



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding CHELSEA MANOR APARTMENTS  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPC, FFL; CNC, MNDCT, OLC, FFT

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- an order of possession for cause, pursuant to section 55; and
- authorization to recover the filing fee for its application, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the *Act* for:

- cancellation of the landlord's One Month Notice to End Tenancy for Cause, dated February 5, 2021 ("1 Month Notice"), pursuant to section 47;
- a monetary order for compensation under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for her application, pursuant to section 72.

The landlord's two agents, landlord RC ("landlord") and "landlord CM," the tenant, and the tenant's agent attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The hearing began at 1:30 p.m. with me, the landlord's two agents, and the tenant's agent present. The tenant called in late at 2:13 p.m. She said that she used the wrong access code, from a previous hearing, and that she called the Residential Tenancy Branch ("RTB") to obtain the correct access code to call in. During this hearing, the tenant was given an opportunity to discuss the hearing details with her agent and to confirm the evidence already presented by him, so she could add her own submissions. The tenant was given a full opportunity to provide affirmed testimony when she joined the hearing. The hearing ended at 2:23 p.m., after a total of 53 minutes.

The tenant's agent confirmed that he had permission to represent the tenant, who is his mother, at this hearing. The tenant confirmed that her son had permission to represent her as an agent. The landlord confirmed that she was the residential manager and that landlord CM, who is her fiancé, worked in maintenance, both employed by the landlord company named in this application. The landlord said that the landlord company owns the rental unit.

During this hearing, I informed both parties that recording of this hearing was not permitted by anyone, as per Rule 6.11 of the RTB *Rules of Procedure*. The landlord's two agents, the tenant, and the tenant's agent all separately affirmed, under oath, that they would not and did not record this hearing.

At the outset of this hearing, I explained the hearing and settlement processes to both parties. Both parties had an opportunity to ask questions. Neither party made any adjournment or accommodation requests. Both parties affirmed that they were ready to proceed with this hearing, they did not want to settle this application, and they wanted me to make a decision.

During this hearing, both parties confirmed that they attended a previous RTB hearing with a different Arbitrator regarding these applications. Both parties confirmed that they were informed by the RTB prior to this hearing, that the previous Arbitrator was unable to render a decision, so a new hearing with a different Arbitrator would be scheduled. The previous hearing occurred on September 7, 2021, at 11:00 a.m. The hearing was rescheduled for this new hearing date of September 23, 2021. Both parties were in receipt of the new notices of hearing with the new date, time, and access code to call into this hearing. I informed both parties that I did not have any previous knowledge or involvement with these applications and that a new hearing would take place before me and I would render a decision after the hearing. Both parties confirmed their understanding of same.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the Act, I find that both parties were duly served with the other party's application.

At the outset of this hearing, both parties confirmed that the tenant vacated the rental unit on March 2, 2021. The landlord stated that an order of possession was not required by the landlord. I informed her that the landlord's entire application, including the \$100.00 filing fee, was dismissed without leave to reapply. She confirmed her understanding of same. I informed the tenant's agent that the tenant's application to

cancel the 1 Month Notice and for an order to comply, was dismissed without leave to reapply. He confirmed his understanding of same.

I informed both parties that this hearing would continue, and I would make a decision regarding the tenant's monetary application, as this was the only claim remaining in the tenant's application that was not yet decided. I notified both parties that they would each be given an opportunity to present their submissions regarding the tenant's monetary claim only. Both parties confirmed their understanding of same.

#### Issues to be Decided

Is the tenant entitled to a monetary order for compensation under the *Act, Regulation* or tenancy agreement?

Is the tenant entitled to recover the filing fee for her application from the landlord?

#### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 1, 2016 and ended on March 2, 2021. Monthly rent in the amount of \$770.00 was payable on the first day of each month. A security deposit of \$375.00 was paid by the tenant and the landlord returned this deposit to the tenant. A written tenancy agreement was signed by both parties.

As per her application, the tenant seeks a monetary order of \$8,127.30 plus the \$100.00 application filing fee.

The tenant's agent testified regarding the following facts. The tenant thought the rental building was smoke-free. Despite the tenant's complaints to the landlord's "previous manager," who is no longer with the landlord company and not at this hearing, there was no solution given by him. The tenant lived in the rental unit from July 1, 2016, when she moved in, for four years after, with no problems. The tenant lived in a top-floor apartment on the inside corner, in a non-smoking building, as noted in the signed addendum, which includes noxious substances. Barbeques are not allowed on decks,

but the previous manager did not enforce it, despite knowing that many people have and use them. The tenant is sensitive to smoke, including from barbeques, due to asthma and chronic obstructive pulmonary disease ("COPD"). The tenant was exposed to second-hand smoke, her use of medications increased, she was away from the rental unit for at least half of the time, she had to stay at her son's and sister's apartments, and she was better when she was not staying at the rental unit. She had asthma flare-ups, went to the hospital emergency room, suffered respiratory problems, and a hoarse voice. The previous occupant living below the tenant's unit passed away, and when her family members came to clean out the apartment, they smoked marijuana and cigarettes. The tenant told the landlord and he asked what he could do because they were grieving from the death. When a new occupant moved into the below unit after the death, the problems continued.

