



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pacifica Housing
and [tenant name uppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT, RR

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- an order requiring the landlord to provide services or facilities as required by the tenancy agreement or the Act, pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation (the Regulation) or tenancy agreement, pursuant to section 67; and
- an order to reduce the rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65.

Both parties attended the hearing. The landlord was represented by managers KC (the landlord) and SB. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Preliminary Issue – Service

The tenant served the notice of hearing and the evidence (the materials) by email on October 10, 2021. The landlord confirmed receipt of the materials. The tenant confirmed receipt of the response evidence by January 15, 2022.

Based on the testimony offered by both parties, I find the tenant served the materials and the landlord served the response evidence in accordance with section 89(1) of the Act.

The tenant amended the application for a monetary order in the amount of \$11,200.00. The tenant served the amendment on January 27, 2022 by email.

Regulation 44 states that a document served by email is deemed received on the third day after it is emailed. The amendment is deemed received on January 30, 2022.

Rule of Procedure 4.6 states:

As soon as possible, copies of the Amendment to an Application for Dispute Resolution form and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by section 89 of the Residential Tenancy Act or section 82 of the Manufactured Home Park Tenancy Act and these Rules of Procedure. The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution form and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) not less than 14 days before the hearing.

Based on the testimony offered by the tenant, I find the landlord received the amendment two days late, per Rule of Procedure 4.6.

Based on the foregoing, I do not accept the amendment for a monetary order in the amount of \$11,200.00.

Preliminary Issue – Update of the Tenancy Address

Pursuant to section 64(3)(a) of the Act, I have amended the application to correct the tenancy address. The correct address is recorded on the cover page of this decision.

Issues to be Decided

Is the tenant entitled to:

1. an order for the landlord to comply with the act?
2. a monetary order in the amount of \$431.82?
3. an order to reduce the rent for repairs, services or facilities not provided?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the tenant's obligation to present the evidence to substantiate the application.

Both parties agreed the tenancy started on August 12, 2019. The tenant is currently occupying the rental unit. Monthly rent currently is \$874.00, due on the last day of the prior month. At the outset of the tenancy the landlord collected a security deposit of \$431.00 and holds it in trust. The tenancy agreement was submitted into evidence.

Both parties agreed the rental building is completely smoke free.

The tenant is seeking an order for the landlord to evict tenant VI (VI's first name and unit number are recorded on the cover page of this decision) and to add non smoking signage throughout the rental building. The tenant is also seeking a rent reduction of \$400.00 per month because of the constant smoke pollution and noise disturbances.

The tenant affirmed that several tenants smoke in the rental building. The tenant has a pulmonary disease and constantly needs to wear masks in her rental unit because of the strong smoke pollution originating from the other rental units.

The tenant submitted a complaint in writing to the landlord in September 2019 regarding the smoke pollution and the landlord did not act.

The tenant stated that tenant VI moved to the rental building in early 2021 and she is one of the worst smoking offenders. Tenant VI occupies the rental unit above the tenant's unit.

The landlord emailed the tenant on April 08, 2021: "We have received this and are aware of what is going on with VI and are doing our best to try to get her into alternate housing."

The tenant emailed the landlord on April 28, 2021: "i am disgusted with Pacificas non involvement in smoking issues at this building, and failure to protect law abiding tenants from harm".

The tenant emailed the landlord on May 14, 2021:

this issue is still going on daily with VI smoking. Is there any way you can get her into housing faster? there are hotels in town that do meals and lodging and support staff. I have a right to breathe and this is not okay.

Also, i called the police approximately two weeks ago and spoke with the same officer who was called out last time to talk to VI. she is obviously not getting appropriate warnings and getting endless chances to stay while i am the victim here breathing in her smoke and dealing with her noise violations.

i really wish someone would email me back. so far i have called the police twice on her for noise violations and written your company countless emails with no adequate response.

I emphasized with bold letters the most relevant parts of the quotations in this decision.

