



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Packdale Place Housing Society  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OLC, MNDC

### Introduction

This hearing was convened by way of conference call in response to the tenant's application for an Order for the landlord to comply with the *Residential Tenancy Act* (Act), regulations or tenancy agreement and for a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act* (Act), regulations or tenancy agreement.

The tenant and landlords administrator attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

### Issue(s) to be Decided

- Is the tenant entitled to an Order for the landlord to comply with the Act?
- Is the tenant entitled to a Monetary Order for money owed or compensation for damage or loss?

### Background and Evidence

The parties agree that this tenancy started on September 15, 2012. Rent for this unit is \$435.00 per month and was due on the 1<sup>st</sup> day of each month in advance. The tenant vacated the rental unit on February 09, 2013.

The tenant testifies that prior to renting this unit the tenant asked the administrator (WC) if the building was a smoke free building as the tenant suffers from allergies to smoke. The tenant testifies that WC assured the tenant that the building was smoke free. The tenant testifies that after living in the unit for about a month the tenant started to suffer with severe symptoms due to her allergy to smoke. The tenant testifies that the first night in the unit the tenant had informed the caretakers of the building that she could smell smoke. The tenant testifies that she wrote to WC about these issues and was told that some of the smokers in the building had been grandfathered in, that allowed them to smoke. The tenant testifies that at the time there was only one tenant that had been grandfathered in and that tenant no longer smoked.

The tenant agrees that the landlord has provided a designated smoking area outside the building however the tenant testifies that when these smokers come into the building the tenant is affected by the smell of smoke on their clothes. The tenant testifies that the tenant living below her unit smokes in her unit and the smell of smoke filters into the tenants unit as it is a wooden building.

The tenant agrees that the landlord did offer the tenant an alternative unit but as this was on the ground floor the tenant felt this was not suitable. The tenant testifies that the WC asked her to call him when she could smell her neighbouring tenant smoking in her unit and that WC would come over and they could go to speak to that tenant and see if that tenant was smoking. The tenant testifies that she could not get any proof that the neighbouring tenant was smoking in her unit except for the fact the tenants allergies became so bad. The tenant testifies that the caretaker of the building told the tenant that

as other smokers were scattered around the building even if another unit became available the tenant may still suffer from second hand smoke.

The tenant seeks compensation from the landlord to recover the costs for the tenants move into the unit. The tenant has provided a receipt for \$2,700.00 plus tax of \$324.00 for the moving company and the tenant's bus ticket for \$55.50 plus \$6.66 tax. The tenant also seeks additional bus fares of \$48.59 but has not provided a receipt for this fare. The tenant had claimed for additional costs for moving out of the unit but has withdrawn these additional costs from this claim.

The landlord's administrator WC disputes the tenant's claims. WC testifies that they did not misrepresent the building to the tenant. The tenant would have been aware that there are smokers living in the building as it is mentioned that any smokers must smoke in the designated areas in the tenancy agreement and the rules and regulations and the tenant was informed that smokers must smoke outside the building.

WC testifies that they did not discount the tenant's claims but in order to do anything about an offending tenant that smokes in their unit the landlord has to have proof of this in order to send an offending tenant a warning letter leading to a possible eviction. WC testifies that they did everything possible to determine the tenants claims but neither WC or the caretakers can smell smoke in either the tenants unit or in the unit of the tenant living below this tenant. WC testifies that he explained to the tenant that he had to have definitive proof and that the landlord cannot act on conjecture alone. WC testifies that there are no common vents between the units. WC testifies that this building is a low income building and they do not have available funds to accommodate requests to completely seal a tenants unit.

WC testifies that the tenant was offered the first available unit but declined that offer. WC testifies that units do not become available very often but the landlord did try to accommodate the tenants request; however it was the tenant's choice to move out of the unit. The WC testifies that they cannot discriminate against tenants that smoke and

in accordance with the legislation they have provided a designated smoking area for any tenants that do smoke.

### Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. The tenant has applied for an Order for the landlord to comply with the *Act* with regard to protecting the tenant's right to quiet enjoyment of her rental unit from other tenants that smoke in the building. As the tenant has moved from the unit this section of the tenants claim will no longer have any effect as no Orders of this nature could be enforced against the landlord if they were granted. Therefore I will address the tenants claim for compensation only. In this matter the burden of proof falls to the tenant to show that the landlord did not protect the tenants right to quiet enjoyment by allowing other tenants to smoke in their rental unit which has adversely affected the tenants health.

The tenant claims the landlord also misrepresented the building by describing it as a non smoking building prior to the tenancy commencing. I have considered the evidence and testimonies presented and find that the documentation in the form of the tenancy agreement clearly identifies that the building allows smokers to reside in the building but that they must smoke in a designated area. I further find the tenant has signed this agreement so should have been aware that there was the potential that other tenants may smoke and that the smell of smoke may carry into the building on their clothes. I find the tenant has provided no corroborating evidence to show that the tenant in the neighboring unit was smoking in that unit and that the smell of this smoke filtered into the tenants unit. I find the landlord preformed their due diligence by responding to the tenants concerns and complaints about smoke but on further investigation the landlord's agents could not detect the smell of smoke either in the tenants unit or that of the tenant's neighbor. If the tenant is so susceptible to the smell of smoke due to allergies then a landlord cannot be held responsible for ensuring that no tenants smoke or carry that smell of smoke into the building.

I find the landlord offered the tenant alternative accommodation but this offer was declined by the tenant and the landlord's agent asked the tenant to notify the landlord's agent when the smell of smoke was pervading the tenants unit so the landlord's agent could come at that time and investigate the cause. However the tenant failed to notify the landlord so an immediate investigation could take place. A landlord has a duty of care to all tenants and when faced with a complaint from one tenant about another then the landlord can only investigate at that time and without further proof of a non compliance with the tenancy agreement then a landlord has no other action for recourse against a non complying tenant. The tenant also has a duty when making a complaint to provide evidence to support that complaint or to assist the landlord in a reasonable manner to obtain that evidence by informing the landlord when the problem reoccurred.

As the tenant has failed to meet the burden of proof in this matter I find the tenant's application for compensation for moving costs and bus fares must be denied.

### Conclusion

The tenant's application is dismissed in its entirety without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: May 13, 2013

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Residential Tenancy Branch

