Background Information

[1] On July 20, 2023 the Residential Tenancy Office (the "Rental Office") issued Order LD23-338 which ordered the tenancy agreement between the parties to terminate effective August 28, 2023. The Applicants appealed this decision to the Island Regulatory and Appeals Commission (the "Commission") on July 27, 2023.

[2] On August 21, 2023 the Rental Office issued Order LD23-395 ordering the Applicants to pay outstanding rent. The Applicants appealed this decision to the Commission on September 11, 2023.

[3] Both Order LD23-338 and LD23-395 were scheduled to be heard before the Commission together on October 4, 2023. The hearing was adjourned to October 17, 2023 and the Commission heard the appeal of the two decisions on that day.

[4] On November 2, 2023 the Commission issued Order No. LR23-68 which stated:

IT IS ORDERED THAT

1. ***The appeal of Order LD23-338 and LD23-395 are allowed, in part.***
2. ***The tenancy agreement is terminated as of November 30, 2023 at 5:00 p.m. The Tenants shall vacate the Premises by this date and time.***
3. ***The Tenants shall pay to the Landlord the amount of $13,700.00 by November 30, 2023 at 5:00 p.m.***
4. ***No rent is owing for November 2023.***
5. ***A certified copy of this Order may be filed in the Supreme Court and enforced by Sheriff Services as permitted by the Act.***

[5] On November 28, 2023 the Applicants filed a Notice of Application with the Appeal Court of Prince Edward Island (Appeal Division). The Notice of Application seeks the following remedies:

a) *An extension or abridgement of time pursuant to Rule 3.02 of the Rules of Civil Procedure.*
b) *A "Stay" of an Order No: LR23-68 of an Order of the Island Regulatory and Appeals Commission that has not yet been filed as of this date with the Supreme Court.*
c) *Direction from the Court as to Service upon the Respondents who are "Avoiding and not accepting service" and their purported "Agent" who has no known address listed or provided for service and*
d) *Costs of this application.*

[6] As of the time and date of the hearing, no extension and/or "stay" has been granted by the Appeal Court of Prince Edward Island.

[7] A preliminary matter on the question of jurisdiction was identified by the Rental Office:

- ***Are the applicants "tenants" within the meaning of the Residential Tenancy Act?***

For this reason, the decision refers to the parties as the "Applicants" and the "Respondents".

Introduction

[8] On January 30, 2024 the Applicants filed a *Tenant Application to Determine Dispute* (Form 2(A)) (the "Application") with the Rental Office. The Application seeks a finding that the Respondents have breached section 21 of the *Residential Tenancy Act* (the "*Act*"). Further, the Application requests an order that the discontinued services be restored effective immediately.

[9] The Respondents are seeking that the Application be dismissed in its entirety and are seeking partial indemnity costs in the amount of $750.00.

[10] All documents (including the Notice of Hearing and Evidence) were properly served to the parties in accordance with clause 100(1) of the *Act.*

[11] On February 7, 2024 a teleconference hearing was held at 11:00 a.m. before a Residential Tenancy Officer (the "Officer"). The Applicant appeared, representing the Applicants. The Respondent appeared, represented by legal counsel.

Preliminary Issue on Jurisdiction

[12] The parties provided written and oral submissions relating to the question of jurisdiction. The arguments and submissions focused on whether or not the Applicants are "tenants", whether or not there is a tenancy agreement, and whether or not the Officer can grant the remedy sought in the Application.

Preliminary Issue to be Decided

i. Are the Applicants "tenants" within the meaning of the *Act*?

Issues to be Decided

ii. Have the Respondents breached clause 21 of the *Act*?

iii. Are the Respondents required to restore services to the Rental Unit?

Summary of the Evidence

[13] In April 2015 the parties entered into a verbal month-to-month tenancy agreement for the Rental Unit. Rent is $1,200.00 due on the first day of the month. No security deposit was required. The Applicants continue to live in the Rental Unit.

