rental agreement between the lessor and the lessee is terminated as of October 24, 2018 and the lessee shall vacate the premises on or before October 24, 2018.”*

The Commission heard the appeal on November 6, 2018. The Appellant was present at the hearing along with her son-in-law Richard Graves (“Mr. Graves”). The Respondent was represented by Wayne Bevan (“Mr. Bevan”) and Betty Morrison (“Ms. Morrison”).

EVIDENCE

The Appellant testified that she has no idea why she is being evicted. She testified that the actions of a third party were responsible for damage to her apartment and this third party had been living in another apartment in the building. She testified that she had contacted the police. She testified that her roommate is moving out.

The Appellant testified that she no longer smokes in the building. She stated that she smokes away from the building or at her daughter's residence. She stated that there are other smokers who live in the building.

When the Appellant was asked why she did not promptly advise the Respondent that it was the third party who broke the window, she replied that she was scared to identify the person who broke the window. The Appellant testified that this third party had threatened her life by threatening to burn down her apartment.

Mr. Graves testified that the Appellant does not smoke in the apartment.

Mr. Bevan testified that he has spoken with the other tenant who had allowed the third party on the premises. Mr. Bevan stated that the cleaners could smell smoke in the building and he noted that the living room window for the Appellant's apartment was always open. Mr. Bevan submitted that the matter has come down to a smoking issue, and explained that when the Appellant first moved in, smoking was not permitted in the apartment or within 20 feet of the building.

Ms. Morrison testified that they were not aware of who is going in and out of the window. She also testified that the Appellant had not informed them of who was living there as the Appellant's roommate. Ms. Morrison testified that now no smoking is permitted anywhere on the property, inside or outside.

DECISION

The appeal is denied and Director's Order LD18-322 is confirmed, subject to a variation in the rental agreement termination date.

A rental agreement was signed by the parties on May 27th, 2015 and on "May 27th" [no year stated] the Appellant signed a no smoking agreement that prohibited smoking in the apartment or any closer than 20 feet from the building. In addition, the Respondent provided a policy notice from Bevan Enterprises Inc., possibly a company connected to the Respondent company, indicating that all properties owned and operated by Bevan Enterprises Inc. will be non-smoking as of March 1, 2018. This notice goes on to state:

This means NO SMOKING anywhere inside the buildings, in the apartments, on patios, in parking lots or anywhere on the grounds.

This ban will include cigarettes, e-cigarettes, cigars & both medicinal and recreational Marijuana.

In Director's Order LD18-322, the Director found that the Appellant's smoking in the apartment and outside on the fire escape, as well as the illegal dumping of a couch outside the building were sufficient to warrant a termination of the rental agreement. The Director found that there was insufficient evidence to determine that the apartment was illegally sublet. The Director found that the property issue, a broken window, appeared to be before the courts and was not a deciding factor.

The Commission finds that the issue of the broken window was caused by a third party, admitted to the building by another tenant, and the Appellant, far from facilitating this third party, was a victim of the actions of the third party. While the Appellant ought to have promptly informed the Respondent of the identity of the person who broke the window, the Commission accepts the testimony of the Appellant that she was scared to do so.

The Appellant admits to having smoked in her apartment in the past and admits to smoking outside. The Appellant maintains that she no longer smokes in the apartment, but the evidence is not clear as to when she stopped smoking in the apartment. The evidence filed by workers hired by the Respondent [see Exhibit E-4 (j), (k) and (l)] identifies a smell of cigarette smoke outside the Appellant's door on "3 or 4 occasions" and on a "weekly basis" as well as "Different times doing repairs seen ashtrays full of butts." Two out of these three unsworn statements were undated and the authors of these statements were not presented as witnesses where clarification could be sought.

Where a lessor seeks to terminate a rental agreement, the onus is on the lessor to establish, on the civil standard of the balance of probabilities, that the rental agreement should be terminated. The concept of the civil standard of the balance of probabilities deserves further explanation to aid in its understanding. The following case provides a simple and meaningful explanation of the concept.

In *McIver v. Power*, [1998] P.E.I.J. No. 4, Prince Edward Island Supreme Court – Trial Division, 1998 CanLII 4858 (PE SCTD), MacDonald C.J.T.D. described the balance of probabilities at paragraph 5 of his decision:

[5] In any civil case the plaintiff must prove their case on a balance of probabilities if they are to succeed. This means that the plaintiff must prove that his facts tip the scale in his favor even if it is only a 51% probability that he is correct.

The Respondent alleges in the Form 4 Notice of Termination by Lessor of Rental Agreement dated September 24, 2018 that the Appellant has failed to meet the requirements set out in s.14(1)(a), s.14(1)(b), s.14(1)(e) and s.14(1)(h) of the **Rental of Residential Property Act** (the "**Act**").

