



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OLC RR

### Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution. A hearing by telephone conference was held on November 16, 2021. The Tenant applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "Act").

The Tenant and the Landlord both attended the hearing. All parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. The Landlord confirmed receipt of both of the Tenant's application packages.

Both parties confirmed receipt of each other's documentary evidence packages and no service issues were raised. Both parties confirmed they understood Rule 6.11.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence submitted in accordance with the rules of procedure and evidence that is relevant to the issues and findings in this matter are described in this Decision.

### Preliminary Matters

During the hearing, the Tenant stated he wishes to withdraw his initial application and is only seeking monetary compensation due to his loss of quiet enjoyment of his rental unit over a 2 month period, July and August 2021.

I note the Tenant applied for a rent reduction as part of this application. However, as per the Guideline # 22, a rent reduction is typically used when there has been a substantial

reduction in a service or facility included with this tenancy. The Tenant repeatedly cited his loss of quiet enjoyment as the basis for his claim, and the Landlord understood that this is what the claim was about. As such, I find it appropriate to amend the Tenant's application to include an application for monetary compensation for damage or loss under the Act, rather than an application for a rent reduction.

The Landlord was willing and able to proceed to respond to the Tenant's claim for loss of quiet enjoyment.

In summary, I amend the Tenant's application to remove a request for the Landlord to comply with the Act, and to proceed on a general claim for damage or loss under the Act due to loss of quiet enjoyment, rather than as a claim for "rent reduction". The Tenant's claim for loss of quiet enjoyment will be dealt with further below.

#### Issue(s) to be Decided

- Is the Tenant entitled to monetary compensation under the Act for the loss of quiet enjoyment?

#### Background and Evidence

Both parties agree that monthly rent is set at \$1,390.00 and is due on the 15<sup>th</sup> of each month. The Tenant stated he has lived in the rental unit for over a year now, and sometime in the latter part of June 2021, the occupant of the suite below him started smoking on his balcony, causing smoke to drift into the subject rental unit. This was the seminal incident for the subsequent escalating conflict. Both parties agree that this is a non-smoking complex, on any part of the property.

The Tenant is seeking compensation which amounts to 70% of his monthly rent for July and August 2021, which is the period of time he claims to have suffered a loss of quiet enjoyment at the subject rental unit.

More specifically, the Tenant stated that he smelled a strong smell of cigarette smoke coming from the balcony of the unit below him on June 30, 2021. At that time, he took a photo of the ashtray on the balcony of the lower unit to show the Landlord that the Tenant below was smoking. The Tenant stated he sent a text message to the Landlord's agent on June 30, 2021, along with a photo of the ashtray.

The Landlord stated that his agent immediately followed up with the Tenant below asking about the smoking, via text message. The Landlord stated that the Tenant below acknowledged he was smoking and was unaware he was not allowed to do so. Shortly after the Landlord sent the Tenant below a message about the smoking on June 30, 2021, the Tenant below yelled obscenities at the Tenant about taking photos of his balcony, and for complaining about the smoking.

The Landlord stated that the Tenant below promised, at that time, to not smoke on the premises, going forward. The Landlord stated that, other than more unsubstantiated complaints from the Tenant throughout July and August, no further photos or direct evidence was provided to show the Tenant below was still smoking. Despite the lack of direct evidence, the Landlord stated they sent numerous messages (informal text messages, as well as a formal letter) to the Tenant below to report that a complaint had been received regarding the smoking. The Landlord noted that they were limited in what formal actions could be taken due to the fact that there is very limited evidence supporting any ongoing smoking, especially considering the fact that the Tenant below had denied smoking on the property anytime after June 30, 2021.

The Tenant stated that he has asthma and is sensitive to smoke, which is why he immediately let the Landlord know of the smoke he smelled on June 30, 2021. The Tenant does not feel the Landlord did enough to diffuse the situation, and protect his quiet enjoyment throughout July and August. Ultimately, the Tenant below moved out at the start of September 2021 and both parties agree this issue no longer exists, going forward.