The landlord testified that in May 2021 she added paper non smoking signage and sent a letter to all the tenants reminding them that the building is smoke free. The paper signage was torn down within one week and the upper management did not authorize the landlord to add permanent non smoking signage. Currently, there is no signage in the building indicating the building is non smoking.

The tenant submitted a letter to the landlord dated October 03, 2021:

Hi I am writing to the residential tenancy workers addressing this complaint,
I have been kept awake for two years, since August 2019 from severe cigarette smoke flooding into my apartment. We all sign non smoking agreements when we move in as this is supposed to be a one hundred percent non smoking building. I have severe asthma and copd and cannot believe the disrespect i have been treated with by pacifica staff in trying to get resolution to these complaints.

There was a male tenant in suite [redacted for privacy] upstairs from me from August 2019 until early 2020. At which time pacifica evicted him for witnessed smoking. In an appointment with my mother [redacted for privacy], my case manager at the time [redacted for privacy], and [redacted for privacy]manger of tenant services for Pacifica we went in to complain in person in December 2019. [redacted for privacy] said she would look into a rent reduction for an air purifier to relieve the situation until the upstairs man was evicted. When i followed up with her she said Pacifica would not pay for the rental of an air machine or give me a rent credit to do so myself. Even though [redacted for privacy] wrote me an email saying that she would go to good efforts to put a non smoker upstairs or someone who was capable of understanding my medical

situation and smoking outside, that didn't happen. **They moved in VI, the current tenant in [redacted for privacy] who has violent episodes, and is unable to comply with noise rules or non smoking rules.** I went another many months on nightly ashtma medication coughing for hours only able to sleep a few hours in the daytimes, when i appealed again to Pacifica for help. [redacted for privacy] was manager of pacifica at the time and again declined to help me with rent reduction or costs of air filter. The [redacted for privacy] became tenant services manger and repeatedly ignored my phone calls and emails for months at a time.

The tenant is seeking a monetary compensation in the amount of \$431.82. The tenant said that she asked the landlord to provide an air purifier because of the strong smoke pollution. The tenant purchased the air purifier and the filters (the air purifier) and paid the amount of \$431.82 (receipts submitted into evidence) in July 2021. The tenant affirmed the landlord informed her that she was authorized to reduce rent to recover the cost of the air purifier and later the landlord denied the rent reduction.

The tenant referenced the air purifier compensation in the October 03, 2021 letter:

I decided to withhold august 2020 rent from pacifica and buy myself an air filtration HEPA unit which was doctor recommended. It came with filters from amazon.ca Then this past summer 2021, i needed another batch of replacemnt filters to keep the unit going. This total is 431.82. i am asking pacifica to cancel this amount owing from the month of rent i withheld from them in august 2020, as i am on a repayment agreement with them 10.00 per month to avoid eviction.

This situation has put me in an awful situation. I belive pacifica housing is not only careless but negligent and i will be pursuing a BC human rights complaint for damage to my breathing. It is a human right to breathe, and pacifica has gone out of their way to avoid and neglect this situation.

The landlord stated the prior building manager analyzed the tenant's request for a rent reduction due to the air purifier and denied it.

The tenant submitted complaint forms dated September 06, October 11 and December 04, 2021 reporting that tenant VI is smoking and that there is smoke pollution in her rental unit. The tenant provided specific times for the incidents.

The tenant emailed the landlord on November 05, 2021:

hello, although i appreciate that you and the other member of Pacifica staff called me the other day, it did nothing to address things.

We will be waiting for the hearing in February with the RTB. I have begun the human rights complaint process with Smoke free BC also.

None of the few items i had clearly and specifically laid out for Pacifica in the RTB dispute were taken seriously or addressed by the meeting.

I will no longer be accepting phone calls from Pacifica. everything will be in written email form from here forward.

Making me move out of my suite and across town does not address the problem. I deserve smoke free housing it is what i was promised upon move in. I deserve to be able to stay in my place and be well.

As you know there are 25 supporting documents i attached with the RTB dispute and more piling up every day with the smoking and noise disruption in the building.

