



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Peninsula Community Services AKA Beacon Community Services  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDC OLC RP

### Introduction

This hearing was convened as a result of the tenant's application for dispute resolution seeking remedy under the *Residential Tenancy Act* (the "Act"). The tenant applied for a monetary order for money owed of compensation for damage or loss under the Act, regulation or tenancy agreement, for an order directing the landlord to comply with the Act, regulation or tenancy agreement, to make repairs to the unit, site or property, and to recover the filing fee. As a filing fee was not paid by the tenant for this application, the filing fee will not be considered further in this Decision.

The tenant, counsel for the tenant, two witnesses for the tenant, three agents for the landlord, and three witnesses for the landlord attended the teleconference hearing and gave affirmed testimony. During the hearing both parties were given the opportunity to provide their evidence orally and respond to the testimony of the other party.

At the outset of the hearing, the parties confirmed that they received evidence from the other party and had the opportunity to respond to that evidence prior to the hearing. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Preliminary and Procedural Matters

The first portion of the hearing on July 3, 2013 was adjourned to provide additional time to hear testimony. The hearing reconvened on August 8, 2013. The parties were advised on July 3, 2013 that no additional documentary evidence would be accepted as the hearing had commenced.

During the hearing, the tenant requested to withdraw her request for repairs to the rental unit. As a result, that portion of the tenant's application was not considered.

### Issues to be Decided

- Is the tenant entitled to a monetary order under the *Act*, and if so, in what amount?
- Has the tenant provided sufficient evidence that the landlord should be directed to comply with the *Act*, regulation or tenancy agreement?

### Background and Evidence

The parties agree that a month to month tenancy agreement began on January 1, 2007. Currently monthly rent is \$320.00, which is \$389.50 after including cable, parking and electricity.

The tenant has applied for a monetary claim in the amount of \$1,120.00. The tenant's claim is for loss of enjoyment of the rental unit due to cigarette smoke entering the rental unit calculated at seven months at \$160.00 per month. The amount of \$160.00, according to the tenant, represents one-half of a month's rent multiplied by seven months comprised of November 2012, December 2012, January 2013, February 2013, March 2013, April 2013 and May 2013.

The lead agent for the landlord, DM ("agent DM") testified that the rental building is between 25 and 28 years old and consists of 21 rental units. Agent DM stated that he started his position as property manager for the landlord approximately four years ago. The original tenancy agreement was submitted in evidence which shows a start date of January 1, 2007. There is no term in that tenancy agreement which supports that the building was a non-smoking building in 2007.

Agent DM stated that the tenant's tenancy agreement started before he began as property manager, however, it was not until "late 2009" that he introduced a non-smoking addendum for new tenants, as part of all new tenancy agreements. Agent DM testified that existing tenants who had already signed tenancy agreements prior to the non-smoking addendum introduced in later 2009 were "grandfathered" and were still permitted to smoke, although they are encouraged to smoke in a designated smoking area. According to agent DM, a designated, covered smoking area was provided outside at the rear of the building.

The tenant stated that she first complained about smoke coming from unit 102, the rental unit below her rental unit, on January 27, 2012. A copy of that letter was submitted in evidence. Agent DM stated that he responded to the tenant in writing on February 1, 2012. In that letter, agent DM acknowledges the tenant's letter dated

January 27, 2012 and that he will send a formal letter to the tenant in 102 as it constitutes a material breach of their tenancy agreement as the tenant in 102 had signed a non-smoking addendum as part of their tenancy agreement.

The tenant stated that she submitted a second complaint letter in writing dated February 18, 2012 and had placed it in the drop box for the landlord. Agent DM testified that he did not receive that letter from the tenant. The tenant stated that she submitted a third letter dated February 27, 2012. Agent DM confirmed that he received that letter and called the tenant in response. On May 24, 2012, the landlord issued a second warning letter to the tenant in 102 and by September 2012, the tenant in 102 had been evicted by the landlord. A new tenant, LM, moved into unit 102 on September 15, 2012, and signed a non-smoking addendum as part of her tenancy agreement.

The tenant testified that the first complaint she submitted in writing about tenant LM in unit 102 was dated October 27, 2012. Agent DM stated that he did not receive that letter from the tenant. Agent DM stated that he did receive an e-mail from the tenant dated November 5, 2012 alleging smoke on Saturday night due to the tenant smoking in unit 102.

The tenant stated that she wrote a second letter of complaint to the landlord regarding tenant DM in unit 102 on January 27, 2013. Agent DM stated that he did not receive a copy of that letter.