Applicants' Evidence and Submissions

Preliminary Issue: Are the Applicants "tenants" within the meaning of the Act?

[14] The Applicant submitted 40-pages of documents into evidence. The Applicant testified that the Respondents (*referred to as the Landlords in his submissions*) have breached their contract. The Applicant testified that he disagrees with the findings from the Commission in Order No. LR23-68 and has appealed to the Court of Appeal. The Applicant argued that the Commission's Order is *appealable* and therefore not binding.

[15] The Applicant has applied for a "stay" of Order LR23-68 and submitted into evidence a copy of a Notice of Application outlining the Applicant's reason(s) for the Notice of Application to the Court of Appeal. The Applicant admitted that the "stay" and/or the extension has not been granted yet because he cannot control the "Court's schedule". The Applicant argued that due to the application to the Court, Sheriff Services will not enforce the Commission's Order No. LR23-68.

[16] The Applicant argued that the Respondents have impeded due process throughout their disputes (naming his experiences and delays before the Commission and the Court). The Applicant argued that the Respondents turned off his internet before the first hearing with the Commission. This caused an adjournment of the first appeal with the Commission. The Applicant argued that on January 8, 2024 the Respondents turned off the electricity to the Rental Unit; however, the Respondents have been interfering and not providing services for much of the tenancy.

[17] The Applicant argued that the Rental Office cannot make a finding on whether or not the Applicants are "Overholding Tenants" because that is up to the "Court" (referring to the Court of Appeal). The Applicant argued that section 51(4) clearly restricts the "Landlord's right to possession". The Application argued that he is a "tenant" who currently possesses the Rental Unit. The Applicant argued that until the Court of Appeal rules and/or the Sheriff executes an order there is a tenancy agreement that exists.

[18] The Applicant argued that communication with both the Court of Appeal and the Commission has led him to believe that the only process to have his remedy sought is through the Rental Office by way of the Application. The Applicant referred to documentary evidence of conversations between staff at the Court of Appeal, and the Commission. The Applicant concluded his submissions by arguing that the Rental Office can order the remedy sought because there is an existing tenancy agreement and they are "tenants" within the meaning of the *Act*.

Respondents' Evidence and Submissions

[19] The Respondent provided Commission Order LR23-68, written submissions and their legal arguments into evidence. Through oral submissions, written submissions, and examination, the Respondent laid out the facts of the case. The Respondent argued that there is no evidence that Order LR23-68 has been "stayed" and/or overturned. The Respondent argued that the Applicant is explicitly contravening Order LR23-68. The Respondent argued that Order LR23-68 is in effect unless it is "stayed" and/or overturned by the Court of Appeal.

[20] The Respondent argued that a mere filing of a notice of application does not "stay" Order LR23-68. The Respondent argued that the *Rules of Civil Procedure* provide that even the filing of an actual notice of appeal does not operate as a stay of the underlying proceedings citing *Rule 63.01 (1)*.

[21] The Respondent argued that Order LR23-68 is in effect, the tenancy agreement is terminated, and that the Applicants are required to vacate the Rental Unit. With the tenancy agreement terminated the Respondents do not need to provide services which would be required in the tenancy agreement. The Respondents noted that they have only taken the services out of their own name and that there is nothing stopping the Applicants from putting the services in their name. The Respondent argued that the Applicant is also seeking an extension to file an appeal because the Applicants are outside of the 15-day filing requirement in section 89(9) of the *Act*.

[22] The Respondent argued whether or not the Sheriff executes Order LR23-68 is irrelevant to the Application before the Director. The Respondent argued that the Application should be dismissed entirely because it is a *collateral attack* on the Commission's Order No. LR23-68.

