



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD. FOR GALAXY VALUE ADD
PROP and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT, FFT

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 for the landlord to comply with the Act, the Residential Tenancy Regulation (the Regulation) and/or tenancy agreement, pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, the Regulation or tenancy agreement, pursuant to section 67; and
- an authorization to recover the filing fee for this application, under section 72.

This hearing was originally convened on March 25 and adjourned to July 12, 2022 due to time constraints. This decision should be read in conjunction with the Interim Decision arising out of the March 25, 2022 hearing.

On July 12, 2022 the tenant and the landlord attended the hearing. The landlord was represented by property manager WM (the landlord). Witnesses for the landlord JK and for the tenant OZ also attended. 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, the amendment and the evidence (the materials) via registered mail on December 17, 2021. The landlord confirmed receipt of the materials.

The landlord served the response evidence on March 17, 2022. The tenant confirmed receipt of the landlord's response evidence and that she had enough time to review it.

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

The tenant served a second package of evidence on March 18 and a third package on March 23, 2022. The first hearing was on March 25, 2022.

Rule of Procedure 3.14 States:

Evidence not submitted at the time of Application for Dispute Resolution Except for evidence related to an expedited hearing (see Rule 10), **documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.**

(emphasis added)

The tenant's evidence packages served on March 18 and 23, 2022 are excluded, per Rule of Procedure 3.14.

Preliminary Issue – application for an order for the landlord to comply

The tenant submitted this application on December 10, 2021 for an order for the landlord to comply with the Act because the tenant from unit 2** (the lower tenant / unit) disturbed her by smoking in his rental unit and making unreasonable noises.

Both parties agreed the lower tenant moved out on December 31, 2021.

The tenant is only seeking monetary compensation.

Section 62(4)(b) of the Act states an application should be dismissed if the application or part of an application for dispute resolution does not disclose a dispute that may be

determined under the Act. I exercise my authority under section 62(4)(b) of the Act to dismiss the application for an order for the landlord to comply.

Issues to be Decided

Is the tenant entitled to:

1. A monetary order for compensation?
2. An authorization to recover the filing fee for this application?

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. I note the two hearings lasted a total of 147 minutes and the tenant's accepted evidence consists of 37 PDF files and 55 audio and image files.

Both parties agreed the ongoing tenancy started on November 16, 2020. Monthly rent is \$985.00, due on the first day of the month. The landlord collected and currently holds in trust a security deposit in the amount of \$485.00. The tenancy agreement was submitted into evidence. It indicates the tenant cannot smoke in the rental building.

The tenant is seeking monetary compensation for loss of quiet enjoyment in the amount of \$485.00 per month from December 2020 to November 2021 and \$970.00 for December 2021. The tenant claims compensation in the total amount of \$6,305.00 because the landlord did not address her complaints against the lower tenant. The amendment states:

I am requesting a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation (" Regulation") or tenancy agreement pursuant to section 67 of the Act. The landlord did not show good faith in fulfilling their responsibility in ensuring my right to peaceful enjoyment.

The landlord affirmed the wood frame rental building was built in 1973. The tenant stated the landlord informed her there is a thin layer of concrete between the floors after she moved in.

The tenant testified the entire rental building is smoke free. The landlord said that some tenants are allowed to smoke in their rental units because they have old tenancy agreements. There is no bylaw prohibiting tenants from smoking in the rental building.

The tenant affirmed that immediately after she moved to the rental unit, she noticed a continuous and unusual noise originating from the pipes under her bathtub and banging noises on her floor originating from the lower unit. The tenant stated her floor used to shake because of the banging noise. The tenant testified she also smelled tobacco and marijuana in her unit. The tenant purchased an air filter and air fresheners because of the smoke pollution.

The tenant said the lower tenant is responsible for the noises and smoke pollution, as his rental unit is immediately below her unit. The tenant knew when the lower tenant was at his rental unit because she could hear him coughing and laughing. The tenant observed a pile of cigarettes on the lower unit's balcony.

The tenant could only hear the noises and smell the tobacco and marijuana when the lower unit tenant was at home.

The tenant emailed the landlord on December 12, 2020:

I have a pressing problem, the occupant of 2** has been deliberately banging on the walls, ceiling, and washroom pipes all times of day and night. It seems he may believe that I am to blame for the regular ticking/banging of the radiator. I am assuming the loud ticking noise is the expanding and contracting of the radiator pipes, the sound seems to originate from the furthest corner of my bedroom on the perimeter of the building where the radiator pipe runs.