Agent DM called witness DV, who testified that he had access to the drop box in the rental building for twelve years and that if any letters were in the drop box, he would take them to DM. Witness DV stated that he could not recall specific letters. Witness DV was asked how many times he was in the rental unit of tenant LM in unit 102. DV responded that he had been in unit 102 between six and ten times to repair her sink and shower and had never seen tenant LM in unit 102 smoke in the rental unit or detect the smell of tobacco in unit 102 during his time in unit 102. Witness DV was asked if he ever smelled smoke in the applicant tenant's rental unit. Witness DV testified that he has never smelled tobacco smoke in the tenant's rental unit. Counsel for the tenant cross-examined witness DV by asking him what hours he worked and whether he had been in unit 102, the unit below the tenant, in the evening. Witness DV stated that he worked between 8:00 a.m. and 5:00 p.m., however, he is on call 24 hours per day. Witness DV stated that he is generally not in the building after 5:00 p.m. and has not been in unit 102 in the evening.

The tenant stated she wrote a third letter to agent DM on March 7, 2013. Agent DM testified that he did not receive that letter from the tenant.

Agent DM testified that based on the concerns brought to their attention by the tenant they investigated unit 102, the unit below the tenant's rental unit, as the tenant was alleging the tenant in unit 102 was the cause of the smoke entering her rental unit. Both agent DM and agent JY testified that when they both attended unit 102, they could not smell smoke.

Agents DM and JY stated that they had a lengthy conversation with tenant LM in unit 102 to ensure she was aware that if she was going to smoke, it had to be outside at the rear of the building in the designated smoking area. Agents DM and JY stated that they then visited the applicant tenant in her rental unit above and did not smell smoke, however, they did smell a strong smell of the tenant's "vaporizer" or air freshener, and could "barely breathe". The tenant denied that the strong smell from her vaporizer or air freshener could be impacting her breathing and medical condition.

The tenant submitted a medical letter in evidence dated March 28, 2013 from Dr. CJ which indicates four medical conditions suffered by the tenant and recommends that she should not breathe cigarette or other types of smoke as it is known to exacerbate the tenant's medical condition. The agents did not dispute that the tenant suffers from medical conditions.

The tenant called witness AM, the sister of the tenant. Witness AM testified that she attends the rental unit between four and five times per year and was last there in June 2013 and that she "smelled smoke" in the rental unit. Witness AM stated that the smell of smoke was not heavier outside, the smell was stronger inside and the hallway "just reeked of smoke". Witness AM stated that she smells smoke each time she is in the rental unit but recalls back in 2007 that she did not smell smoke. Counsel for the tenant asked the witness what her experience was with the smoke in her sister's rental unit. Witness AM stated that the smoke is annoying and uncomfortable and that she would not live in the rental unit. Agent DM cross-examined witness AM by asking her if she smelled smoke anywhere else in the building. Witness AM stated that she also smelled smoke in the hallways, elevators and the lobby.

Agent DM testified that when he attends the building, he does not smell smoke very often but did confirm that two years prior, they had a chronic smoker in the building who subsequently vacated the building. According to agent DM, two of the twenty-one rental units in the building are rented to known smokers who are "grandfathered" as they have lived in the rental unit prior to the non-smoking addendum being introduced in late 2009 for all new tenancy agreements.

Agent DM stated that they have investigated tenant LM in unit 102 but have never smelled smoke in her rental unit and as a result have not issued her a warning letter since tenant LM moved into unit 102 on September 15, 2012. The tenant testified that she saw tenant LM in unit 102 through her window at night with the light on smoking sometime in November 2012, however, she could not recall a specific date.

Agent DM called witness LM, the tenant in 102, which is the rental unit directly below the applicant tenant's rental unit. Witness LM stated that she has lived in the building for eleven months, since September 15, 2012. Agent DM asked witness LM if she smoked in her unit. Witness LM denied that she smoked in her unit, but confirmed that on the first day that she moved in, she did smoke on the patio and then realized that smoking on the patio was not permitted, and from that point forward she would only smoke in the designated smoking area outside at the rear of the building or on the street. Witness LM denies smoking near the tenant's rental unit.

Counsel for the tenant cross-examined witness LM by asking her what she was told about the smoking rules. Witness LM stated that she was advised that there was no smoking in the rental unit but does not recall being told about the patio and that she had quit smoking but started again at a later date. Witness LM stated that she has tried patches, electronic cigarettes and gum in an effort to help her stop smoking. Counsel asked witness LM how many cigarettes per day she smokes, to which witness LM replied "six or eight cigarettes per day but sometimes three."