The tenant's agent stated the following facts. The tenant kept asking the previous manager to deal with the issue, but he refused to go to the tenant's rental unit to check or do anything. The tenant bought an industrial smoke monitor filter, which detects change in the air quality and "CO2 and VOC," and put it in her rental unit. The tenant showed the previous manager the smoke profile taken throughout the day, from the monitor. The previous manager said it was a toy, the readings were "bogus," he was "gaslighting" the tenant, and said it was all "in her head." The tenant kept a log of the smoking, since the previous manager told her it was her job to find out who was smoking. The tenant walked around the rental building, trying to detect smoke from different units. The tenant was dizzy and disoriented from the smoke, called the police regarding drugs in the rental building, the "swat team" showed up, and it was a "misunderstanding" because the tenant was sick. The previous manager called "mental health" on the tenant because of this incident. The tenant "stomped" on the floor because of the smoke coming from below her unit, the previous manager "wrote up" the tenant, and failed to take any action regarding the smoke. The previous manager did not inspect the tenant's rental unit, did not post any notices in the rental building about smoking, and said that a "nice elderly couple" was living below the tenant so they could not be smoking. The tenant had to move out during the covid-19 pandemic, she is elderly and at-risk, and she pays more monthly rent at \$1,180.00 now at her new unit. The landlord re-rented the tenant's unit for more rent and wanted the tenant to move out to make more money.

The landlord testified regarding the following facts. She started in March 2021 as the new landlord manager with landlord CM. In the two days that the landlord dealt with the tenant before she moved out, the tenant took up a lot of the landlord's time. The landlord took the tenant's needs seriously, felt bad for her suffering, and tried to help

her. The landlord does not have the full story regarding the tenant's case from the previous manager because she was not around then. The previous manager is old and retired, is no longer with the landlord company, had declining health, and was not good in social situations. However, he could not find proof of the smoke inside the rental building. The landlord is now strict with smoking in the rental building and tries to find the source or asks occupants where it is, and then addresses the problem. The landlord tried but could not find the cause of smoke that the tenant claimed was inside her rental unit, and there was no concrete evidence or proof of smoking or vaping. The carpet was new when the tenant moved into the rental unit. When a new occupant moved into the rental unit after the tenant left, the carpet was replaced again.

Landlord CM stated the following facts. He inspected the fans in the rental building, and they were working properly and bringing in air, despite the forest fires at the time. New occupants in the rental building do not smoke. He went personally to check inside the tenant's rental unit, and he could not smell any smoke even though he crawled around on the carpet. The smell could have been coming from the carpet cleaning fluid that the tenant used on the carpet inside the rental unit.

The tenant's agent stated the following in response to the submissions of the landlord and landlord CM. There was vaping from a vape machine in the rental building. The tenant is not an "average" or "normal" person, as she is more sensitive to any type of smoke because of her asthma and COPD. The tenant's agent also has COPD and when he visited the tenant at the rental unit, his voice felt hoarse and his chest was heavy.

The tenant testified regarding the following facts. The previous manager was very "gruff" with her, he said there was no smoke, vape, or mold in her rental unit. The occupant living below the tenant apologized to the tenant for vaping. When the tenant reported the issue to the former manager, he asked the occupant for her "vaping gun." The tenant does not know what a "vaping gun" is or that it existed.

### Analysis

The following RTB *Rules of Procedure* are applicable and state the following, in part:

#### *7.4 Evidence must be presented*

*Evidence must be presented by the party who submitted it, or by the party's agent...*

...

*7.17 Presentation of evidence*

*Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...*

*7.18 Order of presentation*

*The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...*

I find that the tenant and her agent did not properly present the tenant's evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having the opportunity to do so during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure*.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the tenant must satisfy the following four elements on a balance of probabilities:

- 1) Proof that the damage or loss exists;
- 2) Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
- 3) Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 4) Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for \$8,127.30 without leave to reapply.

During this hearing, the tenant and her agent failed to go through any specific monetary claims or the amounts for each claim. They did not indicate what amounts the tenant was seeking, why she was seeking it, how the landlord was responsible, what proof was given of the amounts sought, and what efforts were made by the tenant to mitigate her losses. I find that the tenant failed the above four-part test.

The tenant did not provide a monetary order worksheet or breakdown during this hearing. The only reference to the tenant's total monetary amount of \$8,127.30 was by me, when I confirmed the tenant's application with the tenant's agent.

This hearing lasted 53 minutes, so the tenant and her agent had ample opportunity to present the tenant's application. The tenant's agent spoke for the majority of the hearing time, as compared to the landlord's two agents. During this hearing, I repeatedly asked the tenant and her agent if they had anything else to say or any information to present. They were given a full opportunity to present the tenant's application and to repeatedly respond to the submissions of the landlord's two agents.

The tenant and her agent failed to go through any of the tenant's documents that were submitted for this hearing. The tenant's agent referenced the existence of documents but did not point me to any specific pages or portions. Rather than presenting the tenant's monetary claim, the tenant and her agent were more focussed on talking about the reasons why this tenancy ended and the 1 Month Notice. This is despite the fact that I told the tenant's agent at the beginning of this hearing, that those claims were dismissed since the tenant moved out.

As the tenant was unsuccessful in her application, I find that she is not entitled to recover the \$100.00 filing fee from the landlord. This claim is dismissed without leave to reapply.

### Conclusion

Both parties' applications are dismissed in their 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: September 23, 2021

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Residential Tenancy Branch