[23] The Respondent argued that section 77(a)(ii) of the *Act* empowers the Director to dismiss an application where, in the Director's opinion, the application is an "abuse of process." The Respondent provided this summary in relation to its argument:

- "*In general terms, the doctrine of abuse of process prevents an applicant from using the process of a tribunal in a way that would bring the administration of justice into disrepute. There are many ways in which an application may be an abuse of process. By way of example, an application is an abuse of process if it amounts to a "collateral attack" on a prior order of a tribunal."*

- *"An application amounts to a "collateral attack" on a prior order of a tribunal if, in effect, the application challenges the legal force of that prior order otherwise than through the appropriate appeal or judicial review mechanism. A proceeding may constitute a collateral attack on a previous decision even if it does not "bluntly assert" that the previous decision is being challenged. The question is always whether the proceeding, in effect, challenges the legal force of the previous decision.*"

[24] The Respondent argued that the Application amounts to a collateral attack on Order LR23-68 in two ways:

- "*The Application expressly challenges the legal force of Order LR23-68. The tenancy agreement was terminated and the Applicants were ordered to vacate. In the Application, the Applicants assert that they maintain "legal possession" of the Rental Unit.*
- *The Application impliedly challenges the legal force of Order LR23-68. The Applicants are asking the Director to make an order that will facilitate their continued occupation of the very rental unit that the Commission has ordered them to vacate."*

Analysis for the Preliminary Issue

[25] The Application is made in accordance to section 75 of the *Act*. In such applications it is the Applicant's burden to prove, on a balance of probabilities, any and all claims. This means that the Applicant must provide the decision-maker sufficiently clear, convincing and cogent evidence to prove their claim(s).

Preliminary Issue: i Are the Applicants "tenants" within the meaning of the Act?

[26] Clause 75(1) of the *Act* states:

> ***75. Application to determine disputes***
> *(1) Except as otherwise provided in this Act****, a tenant****, a landlord or a person representing a tenant or landlord may, during or within six months after termination of a tenancy agreement, make an application to the Director to determine*
> *(a) a question arising under this Act or the regulations;*
> *(b) whether a provision of a tenancy agreement has been contravened; or*
> *(c) whether a provision of this Act or the regulations has been contravened*

[27] Further, clause 1(x) of the *Act* states:

> ***1. Definitions***
> *In this Act,*
> *(x)* ***"tenant"*** *includes*
> *(i) a person who is entitled to use or occupy a rental unit under a tenancy agreement,*
> *(ii) the assigns and personal representative of a person referred to in subclause (i), and*
> *(iii) when the context requires, a former or prospective tenant.*

[28] **The Officer finds that the Applicants are *not* "tenants" as defined in the *Act*. Further, as the tenancy agreement has been terminated by the Commission in Order LR23-68, and that Order LR23-68 has not been stayed pending appeal, there is no tenancy and therefore no rights and obligations flowing from the *Act*. Put another way, the *Act* does not apply in these circumstances.**

[29] The Officer comes to these conclusions for the following reasons:

[30] To begin, the Officer agrees with the Respondents' position that the *Act* expressly provides an automatic "stay" of an order from the Rental Office while under appeal to the Commission. However, the *Act* does not provide an appeal from the Commission's order to the Court of Appeal be automatically "stayed". In order for it to be "stayed", the appellant must be granted a "stay" by the Court of Appeal.

[31] In this case, the Applicants have applied for a "stay" and an extension for an appeal of the Commission's Order LR23-68. The Officer also agrees with the Respondents' position that the *Rules of Civil Procedure* provide that even the filing of an actual "notice of appeal" does not operate as a "stay" of the underlying proceedings. Therefore, the Officer concludes that the **current status** is that the tenancy agreement has been terminated between the parties.

[32] The Officer finds that the evidence establishes that the Commission in Order LR23-68 terminated the tenancy agreement between the parties on November 30, 2023. There is no evidence to conclude that Order LR23-68 was "stayed" and/or overturned by the Court of Appeal. As a result, the Commission's findings in Order LR23-68 are still in effect and enforceable. This means that the tenancy agreement is still terminated.

