

ADDRESSING MISTAKES:

IRAC'S COMMITMENT TO ACCOUNTABILITY



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From the Ombudsperson

This report details procedural errors made by the Island Regulatory and Appeals Commission (IRAC) during the hearing of an appeal pursuant to the former *Rental of Residential Property Act*. It explains the steps we took to identify this unfairness and how we worked with IRAC to address it. Ultimately, IRAC proposed a way to take accountability for its mistakes, which I accepted as a meaningful resolution to my concerns.

In the situation described in this report, a landlord of an apartment complex applied to the Residential Tenancy Office (RTO) for a 12% rental increase in the spring of 2023. This was shortly after the PEI legislature reduced the maximum permissible residential rental increase to 0%. The landlord's request applied to 23 rental units. After the RTO allowed the increase, the tenants appealed the order to IRAC, which upheld the decision. Through both hearings the landlord relied on more than 1,000 pages of invoices, receipts, contracts and other documents to support its request. Unfortunately, this evidence was not properly handled by either the RTO or IRAC. Together with other procedural oversights detailed in this report, this resulted in an unfair administrative process.

Not long after raising rents, as permitted by the RTO and IRAC, the landlord sold the building. A new landlord, who was uninvolved in the RTO and IRAC processes, then took possession.

When my office presented IRAC with a detailed assessment of the evidence, along with a critical analysis of the flaws

in its process, IRAC provided meaningful feedback and committed to a fair path forward. This path involves the tenants, who were the complainants to OmbudsPEI, as well as the landlords, both former and current, who could be impacted by the outcome.

My assessment of the tenants' complaints was limited to considering whether IRAC acted unfairly based on the information that was before it at the time of the hearing. Because of this, and due to the confidentiality provisions of the *Ombudsperson Act*, I was unable to involve the landlords in my investigation. By committing to a resolution process that involves the landlords, IRAC enabled a solution where all parties can meaningfully participate.

While the outcome of that process will be determined in the future, IRAC has committed to a pathway forward that demonstrates its commitment to taking accountability for its mistakes. In addition, IRAC has since adopted new practices around the disclosure and sharing of evidence to avoid similar mistakes in the future.



Matthew Chapman
Ombudsperson and Public Interest
Disclosure Commissioner





Introduction

The law on Prince Edward Island limits how much a landlord can increase rent each year. The maximum allowable increase is set by the Director of Residential Tenancy (the Director), who leads the RTO. Maximum allowable rent increases, set annually, have ranged from 0% to 7.5% over time. At the time of the landlord's request for a 12% increase, the maximum allowable increase was 0%.

The law also provides a regulatory framework for landlords to apply for "greater than allowable" rent increases. At the time this matter was heard by the RTO, and then by IRAC on appeal, the former *Rental of Residential Property Act* (the "former RRPA") was in force, and there was no legislated limit to a "greater than allowable" rent increase.

The former RRPA required landlords to apply to the RTO for a greater than allowable rent increase and to demonstrate why that increase was warranted. During this process, landlords provide evidence to substantiate their application and the RTO adjudicates that application through a hearing process. The onus rests with the landlord to demonstrate why the greater-than-allowable rent increase is warranted. Tenants are entitled to participate in that hearing process and often provide their own submissions and evidence in response. The RTO must consider all submissions and decide whether to dismiss or allow the landlord's application.

If either the landlord or a tenant disagrees with the RTO's order, they can appeal the decision to IRAC. IRAC is then charged with re-hearing the matter by appeal, allowing both the landlord and tenants to provide more evidence and submissions. IRAC then issues a decision of its own which will confirm, vary or cancel the RTO's order.

If any party believes they have been treated unfairly during the IRAC appeal hearing process, they can file a complaint with OmbudsPEI. If OmbudsPEI is satisfied that it would have been unreasonable to expect the complainant to resort to the court to appeal IRAC's decision, OmbudsPEI may investigate the complaint.