Counsel asked witness LM if she has ever smoked in the rental unit, to which witness LM replied "no". Witness LM confirmed that the tenant did speak to her about her smoking based on two conversations, the first time when she smoked on the patio on the first day and witness LM apologized to the tenant living upstairs as she was not aware and assured the tenant that she would not do that again. The second conversation was in the parking lot and was "abusive" according to witness LM. Witness LM stated that the tenant called her a "liar" several times.

Counsel asked witness LM if she ever once smoked in her rental unit, to which witness LM replied "never once, not even when I was sick or in the rain." Agent DM testified that he has personally witnessed tenant LM outside in the designated smoking area while it was raining so he could confirm her testimony. Counsel for the tenant asked witness LM if she was ever asked by agent DM or any other agent whether she smoked in the rental unit and she replied "yes, a couple of times". Witness LM stated that she wrote a letter to the landlord dated April 29, 2013 to confirm that she does not smoke in her rental unit as she felt that she needed to defend herself from the accusations by the tenant. Counsel for the tenant asked witness LM what she was told about the consequences for

violating the non-smoking addendum she signed, to which witness LM replied "it would be grounds for eviction".

Agent DM called witness PI, a tenant living in unit 211 for the past two years. Witness PI stated that his rental unit is located around the corner and down the hall from the applicant tenant, and on the same floor. Agent DM asked witness PI if he has ever been in unit 102, to which witness PI confirmed "yes, about four times per week". Agent DM asked witness PI if he had ever smoked in the rental unit of tenant LM in unit 102. Witness PI replied "never". Agent DM asked witness PI if he has smoked and where he has smoked. Witness PI stated he has smoked but has not smoked for one month, and when he did smoke he was joined by tenant LM in the designated smoking area located outside at the rear of the building. Counsel for the tenant asked witness PI if he and the tenant from 102 are friends, to which witness PI replied "yes". The tenant's counsel asked if he had ever had a conflict with the applicant tenant to which he replied "yes, over a cigarette in my mouth when I delivered a package to tenant LM in unit 102". Witness PI stated that this incident occurred approximately one or two months ago and that he apologized to the tenant, and was the only time that he forgot about having a cigarette in his mouth. Counsel for the tenant asked witness PI if in the two years he has been in the building is that the only time you smoked in the building and he replied "yes and I apologized".

Agent DM said that there was a water leak in unit 102 on July 24, 2013 and that KA, an employee with a restoration company was called to attend to fix the water leak. Agent DM referred verbally to a letter that was not submitted in evidence dated August 6, 2013, where agent DM states that KA wrote that he had to remove the carpets in the rental unit of 102 and there were no signs of smoke or tobacco residue. Counsel for the tenant questioned the reliability of that document as she and the tenant did not have a copy of the letter being read into evidence by the agent DM. Agent DM confirmed that KA was not available as a witness during the hearing.

Counsel for the tenant asked the tenant several questions during the hearing. The tenant was asked by her counsel what she was advised of in 2007 regarding the building. The tenant testified that the building was described as a "non-smoking building". The tenant stated that she was not a smoker. Counsel for the tenant asked the tenant if she was aware of any other tenants in the building that have moved in since the new smoking rules were introduced for new tenants in late 2009. The tenant referred to a tenant "LB" (tenant LB) in unit 102. The tenant then changed her testimony to unit 101. The tenant stated that tenant LB mentioned to her that she was permitted to smoke in her rental unit. Agent DM confirmed that due to a typographical error, tenant LB did not have a non-smoking addendum added to her tenancy agreement in error.

Agent DM stated that he has warned tenant LB five or six times verbally and in writing twice to smoke only in the designated smoking areas due to concerns of tenant LB smoking in her rental unit. According to the applicant tenant, however, smoke from tenant LB in unit 101 does not enter her rental unit. The tenant stated that the problem is with tenant LM in unit 102; when tenant LM in unit 102 leaves, there is no smoke in my unit, and when she returns, there is smoke.

Counsel for the tenant asked the tenant what the impact of the smoke in her rental unit was having on her. The tenant replied "I can't sit in the kitchen and have to go to my bedroom, the smoke enters all the time and is only gone with the tenant below me in 102 is gone and she is disregarding everything I have told her". The tenant described witnessing tenant LM in unit 102 smoking in her bedroom at night with the light on a couple of months ago, however, could not recall the date. Agent CP asked the tenant if she could tell the difference between an electronic cigarette and a regular cigarette from a distance. The tenant replied "no, not at night, I can't tell what type of cigarette she is smoking".