[33] The Officer notes that because the tenancy was terminated, this gives rise to the question of whether the Applicants are "tenants" for the purposes of the *Act*. Looking first at clause 1(x)(i), the Applicant is not entitled to use or occupy the Rental Unit **under a tenancy agreement**. The Officer reiterates that the tenancy agreement is still terminated.

[34] Clause 1(x)(ii), the Applicants in this case are not an assign or personal representative of a person who is entitled to use or occupy the Rental Unit under a tenancy agreement.

[35] Clause 1(x)(iii) mentions "former tenant" when the context requires it. In certain situations, a former tenant may file an application (Form 2(A)) with the Rental Office after the tenancy and the tenancy agreement has ended. An example, would be a request for a return of the security deposit and/or a finding that compensation is owed due to a "bad faith" eviction. In such examples, the context allows a "former tenant" to exercise their rights and protections under the *Act*.

[36] In this case, the Applicants have **not** submitted the Application in their capacity as "former tenants" seeking to assert their rights under the former tenancy agreement. Rather, the Applicants have submitted the Application seeking to assert their rights under the tenancy agreement as if the tenancy agreement is valid and continuing, despite the termination ordered by the Commission. Simply put, the Applicants are attempting to assert their rights under the *Act* as if they are *current* and *existing* tenants – rather than "former tenants".

[37] The *Act* applies only to tenancies of rental units. This is made clear in clause 2(1) of the *Act*, which states:

> ***2. What this Act applies to***
> *(1) Subject to section 4, this Act applies to tenancies of rental units.*

A “tenancy” is defined in the *Act* to mean “a tenant’s right to possession of a rental unit under a tenancy agreement pursuant to clause 1(v) of the *Act*. There is no right to possession under a tenancy agreement, it follows that there is no “tenancy” for the purposes of the *Act*. If there is no tenancy, then, in accordance with clause 2(1), the *Act* does not apply.

[38] For this reason, the Officer finds that the Applicants do not have the right to file the Application with the Rental Office pursuant to section 75 of the *Act*. The Officer finds that practically, to find that the tenant is a “tenant” for the purposes of the *Act* would both circumvent the Commission’s order and reward the Applicants for non-compliance with the order. Such an interpretation could encourage non-compliance with orders of the Director and/or the Commission in this, and other matters.

[39] As the *Act* does not apply in these circumstances, the Officer will not make any findings as it relates to the remaining issues of this order.

Costs

[40] The Respondent is seeking partial indemnity costs in the amount of $750.00 pursuant to the Director’s powers under clause 85(1)(q). The Officer has heard oral submissions from the parties as it relates to costs. The Officer has considered the totality of the Application, the arguments presented and the reasons for the Application being filed to the Rental Office.

[41] In this case, despite the Application being dismissed because the *Act* does not apply, the Officer finds that the evidence establishes that the Applicants filed the Application with the Rental Office in good faith. The Applicants had a reasonable belief that the Application was the appropriate step in their legal dispute with the Respondents. No costs are awarded in this case.

Conclusion

[42] The Application is dismissed without costs.

IT IS THEREFORE ORDERED THAT

A. The Application is dismissed without costs.

DATED at Charlottetown, Prince Edward Island, this 16th day of February, 2024.

(sgd.) Cody Burke

Cody Burke
Residential Tenancy Officer

NOTICE

Right to Appeal

This Order can be appealed to the Island Regulatory and Appeals Commission (the “Commission”) by serving a Notice of Appeal with the Commission and every party to this Order within **20 days of this Order.** If a document is sent electronically after 5:00 p.m., it is considered received the next day that is not a holiday. If a document is sent by mail, it is considered served on the third day after mailing.

Filing with the Court

If no appeal has been made within the noted timelines, this Order can be filed with the Supreme Court of Prince Edward Island and enforced as if it were an order of the Court.