As we talked about moving to another Pacifica building is not a solution as to quote [redacted for privacy] your previous tenant services manager, "**There are worse smoking problems in all our other Pacifica buildings**, we don't want to move you into an even worse situation".

I was on the list for ten years with BC housing. Each time i updated my account with them they said it would be years before any of their building were actually non smoking. Their secretary at BC housing the last time i was there said she did not feel comfortable updating my application or housing me in their agency as the smoking complaints she was getting were awful.

These ongoing and disruptive smoking and noise at the helios are a violation of my quiet enjoyment of the building.

It is an insult to be told to fill out paperwork for different housing and move myself along because your agency won't deal with the problems here at the helios.

The tenant submitted a complaint form dated November 23, 2021:

tenant VI was making loud noises that were severely disturbing all day. The loud noises went on from 10am-noon and then again starting from 4-5pm. i banged on ceiling upstairs once 5pm asking her to be quiet. She retaliated in the manner below. **i called police. police sent an officer. i talked in person to the officer near 6pm. He asked me a bunch of questions trying to get a better understanding of why Pacifica is doing nothing to move this tenant. The police officer was surprised and dissapointed that this has gone on for a year and nothing has been done to resolve the situation.** The noises the tenant was making include some sports equipment or ball dribbling repeatedly against the floor. Dragging of furniture repeatedly against floor. Dropping of loud and heavy items repeatedly against floor, and loud banging noises. All of these noises continued for several hours of that day. I was advised by police to file a FOi with the police department and attach all these police call outs to my residential tenancy dispute and human rights claim.

The tenant submitted a letter from tenant KA (resident of the same rental building) dated January 03, 2022:

I have to constantly keep my windows and doors closed to keep the marijuana and cigarette smells to a minimum. Even with a large air purifier, the smells still come in through the gaps of the main door and bathroom vent. I can certainly say that most of the smells come from [tenant VI]. Although, due to a lack of proper enforcement of rules, it is definitely not the only unit near my apartment that has tenants smoking cigarettes and marijuana inside.

I have seen many of my neighbors make complaints about this issue to no avail, and I have sent formal requests to Pacifica Housing on the following dates:

March 1, 2021 - No reply.

Sep 6th, 2021 - I received a reply, asked for the form to be filled up. They acknowledge the email. No changes.

November 5th, 2021 - Tenant Services informed them they would follow up. The smells resumed a week later and were constant in December.

Many neighbors near me have moved away, but considering my financial situation, I do benefit enormously from the lower than market rate offered to me, being a single mom of three kids. I much rather avoid conflict for myself and my children and being ostracized. But I do, indeed, would like to see this matter solved without feeling at risk of losing my tenancy.

The landlord confirmed receipt of all the complaints from the tenant and testified that she deals with all the complaints. The landlord said that since June 2021, when she started working at the tenant's building, she has attended the building frequently and that she is aware that there is an issue with smoke pollution. The landlord does not

consider the complaints submitted to the prior building manager. The landlord can only act if the complaints provide information about the origin of the smoke.

The landlord served a reminder and two warnings to tenant VI since September 2021 because of smoking. The landlord does not want to provide further information about the situation of tenant VI because of privacy concerns.

Landlord SB affirmed that there is not enough evidence to terminate the tenancy of VI.

The landlord stated that she acts in accordance with the Act, the landlord's internal policies and the orders issued by the landlord's directors. The landlord's written submission states:

It is the position of the Respondent, Pacifica Housing, that this dispute be dismissed, as we feel we have done all we can to accommodate the Applicant's needs. We acknowledge that it can be frustrating to live in a situation with neighbours who make noise and smoke indoors; however, this is an unfortunate aspect of apartment living and one that we are seeking actively to resolve.

The tenant submitted into evidence a monetary order worksheet indicating a monetary claim of \$431.82.

Analysis

Section 7 of the Act states:

Liability for not complying with this Act or a tenancy agreement

(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Residential Tenancy Branch Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the

party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove the case is on the person making the claim.