Complaint to OmbudsPEI

In this matter, a landlord of a 23-unit apartment building applied to the RTO for a greater than allowable rent increase. The RTO allowed the requested increase and IRAC upheld that decision on appeal.

Following IRAC's decision, the tenants contacted OmbudsPEI to complain that IRAC followed an unfair process when hearing the appeal. The tenants complained that IRAC had not addressed many of the arguments they made. In particular:

- IRAC did not explain how the evidence supported the landlord's claimed capital expenditures, with no breakdown of this figure ever being provided to them – either through the RTO hearing process or the IRAC appeal process. The tenants noted that the invoices they were provided did not correspond to the operating costs claimed by the landlord and that IRAC did not appear to address this.
- IRAC did not explain how the evidence supported the landlord's claim for management fees. It did not appear to the tenants that the landlord submitted any invoices regarding these fees. The tenants also questioned why a corporate landlord needed to pay someone else to manage the property, especially where employee salaries had been accounted for elsewhere in the landlord's claim. Again, the tenants did not believe IRAC considered this.
- IRAC approved an amount claimed for "marketing fees" without explanation.
- IRAC persisted with an error admitted to by the landlord during the hearing process with respect to its claims for snow removal fees.



The tenants also complained that the RTO and IRAC followed unfair administrative processes which impacted their ability to meaningfully participate in the respective hearings. They alleged:

- Some tenants only received the landlord's evidence the day before the RTO hearing, in apparent conflict with the requirements of the *Rental of Residential Property Act Regulations*, and their request for an adjournment to allow time to review these documents was denied. IRAC did not address this matter on appeal.
- The tenants only received disclosure of most of the landlord's complete evidence package at the appeal hearing (OmbudsPEI would come to learn from IRAC that the tenants were, mistakenly, not provided with 55 pages of the landlord's evidence even during the appeal process, which will be discussed in more detail later in this report).
- During the IRAC hearing, time ran out before the tenants could finish their submissions. Despite informing parties that the hearing would reconvene following IRAC's review of additional written submissions, IRAC later decided to conclude the process without reconvening the hearing.

Based on these complaints, OmbudsPEI contacted IRAC through its informal resolution process.

Informal Resolution Process

Nearly every complaint assessment conducted by OmbudsPEI begins through an informal resolution process. This is not a formal investigation. OmbudsPEI is usually able to obtain enough information through this step to allow it to either close the file or propose a way the authority can address our fairness concerns. Through this process, OmbudsPEI can ask for explanations, documentation and any relevant records from an authority under our jurisdiction, which they are permitted to provide to us regardless of confidentiality limitations that other legislation may impose.

What We Learned

i. Disclosure of Evidence

The landlord submitted more than 1,000 pages of evidence, including property valuation reports, contracts, receipts, invoices and other documents. Included in this package was a statement of income and expenses summarizing the landlord's operating costs (called a Form 15), as well as a calculation of its return on investment (ROI). While some of these submissions were provided to the tenants during the RTO hearing, others were not.

Further, we learned that the landlord filed an amended Form 15 the day before the hearing at the RTO, claiming an updated capital expenditure amount and providing a corresponding spreadsheet explaining how that figure was calculated. Mistakenly, neither of these documents were provided to the tenants.

When the tenants appealed the RTO's decision to IRAC, the parties were provided with a more complete evidence package, initially totaling 1295 pages. Through the OmbudsPEI review process, IRAC discovered that 55 pages of the landlord's evidence was still missing from this evidence package. This missing evidence was comprised of:

- A spreadsheet that quantified the landlord's claimed amount for capital expenditures;

- 11 invoices related to capital expenditure expenses; and
- A series of invoices relating to maintenance expenses.

Unfortunately, these 55 pages of evidence were not provided to either the tenants or the IRAC hearing panel who decided the appeal.

ii. Capital Expenditures

The fact that the spreadsheet quantifying the landlord's claimed amount for capital expenditures, and a series of invoices related to some of those expenditures, were not included in the evidence package before the hearing of the appeal, was a procedural error.