Agent CP asked the tenant about a letter written by the tenant dated May 3, 2013 where the tenant writes that she has not had a problem with smoke for the past six years. The tenant confirmed that she wrote that letter, however, must have meant the past two years and not six years.

The final witness to be called was the tenant's witness, SL, the daughter of the tenant. Counsel for the tenant asked witness SL how often she visited her mother. Witness SL stated that she used to visit her mother all the time in 2007, about three or four times per week, and there was no smoke smell. Witness SL testified that she has "not been there in four years". Witness SL later changed her testimony that she meant to say she had "not slept there in four years". Witness SL stated that in the past two years, she has visited her mother about four or five times but does not recall the dates and that agent DM was there during one of her visits with her mother. Counsel for the tenant asked witness SL if she smelled smoke during the visit when agent DM was there, to which witness SL replied "yes". Agent DM stated that he and agent JY were both there and do not recall smelling any smoke on that date, but do recall a heavy smell of a "vaporizer" or air fresheners in the rental unit of the tenant. Witness SL stated that she was present when her mother signed the tenancy agreement and a male advised her mother that it was a non-smoking building. Witness SL later changed her testimony that it was a female and not a male that advised her mother.

### Analysis

Based on the documentary evidence, the testimony provided during the hearing, and on the balance of probabilities, I find the following.

#### Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the tenant did everything possible to minimize the damage or losses that were incurred.

In the matter before me, I find the tenant has provided insufficient evidence that the original tenancy agreement included a non-smoking condition as part of the tenancy agreement. In reviewing the original tenancy agreement submitted in evidence, there is no term that restricts or specifically mentions smoking restrictions within the building or the rental unit.

The tenant provided two witnesses, both of whom are related to the tenant; her sister AM, and her daughter SL. I find the testimony of SL to be vague and inconsistent based on witness SL changing her testimony on two occasions; the first time when she said she had not been at the rental unit in four years and later changed her testimony to not having slept at the rental unit for four years, and the second time when she said a male advised her mother it was a non-smoking building and then later changed her testimony that the person was a female.



The landlord provided three witnesses. I find the testimony of the landlord's witnesses to be more credible as their testimony was more consistent than that of the tenant's witnesses. Therefore, I find the landlord provided a greater preponderance of evidence to support that the tenant's rental unit has not smelled like smoke when visited by the agent DM and JY, witness DV, and witness PI.

The onus of the proof is on the tenant to prove that her rental unit has had smoke in it for the seven months being claimed; November 2012, December 2012, January 2013, February 2013, March 2013, April 2013 and May 2013.

I find that the complaints made by the tenant prior to November 2012 are not relevant to the matter before me, as the tenant has not claimed for compensation for a period other than the seven months from November 2012 to May 2013 inclusive. Between November 2012 and May 2013, the tenant stated she wrote three letters of complaint to agent DM, the first letter on October 27, 2012, in which agent DM responded on November 5, 2012 and investigated unit 102 and did not find smoke in the rental unit of 102. The second letter dated January 27, 2012 and the third letter dated March 7, 2013, which agent DM stated he did not receive from the tenant. Witness DV testified that he brought all letters submitted in the drop box to agent DM for review by DM.

I find the testimony of the tenant to be vague and inconsistent. Several examples of this include the tenant providing a unit number of another tenant in the building and then changing that unit number, not being able to provide specific dates when she witnessed the tenant in unit 102 smoking, and testifying that she wrote a letter stating there has not been a problem with smoke for the past six years dated May 3, 2013, however, admitted that she likely meant the last "two years" and had written "six years" in error.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails. In the matter before me, the tenant claims the tenant in 102, LM, has been smoking in her rental unit and that smoke has been entering the tenant's rental unit. Agent DM and agent JY proposed that the strong odor from the tenant's "vaporizer" or air fresheners could be causing the tenant discomfort, which the tenant denied. As both versions of events are equally probable and the landlord has provided a preponderance of consistent evidence that no smoke has been detected in the tenant's rental unit, I find the tenant as has failed to meet the burden of proof to prove that smoke has been entering her rental unit and that the landlord has breached the Act, regulation or tenancy agreement. Therefore, **I dismiss** the tenant's application in full, without leave to reapply, due to insufficient evidence.

Conclusion

The tenant's application is dismissed in full without leave to reapply, due to insufficient evidence.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: August 15, 2013

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Residential Tenancy Branch