The Tenant acknowledged that the only direct documentary evidence he had to show the Tenant in the unit below was smoking was the photo from June 30, 2021. The Tenant stated that, following his initial complaint on June 30, 2021, he sent a few text messages to the Landlord including another complaint to the Landlord on July 8, 2021, about smelling smoke. Then, the Tenant sent another text to the Landlord around July 9, 2021, complaining about the Tenant below yelling obscenities through the walls.

The Landlord stated that after the complaint from the Tenant on July 8, 2021, about the continued smoking in the unit below, they followed up the following day with the Tenant below who said he hadn't smoked on the property since June 30, 2021, when he was told not to. Since the Tenant had little evidence to support that there was continued smoking, the Landlord felt they were doing as much as they could to address the allegations of smoking. The Landlord stated they asked the Tenant to provide concrete evidence of smoking, should he have any, to help them deal with the allegations.

The Tenant continued to send complaints to the Landlord, or agent of, and request that the Tenant below be evicted for smoking. At one point, the Tenant informed the Landlord that he was going to file a complaint with our office if the Landlord failed to give an eviction notice to the Tenant below and pay him approximately 2 months rent. This was highlighted in an undated text message provided into evidence.

The Landlord confirmed via text message that they had communicated with the Tenant below about smoking, but he denied doing so since June. The Landlord stated that the Tenant below said he was now going off the property, to a nearby alleyway, to smoke, and had been doing that since June 30, 2021. The Landlord also stated they attended the building around August 10, 2021, to do a site visit, and investigate the smoking issue further. At that time, the Landlord attended the Tenant's unit, the rental unit below (where the smoking was alleged to be coming from), and also the neighbouring unit. The Landlord stated that the neighbour confirmed that the Tenant in the unit below the subject rental unit had in fact been going to the alley to smoke, following being contacted by the Landlord on June 30, 2021.

The Landlord feels the Tenant was actually a part of the escalating conflict with the Tenant below. More specifically, the Landlord stated that the Tenant was aggressive and profane in his interactions with them at some points, which likely exacerbated the conflict over smoking. The Landlord pointed to a text message provided into evidence which shows that the Tenant used multiple profanities and aggressive language when he was interacting with the Landlord via text on July 16, 2021. The Tenant acknowledges sending the profane messages, but feels the Landlord was being passive aggressive by asking for more evidence to help take action against the Tenant of the lower unit, if smoking was in fact occurring.

The Landlord stated that, despite the limited evidence of continued smoking, they sent a formal letter to the Tenant below on July 23, 2021. The Landlord stated they told the Tenant of this letter to the other Tenant, and suggested that the Tenant stop interacting and communicating with the Tenant below. At that point, the Tenant and the Tenant below had exchanged notes, and the Tenant below had yelled obscenities through the walls on multiple occasions. The Landlord also stated that he warned the Tenant to stop using profane language when interacting with them.

The Tenant stated that the Tenant below would sing/yell rap songs outside, and would recite lyrics with threatening words. The Tenant felt threatened by the Tenant below, so involved police on multiple occasions. The Tenant stated that the Tenant below yelled

loudly, and in a threatening manner twice on June 30, 2021, twice on July 9, 2021 (one at 3am), once on July 16, 2021, and another time on July 18, 2021 (again at 3am). The Tenant stated that this impacted his sleep and day to day life, and also made him feel unsafe.

The Tenant feels the Landlord took insufficient actions to get rid of the Tenant below, and keep his behaviour and smoking in check.

The Landlord opined that he and his agents worked continually to diffuse the situation, starting the very day they received the smoking complaint on June 30, 2021. The Landlord stated that following the subsequent complaints from the Tenant, they would follow up with the Tenant below, but he continually denied smoking on the property, and left them with little actionable evidence. The Landlord continued to encourage the Tenant to provide further evidence of smoking, but they never received any. The Landlord noted that the Tenant actually started using profane language when prompted for more evidence, which made it even harder to collect necessary evidence of the allegations. The Landlord stated he eventually hired a property manager to help with the situation, and he attended the rental building with the new property manager around August 11, 2021. It was at this time that they spoke with neighbours, who stated they did not smell smoke, and that the Tenant below was seen smoking off the property, not on his balcony as the Tenant asserted.