He has been banging on the ceiling and walls every weekend since I moved in on November 16th, 2020. As I was new to the building, I couldn't be sure if his banging was deliberate or not as I was still getting used to the sounds of the building. However, I have been here for four weekends now and I can be sure that the banging is from the man in 2** and it is getting more persistent and aggressive. It seems he may not be present Monday to Friday because there is no banging and/or any other indication of his presence mid-week, e.g., music, tv, or smoke (except this week he was present from Thursday on). There is usually a strong smell of marijuana as-well during the weekends; it seems his weekend activities include; smoking weed inside his room, watches tv, and bangs on the walls, ceiling and bathroom pipes. I did make a comment about the smell when doing the walkthrough with [redacted for privacy] (video available) when I moved in, but I thought it was probably due to the last tenant, it is clear now that the smoke is rising up from 2**.

What is the smoking policy for the building?

The landlord replied on December 14, 2020:

[landlord] All our tenancy agreements include a no smoking policy. That being said, I am aware that some long standing tenants have been grandfathered in. It's something we are working to eradicate.

We will reach out to the tenant in 2** for comment and look to have this resolved.

The tenant submitted 52 audio and video files with noises on several dates.

The parties emailed each other on December 15, 2020:

[landlord] I reached to 2** to discuss. He responded pretty quickly and told us that he doesn't know anything about banging on walls, pipes etc. He said he is rarely there and didn't comment on any noise you might have been making.

Are you 100% sure it is 2**? Usually in these situations a tenant will come back and say 'yes but only because that tenant is making excessive noise' etc. This gentleman did not.

[tenant] Yes, I'm sure, it's only on the weekends when he is home. **The pipe banging is a little more difficult to know the origin**, however the ceiling banging it is clearly coming from below my bedroom. I can also hear him swearing. That's why I took the videos and audio recordings to prove what I was experiencing.

It always stops on Sunday night (I assume because he actually has to get a good night sleep for work on Monday) and resumes on Friday (or occasionally Thursday).

[landlord] We have addressed this issue with him and so if he isn't telling us the whole story, at least he knows that we are now monitoring his behaviour. Let me know if this persists now.

[tenant] Did the previous tenants ever make any comment regarding the banging, specific the pipe banging? Or has anyone in the building commented on such a phenomenon? If not I think it's fair to conclude it's deliberate and originating from a specific location. I wanted to ask the tenant above me if they could also hear the pipe banging, because sound travel along metal so it's likely they too can hear it. However I didn't think it would appropriate to go to their door especially given social distancing.

[landlord] Unfortunately we've only just taken this building on and so don't have a complete history of complaints and issues. It does sound very strange but usually it's easy to differentiate between contracting/expanding pipes and someone banging on them.

Perhaps it's worth asking adjacent units if you see them in the hallway etc. Their experience might be able to shed more light on it.

[tenant] I would have asked neighbours had the opportunity presented itself. **It's not my place as a tenant to encroach on their right to privacy so I won't be going to**

soliciting their feedback. I have only lived here a short time so I haven't gotten to know my neighbours personally.

Please let me know who I should contact if and when the banging resumes? A phone number please as this always happens after hours on the weekend at all hour of the night. Not sure what other action I can take as actual recordings which I painstakingly gather doesn't seem to have served my case :(

(emphasis added)

The landlord suggested on December 15, 2020 that the tenant contact the non-emergency police line if the noise persists.

The landlord inquired the lower tenant on December 14, 2020 about the pipe and floor noise. The lower tenant answered on December 14, 2020: "No idea. My apartment is always empty as I work a lot when I am home, I hear nothing. Are they sure it's coming from my apartment and not elsewhere?"

On December 27, 2020 the tenant emailed again the landlord, listing six dates and times in December 2020 that she heard the noise. The landlord replied on December 28, 2020: "Looking at your log, I am not sure that this strange banging is being caused by another resident. The timing and nature of the noise is strange, and the tenant you suspected has indicated that he has no issue with you." The landlord asked his maintenance contractor JK to investigate the source of the noise on December 27, 2020.

The parties emailed each other on December 29, 2020:

[landlord] If the noise is being created by a tenant, then yes, we ask that you call the non-emergency police line as they handle disturbances of this nature.

[tenant] As explained in detail, I can't be sure that the tenant is intentionally being caused by the tenant, therefor your solution provided does not seem appropriate given the circumstances of this problem.