Section 14(1)(a), specifically, "...or any other term of the rental agreement has been breached...", may apply to the extent that the signed May 27 [year not stated, see page 8 of the file] agreement not to smoke in the apartment or within 20 feet of the building is found to be part of the May 27, 2015 rental agreement.

Section 14(1)(e) may apply to the extent that smoking in the apartment or near the building seriously impairs the safety or other lawful right of the Respondent or of another tenant.

Section 14(1)(b) does not apply as there is unchallenged evidence that the damage was caused by a third party admitted to the building by a tenant other than the Appellant.

The Commission agrees with the finding of the Director that there is not enough evidence to determine that the Appellant illegally sublet or assigned her apartment and therefore section 14(1)(h) would not apply.

The Commission is concerned that the Respondent may have been predisposed to seeking a termination of the rental agreement by issuing a Form 4 making a series of allegations, one of which had insufficient evidence and one of which has been demonstrated to be incorrect. That said, the allegations concerning smoking in or near the apartment do justify the Commission's further consideration.

With respect to sections 14(1)(a) and 14(1)(e) of the **Act**, this tenancy has existed for nearly three and one half years and the evidence suggesting smoking in the apartment or near the building is vague when examined from the perspective of when the observation was made and other details which could be revealed through a more thorough written statement or, best of all, through oral testimony followed by effective cross-examination. That said, one unsworn statement was dated more or less contemporaneously to the serving of the Respondent's Form 4 and it speaks to smelling smoke upon entering the building by the Appellant's apartment which is the only apartment on that floor.

A lessor does have a lawful right to set a condition that there be no smoking in a rental unit and on the rest of the rental premises owned by the lessor. The Commission finds, on the balance of probabilities, that the May 27th agreement signed by the Appellant was signed in 2015 and forms a part of the May 27, 2015 rental agreement. The Commission finds that the Appellant agreed to and was aware of the rental agreement condition preventing smoking in the apartment or within 20 feet of the building.

The Appellant admits she smoked in her apartment in the past and she admitted that she continues to smoke outside. Her Form 6 Application by Lessee to Set Aside Notice of Termination suggests that she has been smoking outside on her deck. This suggests that she was smoking within 20 feet of the building at the time the September 24, 2018 Form 4 was served on her.

Considering the evidence of both parties, the Commission finds that the evidence is sufficient to establish that it was more probable than not that the Appellant was, at the time the Respondent commenced action to terminate the rental agreement, continuing to breach the smoking prohibition condition she signed as part of the May 27, 2015 rental agreement. The same factual basis also supports a finding that the breach of the smoking prohibition was impairing the Respondent's lawful right to designate its building and surroundings as smoke free. The Commission therefore finds that the Respondent's Form 4 was valid with respect to sections 14(1)(a) and 14(1)(e) of the **Act**.

Accordingly, the appeal is denied and the Directors decision confirmed, subject to a variation in the termination date. In this appeal the Commission finds there are extenuating circumstances that make it appropriate to provide a later termination date than would be ordinarily ordered; however this later termination date is conditional upon there being no current arrears in rent. At the hearing before the Commission there was no suggestion by the Respondent that November 2018's rent had not been paid in full.

Conditional upon all of November 2018's rent having been already paid and conditional upon all of December 2018's rent being paid on or before December 1, 2018, the Commission hereby orders the termination of the rental agreement as of December 31, 2018 and the Appellant shall vacate her apartment on or before that date. In the event one or both of these conditions have not been met, the rental agreement shall be terminated immediately upon the expiry of the condition deadline.

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 denied.
2. Director's Order LD18-322 is confirmed, subject to the following conditional variation:
3. The Commission establishes a condition that all of November 2018's rent be paid in full as of the date of this Order and the Commission also establishes a further condition that all of the rent for December 2018 is paid in full on or before December 1, 2018. Provided that both of these conditions have been met, the rental agreement between the Respondent lessor and the Appellant lessee is terminated as of December 31, 2018 and the Appellant lessee shall vacate the premises on or before December 31, 2018.
4. In the event that one or both of the above conditions have not been met, the rental agreement shall be terminated immediately upon the expiry of the condition deadline and the Appellant lessee shall immediately vacate the premises.

DATED at Charlottetown, Prince Edward Island, this **14th** day of **November**, 2018.

BY THE COMMISSION:

(sgd. John Broderick)

John Broderick, Commissioner

(sgd. M. Douglas Clow)

M. Douglas Clow, Vice-Chair

(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)