



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

## **DECISION**

Dispute Codes      Landlord: OPC MNDC FF  
Tenant: CNC FF

### Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties. The participatory hearing was held, via teleconference, on March 31, 2023.

The Landlord and the Tenant (agent of) both attended the hearing and provided affirmed testimony. All parties provided affirmed testimony and were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. Both parties confirmed receipt of each other's documentary evidence.

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 and Procedural Matters

The parties agreed that the tenancy is now over, and the Tenant has vacated the rental unit. As such, the grounds related to the cancellation of the 1 Month Notice to End Tenancy for Cause (the Notice), are moot and are dismissed, without leave. The only remaining ground is the Landlord's application for monetary compensation, which will be further addressed below. Further, since the Landlord has already returned the deposit, it is not necessary to consider whether or not he is entitled to retain the deposit to offset the amounts he is seeking.

### Issues to be Decided

- Is the Landlord entitled to a monetary order for damage or loss under the Act?

### Background and Evidence

As per the tenancy agreement provided into evidence, monthly rent was set at \$1,745.00 per month, due on the first of the month, which included a parking spot. The Tenant paid a security deposit, totalling \$847.50. The Tenancy agreement indicates that no smoking is allowed in the rental unit.

The Landlord stated that the Tenant started smoking on his deck in August of 2022, and it directly impacted the person living below, as the smoke would travel into her windows and vents. The Tenant who lived below, D.L., attended the hearing as a witness to say that she moved out after many months of dealing with second hand smoke from the Tenant (cigarettes and drugs). She stated that it was a nightly occurrence and she even videotaped the Tenant as proof. DL stated that she was forced to give only two weeks notice to the Landlord in January, so that she could move out as of February 1, 2023.

The Landlord stated that despite repeated warnings, the Tenant continued to smoke and as a result, DL had to move out. The Landlord is seeking February and March rent, totalling \$3,560.00, for DL's unit (below this rental unit) because the unit sat empty for two months before new renters could be found. The Landlord opined that this is directly caused by the Tenants smoking.

The Tenant's mother, JG, stated that her son has mental health challenges which have been exacerbated by the stress of this eviction. JG opined that the Landlord's witness is not reliable, as many of her complaints fall on dates where the Tenant was not home, or was at work. JG also pointed out that there are others on the property who smoke, and it cannot be known that it was coming from the Tenant's unit. JG also noted that no other Tenants complained about this issue, other than the one witness at the hearing.

### Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord 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 Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or

damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

I note the following portion of Policy Guideline #3 – Claims for Rent and Damages for Loss of Rent:

*In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.*

Further, I note Policy Guideline #5 – Duty to Minimize 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.*

I have reviewed the totality of the testimony, evidence and the submissions. It appears the Landlord was aware the Tenant below, DL, was moving out part way through January 2023. Although the Landlord was able to re-rent her unit starting April 1, 2023, I note the rental unit sat empty for 2 months, and he is now wanting to recover this amount from the Tenant. The Landlord did not specify why it took so long to re-rent the unit below, and what steps he was taking to mitigate his losses on that matter, and rent

the unit sooner. The Landlord has provided insufficient evidence as to how he mitigated the rental losses he states were incurred because of the Tenant's smoking. In order to be successful in this type of claim, the Landlord must demonstrate they did everything that was reasonably possible to minimize the losses, and I find the Landlord has failed to sufficiently demonstrate this. I dismiss this item, in full, without leave.

### Conclusion

Both applications are 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: April 3, 2023

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Residential Tenancy Branch