[landlord] We are doing what we can to locate the source of the noise. I spoke with the head of our maintenance team on this matter who advised that he visited the property on Dec 24,25 and 26th but couldn't hear anything...

[tenant] Was he present during any of the times listed in the log of banging provided? As mentioned, it usually happens late at night and the wee hours of the morning, and usually an hour to multiple hours pass between bangs. A visit to the building wouldn't likely shed much light to the problem unless he went to the source of the problem to look into the matter.

Did he visit apartment 2**? No one came by my apartment. I would think in order to locate the source of the noise perhaps visiting our apartments would be a good start. Has apartment 2** been visited to see if perhaps there might be appliances used that could cause water hammer? Is there something wrong with the plumbing that is causing a build-up of pressure in the pipes? Does the pipe bang when the toilet is flushed? Have all of these possibilities been ruled out? Has the tenants in [redacted for privacy] been questioned to ask if they also can hear the banging, and if so how long have they hear this banging, months? years?

The tenant affirmed the landlord attended her rental unit in January 2021 to investigate the source of the noise. The landlord's agent also attended to the lower unit and opened an access panel in the lower unit's bathroom. The landlord's agent struck the pipe and the tenant heard the same pipe noise. The landlord's agent insulated the pipe and the pipe noise ceased.

JK stated that he attended the tenant's and the lower tenant's rental units, and he was able to replicate the pipe noise. JK insulated the pipe and sealed the access panel. Later JK testified the pipe noise he could hear was not the same noise from the noise files submitted into evidence by the tenant.

The landlord said the pipe banging noise was not intentionally caused by the lower tenant but by heat extension, as it was a paused noise. The landlord affirmed that the only steady noise was caused by JK when he was investigating the source of the noise.

JK and the landlord stated they inspected the lower unit at a later date and the access panel and the pipe insulation were not tampered with.

The lower tenant emailed the landlord on March 09, 2021:

[tenant] Are they still complaining about me up there? Someone wrote "move or die" on my door yesterday evening. I don't think we need Sherlock Holmes to figure that one out but I did report it to the police.

[landlord] We haven't heard any complaints from the tenant in months and so I assumed it had been resolved. Our last conversation with her was about how the noise was being created by a tenant and likely had sometime to do with the plumbing.

[tenant] It's actually been 2 months pretty much since you emailed me last in regards to [the tenant's complaint] about me. I'm trying to wrap up my head around this whole thing but it seems to me that someone is very unhappy with me regardless of weather she has been convinced the pipes are responsible for noises she is hearing and not me. I pretty well know everyone in the hall on my floor and they have all been living [...] for as long as I have, so I have a hard time believing this is

random or anyone else. I'm at work today but we should talk on the phone and figure something out as you guys are obligated to look out for my safety and well being. I currently feel very unsafe with a possible crazy lady living above me.

(emphasis added)

The tenant testified she did not write on the lower tenant's front door.

The tenant emailed the landlord on April 05, 2021:

I am writing to let you know that the ceiling banking from the tenant in 2** has intensified and increased, I have captured some recordings as proof/examples, **I understand my situation has been difficult to believe and/or conceive.** The individual in Apt 2** has increased his harassment by banging the ceiling/my floor in the kitchen and area and the bedroom area. I took recordings on April 4th into the wee hours of April 5th, 2021.

(emphasis added)

The tenant provided further details about the floor banging noise on April 11, 2021: "27 floor bangs in the kitchen in a 29hr period".

On July 18, 2021 the tenant emailed the landlord:

I am writing to place another formal complaint against the occupant of 2** who has continued to harass me by banging on his ceiling/my floor. In addition to the noise/banging harassment, I have been smelling cigarette smoke all weekend long, I can only reason that he is smoking in his unit. If nothing is going to be done to stop the occupant of 2** from his continued harassment which started in November of 2020, I would like to request to be moved to another apartment where my rights to quiet enjoyment can be upheld at no cost to myself.

On October 11, 2021 the tenant emailed the landlord:

The tenant in 2** continues to smoke marijuana inside and bang my roof at all times day and night, most commonly around 4 AM. Please consider this another formal complaint against the tenant in 2** to add to the many complaints that I have made over the last 11 months. I've lost track of how many formal complaints (although i do have them documented for reference if need be) that have gone unaddressed thereby permitting this tenant, and enabling him to continue to violation my renters rights.

The tenant reiterated her complaints on October 17 and 20, 2021. On October 20, 2021, in response to the tenant's complaints, the landlord wrote: "I have sent him an email and he replied back and I told him it is not allowed".