The tenants had no meaningful way to test the figure claimed because this evidence was not provided to them. OmbudsPEI's review of the complete evidence package, which neither the tenants nor the IRAC hearing panel had at the time of the hearing, identified that while the landlord referenced 130 invoices to justify its capital expenditures, only 19 were provided as evidence by the landlord, representing a small fraction of the total dollar amount claimed. It was also apparent that the landlord had miscalculated annual costs for some capital expenditures, using a shorter life expectancy than what the regulations specified at the time.

While OmbudsPEI appreciates that an IRAC hearing panel can assess a landlord's claim based on factors other than invoices alone, and can consider whether annual operating costs may differ from what is typically permitted, it is incumbent on the panel to provide a meaningful explanation for why it might do so, particularly in the face of such a discrepancy between claims and invoices. This did not occur, and in fact could not have occurred, because the IRAC hearing panel did not have all relevant evidence before them to identify these discrepancies. OmbudsPEI therefore understood, in these circumstances, why the tenants complained of an unfairness in the resulting IRAC order.



iii. Management Fees and Marketing Fees

IRAC's order resulting from the appeal does not include specific reasons for why the panel accepted the landlord's claimed management and marketing fees. In this situation, no invoices were provided by the landlord to substantiate any management fees. Only a few invoices were provided to explain marketing fees, however there were no vacancies in the units in the year before the application was made, leading to reasonable questions about why any marketing during this period was necessary. Again, while there may still be justification for why IRAC accepted these claims, providing a reasonable explanation for doing so is critical in the face of such a discrepancy between claims and invoices. Reasons provide justification and transparency and help demonstrate that a decision was both procedurally fair and substantively sound.

iv. Snow Removal Fees

Throughout the OmbudsPEI process, IRAC acknowledged that it missed addressing an error admitted to by the landlord during the hearing, in which the amount for snow removal fees for a separate building was mistakenly claimed.

v. Hearing Format

Finally, the tenants complained about how IRAC conducted the appeal hearing. In particular, the tenants claimed that both during and after the appeal hearing they were advised that IRAC would reconvene later to hear final oral submissions.

OmbudsPEI understands that, as an administrative tribunal, IRAC has the authority to control its own process. However, it was not unreasonable for the tenants to rely on the representation that the oral hearing would reconvene, and OmbudsPEI encouraged IRAC to clearly communicate with parties about process changes moving forward.

Formal Investigation and Resolution

OmbudsPEI was unable to reach a resolution with IRAC through its informal resolution process that would reasonably address the procedural fairness concerns we identified. The Ombudsperson then issued a formal notice of investigation and provided IRAC with a detailed summary of OmbudsPEI's preliminary assessment, while continuing to be open to a potential path towards resolution.

Recognizing that its hearing process included procedural errors, IRAC contacted the complainants and landlord to explain that certain evidence was mistakenly not included in the evidence package provided to the parties, as well as to the hearing panel who decided on the appeal.

IRAC apologized to the parties for this error, provided the missing documents, and informed them that they could request a review of IRAC's decision. Following such a request, IRAC can, at its absolute discretion, engage section 12 of the *Island Regulatory and Appeals Commission Act* to rescind or vary its decision. Through that process, parties can make submissions on issues identified for review, including matters of procedural unfairness in the process IRAC followed when hearing the appeal.



Conclusions and Resolution

It was clear that there were significant procedural errors in IRAC's hearing of the appeal. Acknowledging this, IRAC apologized for its mistakes, provided evidence that had not been disclosed and advised all parties that it would consider a request for a review of its decision. At the conclusion of that review process, IRAC has the option to rescind or vary its decision should it conclude that it is necessary to do so.

OmbudsPEI accepted this as a meaningful path forward that would permit IRAC to address the procedural concerns we identified. While this process does not guarantee a specific outcome, it provides a clear path forward for addressing the procedural errors made by IRAC while engaging all parties that were impacted by those errors. OmbudsPEI is satisfied this provides the tenants with an opportunity to seek a review, and for the landlords, both current and former, to meaningfully engage in that process.





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