Order for the landlord to comply with the Act

Section 28 of the Act states:

A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Branch Policy Guideline 6 states:

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.

Ending a Tenancy for Cause

Under section 47 of the RTA and section 40 of the MHPTA, **a landlord may end a tenancy if a tenant or a tenant's guest has engaged in illegal activity that has adversely affected or is likely to adversely affect the quiet enjoyment of another occupant.**

Section 32(1) of the Act states the landlord must provide and maintain a health rental unit: “A landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law”

Section 47(1)(d) of the Act states:

A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(d): the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

The landlord did not dispute the information about tenant VI. The landlord’s written submission admits there is a smoke and noise issue in the rental building. The landlord already served VI, since September 2021, a reminder and two warnings because of noise and smoke pollution.

I note that the Act does not require the landlord to serve three warnings in writing before serving a notice to end tenancy for cause and the landlord cannot ignore complaints submitted to the prior building manager.

Based on the tenant’s convincing and detailed testimony, the April 08 and 28, May 14, October 03 and November 05, 2021 emails, the November 23, 2021 complaint form and the January 03, 2022 letter, I find the tenant proved, on a balance of probabilities, that tenant VI is significantly interfering, unreasonably disturbing and jeopardizing the health of the tenant. I find that the landlord is breaching section 28(b) of the Act by not sufficiently addressing the tenant’s multiple complaints related to smoke pollution and noise violations. I find the landlord is breaching section 32(1) of the Act by not providing and maintaining the rental unit in a healthy state.

Section 62(3) of the Act states: “The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.”

The landlord must stop breaching sections 28(b) and 32(1) of the Act by protecting the tenant from unreasonable disturbance and enforcing the non smoking rule in the rental building. The landlord may serve a notice to end tenancy to tenant VI and may install ostensive permanent signage throughout the rental building indicating that smoking is not allowed.

Rent reduction

Based on the tenant's convincing and detailed testimony, the April 08 and 28, May 14, October 03 and November 05, 2021 emails, the November 23, 2021 complaint form and the January 03, 2022 letter, I find the tenant proved, on a balance of probabilities, the landlord has been aware of the severe and constant smoke pollution issue and did not act in a timely and efficient manner to guarantee the tenant's right of quiet enjoyment and that the landlord has not been providing and maintaining the rental unit in a healthy state.

Section 65(1)(f) of the Act authorizes me to order a reduction in the tenant's future rent by an amount that is equivalent to a reduction in the value of a tenancy agreement due to the landlord's failure to comply with section 28(b) of the Act:

(1) Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

[...]

(c) that any money paid by a tenant to a landlord must be

(i) repaid to the tenant,

(ii) deducted from rent, or

(iii) treated as a payment of an obligation of the tenant to the landlord other than rent

(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;

Residential Tenancy Branch Policy Guideline 05 provides additional information about the duty to minimize the loss:

B. REASONABLE EFFORTS TO MINIMIZE LOSSES

A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person

knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.

In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:

- remove and dry the possessions as soon as possible;
- promptly report the damage and leak to the landlord and request repairs to avoid further damage;
- file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

Partial mitigation

Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.

The tenant submitted the first smoke complaint to the landlord in September 2019, one month after the tenancy started, and submitted this application for dispute resolution on October 03, 2021. I find that the tenant should have submitted an application earlier for an order for the landlord to comply with the Act and for a rent reduction. As the tenant applied for dispute resolution on October 03, 2021, I order the tenant's rent to be reduced since October 03, 2021.

Based on the tenant's detailed testimony, I find that the value of the tenancy was reduced due to the landlord's failure to guarantee the tenant's right of quiet enjoyment and not providing and maintaining the rental unit in a healthy state by 45% of the amount of monthly rent (\$393.30 per month).

As such, the tenant is entitled to a rent reduction of \$353.97 for October 2021 ($\$874.00/30 \text{ days} \times 0.45 \times 27 \text{ days}$) and \$393.30 per month from November 01 2021 to March 31, 2022. Thus, pursuant to section 65(1)(c) of the Act, the tenant is entitled to be repaid a retroactive rent reduction in the total amount of \$2,320.47.