The tenant further reiterated her complaints on November 4, 11 and 16, 2021.

On November 22, 2021 the tenant emailed the landlord:

My right to peaceful enjoyment as a tenant continues to be violated since moving in November 16th, 2021, for over one year now. I will continue to document and report this violation until the issue has been resolved and I have been appropriately compensated for this ongoing disruption, stress and hardship endured. Please consider this another formal complaint against the tenant in 2** to add to the many complaints that have made, and that have for the most part gone unaddressed and unacknowledged by the landlord for over a year now. Attached is a description of the banging, in addition the tenant smokes weed inside which has also been noted. Attached are 14 recordings for the period of Wednesday Nov 17th - Monday Nov 22, 2021 for your records and mine. I have the original full recordings for reference.

The landlord replied on November 22, 2021:

Please be advised that your complaints have not gone unaddressed and unacknowledged. Let me first say that noise can travel between units, and that it can sometimes disturb your quiet enjoyment. Speaking from personal experience, I too have lived under someone who was rather heavy footed, which became quite frustrating. However, I must be frank with you and advise that there is very little we can do with these recordings. **It is clear that noise is travelling between units, but this is not enough for us to evict a tenant, or even issue a warning. The tenant can easily deny this was their doing, or simply say they were closing a door etc. We have dealt with countless cases like this, and the RTBs ruling invariably advises that noise travel is to be expected within apartment buildings.** If the tenant is playing loud music or having a party, we can absolutely act on this and issue warnings, or even end the tenancy. With respect to the smoking of weed, we are in the process of gathering evidence. **I have absolutely no reason to not believe you, but we first need to corroborate your report. It's difficult to catch people in the act, and the smell of marijuana generally doesn't stick around like cigarettes.** Have you spoken to any of your neighbours about this? Have they experienced similar issues? If anyone else can corroborate your experience, then we have a case to present to the RTB.

(emphasis added)

The landlord said he did not have reasons to not believe in the tenant's report, but he did not have evidence to prove that the lower tenant was responsible for the noise and the smoke pollution and for that reason the landlord did not serve a notice to end tenancy to the lower tenant.

The landlord invited the tenant to look at the listings of other rental units in the same city on November 23, 2021:

[landlord] We do manage several properties in the Nanaimo area, and so if there is something that you like, we would be more than happy to set up a viewing for you. All vacancies are listed on our website.

[tenant's reply on December 11, 2021]: Are you stating that in an effort to uphold your responsibility as the landlord to ensuring the tenants rights to peaceful enjoyment, as per the Residential Tenancy Act, section 62, that you are offering to move me to a alternative/suitable and agreed upon rental at no cost or inconvenience to me? E.g., you would take care of all moving expenses, and any other incurred costs in relocating (moving utilities, change of address mail forwarding etc), as well as ensuring that I would not incur any potential associated costs or expenses such as for example rent increase, damage deposit etc.? Please clarify.

The landlord affirmed that he renovates available units and re-rents them at market rate and that this was offered to the tenant, and she did not accept this offer. The tenant stated she did not receive this offer.

The landlord testified that he inspected the lower unit on December 06, 2021 and there was no sign that the lower tenant tampered with the pipes or smoke pollution in the lower unit.

The tenant said that on December 10, 2021 the lower tenant started making the pipe noise again:

Tenant in 2** has removed the insulation - lining (whatever etc. had used to prevent access to the pipe) and he has started to bang the pipe under my bathtub again.

I have called the office 3:06pm right after the banging started again, I talked with someone from the emergency line and they said they could do nothing and to contact the landlord. I called [landlord], call went straight to voicemail and I left a message.

I have called the police to start a complaint, the officer advised that I continue to report any disturbances to the landlord.

The tenant reiterated her complaints on December 11, 13, 14, 17, 18, 21, 29, 2021.

The tenant was in an alternative lodging from December 12 to 29, 2021 because of the noise.

Witness OZ affirmed that he visited the tenant and could hear the loud pipe noises. The tenant was anxious and suffered because of the noise.

The landlord accepted the lower tenant's notice to end tenancy on December 13, 2021 effective on December 31, 2021 because if one of the two tenants involved in the complaints moved out the issues would be solved.

The tenant did not apply earlier because she tried to solve the issues with the landlord.

The landlord stated that he carefully addressed the tenant's complaints and that some noise is unavoidable in a wood frame building.

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 (RTB) 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.