The Landlord confirmed that when he attended the unit around August 11, 2021, he told both the Tenant, and the lower Tenant, to stop communicating with each other. The Landlord stated that they did not get any copies of the notes exchanged between the Tenant, and the unit below, until August 11, 2021. The Landlord also stated that after getting the names of the police officers the Tenant spoke with in the preceeding weeks, he sent an email directly to the police officer asking about what was going on. However, the Landlord did not receive a reply from police. The Landlord stated the Tenant continued to report smoke, but provided no evidence.

The Landlord stated that they sent another letter to the Tenant on August 17, 2021, outlining the steps they had taken to address his concerns, and again asked him to provide further evidence, if he had any. The Landlord stated that following their conversation with the Tenant below, he gave notice that he would be moving out on August 27, 2021.

### Analysis

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows:

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. The Tenant must also 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.

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.

I have reviewed the evidence and testimony before me. I note there is no dispute that the Tenant below the subject rental unit was new to the building, and he moved in shortly before the issues arose at the end of June 2021. There is no dispute that the Tenant below was smoking on his balcony on June 30, 2021, which is directly below the subject rental unit. The photo taken by the Tenant provides reliable evidence that the Tenant below was actively smoking on his balcony on June 30, 2021. Both parties can agree to this fact. However, following this, I note the Tenant did not have any further evidence supporting that the Tenant below was smoking on the rental property.

Although the Tenant continued to file complaints with the Landlord about the ongoing smoking below, the Tenant didn't provide any further direct evidence to support this. I find the lack of direct evidence from the Tenant, supporting continued and ongoing smoking by the Tenant below, likely would have greatly impacted the Landlord's ability to take more affirmative and aggressive actions to deal with the smoking issue. I note that, on one hand, the Landlord was being told there was ongoing smoking, and on the other hand, the smoking was being denied by the Tenant below. Despite this, the

Landlord still reached out to the Tenant below on numerous occasions, via text, in person, and in writing to try to see if smoking was occurring, and if the issue could be resolved. The Landlord also spoke directly with the Tenant below to stop communications with the Tenant, for any reason, after it became clear the interpersonal conflict was escalating. The Landlord also followed up with police, once they were given the particulars from the Tenant. I accept that this was insufficient from the Tenant's perspective, but I find the Landlord was reasonably responsive in addressing the issues, especially given the lack of direct evidence they were left with.

I note the Tenant is seeking 70% of the rent he paid over July and August 2021, which is when the smoking and the conflict with the Tenant below impacted his quiet enjoyment of the suite. I note the following portion of Policy Guideline #6:

***B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT***

*A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.*

*Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.*

*In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.*

*A landlord can be held responsible for the actions of other tenants if it can be established that failed to take reasonable steps to correct it.*

After reviewing the totality of the evidence, and testimony before me, I find there is a notable lack of evidence supporting that there was in fact ongoing smoking, beyond June 30, 2021, or that there was harassment from the Tenant below that was known about, but not actioned by the Landlord within a reasonable time frame. I found the Tenants recollection and presentation of timelines, including what was reported to the Landlord, and when, was somewhat confusing and vague, particularly with respect to any verbal harassment from the Tenant below.

I find the lack of evidence provided by the Tenant, to the Landlord, to support his complaints would have presented some challenges for the Landlord with respect to decisively following up with the Tenant below or initiating a formal eviction in a more timely manner. Although the Tenant finds the Landlord's actions insufficient to protect his quiet enjoyment, I find the Landlord took reasonable steps and measures to correct some of the problems, given the situation. I find the Landlord took reasonable steps to correct problems, given the lack of direct evidence they were faced with. I find there is insufficient evidence that the Landlord failed to protect the Tenant's right to quiet enjoyment, or that he should be liable for the Tenant's claim. As such, I dismiss the Tenant's claim, in full, without leave to reapply.

### Conclusion

The Tenant's application is dismissed, in full, 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: November 16, 2021

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Residential Tenancy Branch