Pursuant to section 65(1)(f), the tenant must pay reduced rent in the amount of \$480.70 (rent in the amount of \$874.00 subtracted \$393.30), starting on April 01, 2022.

I note that I am not considering repayment agreements in the above calculations.

Section 72(2)(a) of the Act allows the tenant to deduct from future rent an amount owed by the landlord:

- (2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted
 - (a) in the case of payment from a landlord to a tenant, from any rent due to the landlord, and
 - (b) in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant.

As it would take more than four months for the tenant to recover the amount the landlord must pay by deducting it from the reduced amount of rent, I find it is appropriate to issue a monetary order for the tenant in the amount of \$2,320.47.

The tenant is at liberty to submit a new application for a further rent reduction if the landlord does not sufficiently address the smoke and noise complaints after this decision.

The landlord must apply for an authorization to collect full rent when the landlord can prove, on a balance of probabilities, that the landlord is complying with Act, especially sections 28(b) and 32(1) of the Act.

Air purifier

Based on the tenant's convincing testimony and the air purifier receipts, I find the tenant proved, on a balance of probabilities, that the landlord failed to comply with sections 28(b) and 32(1) of the Act and she suffered a loss of \$431.82 because of the landlord's failure to comply with the Act.

The tenant submitted the first smoke complaint to the landlord in September 2019, purchased the air purifier in July 2021 and submitted this application on October 03, 2021. I find the tenant did not mitigate her losses by waiting 25 months to submit this application. If the tenant had applied for dispute resolution earlier the Residential Tenancy Branch could have ordered the landlord to sufficiently address the smoke pollution before the tenant needed to purchase the air purifier.

I dismiss the tenant's claim for compensation for the air purifier.

Compliance Enforcement Unit Referral

Residential Tenancy Branch Policy Guideline 41 states:

The Residential Tenancy Branch may decide that an administrative penalty should be applied when the evidence shows the respondent has:

- Contravened a provision of the Legislation or regulations; or
- Failed to comply with a decision or order of the RTB.

Because I am concerned about landlord's breach of section 28(b) and 32(1) of the Act, I am sending a copy of this decision to my managers. My managers will review this decision and if they are of the opinion that these circumstances could reasonably lead to administrative penalties, then they will send a copy of this decision along with any other relevant materials from the dispute resolution file to the Compliance and Enforcement Unit. This separate unit of the Residential Tenancy Branch is responsible for administrative penalties that may be levied under the Act. They have the sole authority to determine whether to proceed with a further investigation into this matter and the sole authority to determine whether administrative penalties are warranted in these circumstances. After any dispute resolution materials are sent, neither I nor my manager play any role in their process and, if the Compliance and Enforcement Unit decides to pursue this matter, they do not provide me or my manager with any information they may obtain during their process.

Before any administrative penalties are imposed, a person will be given an opportunity to be heard. While the Compliance and Enforcement Unit can review the contents of the dispute resolution file, they can also consider additional evidence that was not before me. They are not bound by the findings of fact I have made in this decision.

Any further communications regarding an investigation or administrative penalties will come directly from the Compliance and Enforcement Unit.

Conclusion

I order the landlord to stop breaching sections 28(b) and 32(1) of the Act by protecting the tenant from unreasonable disturbance and enforcing the non smoking rule in the rental building.

Pursuant to section 65(1)(c) and 72 of the Act, the tenant is entitled to be repaid a retroactive rent reduction in the total amount of \$2,320.47. I grant the tenant a monetary order in the amount of \$2,320.47. The tenant is provided with this order in the above

terms and the landlord must be served with this order as soon as possible. Should the landlord fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Pursuant to section 65(f) of the Act, I authorize the tenant to pay monthly rent in the amount of \$480.70, starting on April 01, 2022.

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: March 02, 2022

Residential Tenancy Branch