I accept the tenant's uncontested testimony that she heard excessive pipe banging and floor noises and had smoke pollution and suffered a loss because of these issues. The tenant had issues with the pipe noise from November 16, 2020 to January 2021 and December 10 to 31, 2021. The tenant had issues with the floor noises and smoke pollution from November 16, 2020 to December 31, 2021.

The parties offered conflicting if the entire building is smoke free. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

The tenancy agreement does not indicate the entire building is smoke free. Based on the landlord's email dated December 14, 2020, I find the building is not smoke free.

Based on the tenant's emails dated July 18 and December 11, 2021 and the landlord's email dated November 23, 2021, I find the tenant asked to move to another rental unit on July 18, 2021 and the landlord suggested the tenant can move to another rental unit on November 23, 2021. The tenant inquired if she could move at no cost on December 11, 2021, the day after she submitted this claim, and the landlord explained during the hearing that she could move to a new rental unit at market rate.

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.

RTB 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.

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.

[...]

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16).

(emphasis added)

The first issue in this case is whether the landlord breached the Act by failing to take reasonable steps to address the tenant's complaints.

The tenant first notified the landlord about her issues on December 12, 2020. The landlord contacted the lower tenant on December 14, 2020 and he denied that he is responsible for the noises and the smoke pollution. The landlord's agent JK inspected the lower unit in January 2021 and insulated a pipe.

Based on the tenant's testimony and the December 15, 2020 email and the landlord's December 27, 2020 email, I find that both parties agreed the pipe noise was unusual. I find that the unusual nature of the pipe noise makes it harder for the landlord to address the pipe noise complaints.

On April 05, 2021, referring to the floor noise, the tenant indicates "I understand my situation has been difficult to believe and/or conceive". I find it was hard for the landlord to address the floor noise.

The tenant stated she had issues with smoke pollution related to marijuana on December 12, 2020, October 11 and November 22, 2021. I find the main smoke pollution issue the tenant had was related to marijuana smoke pollution, rather than tobacco smoke pollution. I find that addressing marijuana smoke pollution is harder than addressing tobacco smoke pollution because, as the landlord indicated in the November 22, 2021 email, the marijuana smell does not linger as much as the tobacco smell.

I find the landlord replied to the tenant's emails within a reasonable time. In response to the tenant's complaints, the landlord also offered the tenant the possibility to move at her cost to another rental unit and accept the lower tenant's short notice to end tenancy in an attempt to address the tenant's complaints. The landlord inspected the lower tenant's unit in January 2021 and on December 06 and 31, 2021.

Based on the review of all the evidence and testimony and the above findings, I find the landlord reasonably addressed the tenant's complaints.

I note the landlord could have taken additional steps to better address the complaints submitted by the tenant, such as inquiring other tenants in the rental building if they are hearing unreasonable noises and having smoke pollution issues. However, as stated above, I do not find it was unreasonable for the landlord not to have taken these steps.

The entitlement to quiet enjoyment does not guarantee a tenant an absolute right to silence in his rental unit. Some noise is unavoidable in a multi-unit dwelling, especially in a wood frame building from 1973.

As stated above, the rental building is not smoke free. Grandfathered tenants have the ongoing responsibility to ensure that smoking in the rental building is not disturbing other occupants. However, some smoke pollution in a rental unit located in a building that is not smoke free is also unavoidable.

I find that the tenant has not provided satisfactory evidence to establish, on a balance of probabilities, that the landlord failed to comply with the Act.

Accordingly, I dismiss the tenant's application for a monetary order.

I note that if the tenant had provided satisfactory evidence to establish, on a balance of probabilities, that the landlord failed to comply with the Act, I would still dismiss the tenant's application for the following reasons.

Per section 7 of the Act and as explained in RTB Policy Guideline 05, the party claiming compensation has the duty to mitigate 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 first notified the landlord about her issues on December 12, 2020 and only submitted this claim on December 10, 2021. The tenant emailed the landlord on 15 dates before submitting this application.

The landlord asked the tenant to inquire other tenants in the rental building if they are hearing unreasonable noises and having smoke pollution issues on December 15, 2020 and the tenant replied stating that “It’s not my place as a tenant to encroach on their right to privacy so I won’t be going to soliciting their feedback”. The landlord reiterated his request to the tenant on November 22, 2021.

I find the tenant failed to minimize her losses by waiting one year to submit this claim. The tenant could have submitted this application earlier.

The tenant must bear the cost of the filing fee, as the tenant was not successful.

Conclusion

I dismiss the tenant’s application 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: July 21, 2022

Residential Tenancy Branch