



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding STRATTON VENTURES LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCT

### Introduction

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

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 67 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord and the landlord's agent attended the hearing and are herein referred to as "the landlord".

As both parties were present, service of documents was confirmed. The tenant testified that the landlord was served with her application for dispute resolution by Canada Post registered mail on July 30, 2018, which was confirmed by the landlord.

Based on the undisputed testimonies of the parties, I find that the notice of this hearing was served on the landlord in accordance with section 89 of the *Act*.

The tenant testified that she served the landlord by personal service to the landlord's agent with her first package of evidence on October 10, 2018, which was confirmed by the landlord. The tenant testified that she served the landlord with a second package of evidence on October 24, 2018. The landlord disputed receipt of this evidence.

I note that Rule 3.14 of the Residential Tenancy Branch Rules of Procedure requires that evidence an applicant intends to rely on at the hearing must be served on the respondent and submitted to the Residential Tenancy Branch not less than 14 days before the hearing. As the tenant's second evidentiary package was served on the

respondent and the Residential Tenancy Branch only two days prior to the hearing, I find that this evidence was not served in accordance with the Rules of Procedure and I have declined to consider it in this decision. However, the tenant was at liberty to provide verbal testimony regarding her evidence.

The landlord testified that their evidence was served on the tenant by Canada Post registered mail on October 16, 2018, which was confirmed received by the tenant on October 19, 2018.

#### Preliminary Issue – Request to Record the Hearing

I advised both parties at the beginning of the hearing that recording of the hearing is not permitted by the Residential Tenancy Branch Rules of Procedure, however I noted that the tenant had submitted a written request to record the hearing due to a disability.

I explained to the tenant that she had an option under the Rules of Procedure to request the services of a court reporter to record the hearing, if she wished. The tenant confirmed that she did not wish to avail herself of this service as she had arranged for an assistant during the hearing. As well, the tenant stated that she would be taking notes during the hearing, which would suffice.

#### Issue(s) to be Decided

Is the tenant entitled to a monetary award as a result of the landlord's failure to comply with the *Act*, regulations or tenancy agreement?

#### Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

Both parties confirmed that this tenancy began July 2008 and ended July 2016. The rental unit was a three-bedroom unit located on the third floor, which is the top floor, of the rental building. There are nine rental units and an office in the rental building. The landlord estimated that the building was built in the mid-1950s.

The tenant testified that she is seeking a claim against the landlord for a breach to the *Act* which resulted in the tenant's loss of quiet enjoyment of her rental unit and compromised her physical health.

The tenant testified that there was a sign in the building symbolizing "no smoking". The tenant interpreted this sign to indicate that the apartment building was a non-smoking building in which smoking was prohibited by law – not only in the common areas but also in individual rental units.

The tenant testified that from the beginning of her tenancy she was aware of smoking in the building but did not find it bothersome until in the latter part of her tenancy when she found the smoking in the building to be more noticeable and raised her concern with the resident building manager. The tenant contends that the building manager did not enforce the restriction against smoking in the building and as a result, the tenant's asthma developed into COPD (Chronic Obstructive Pulmonary Disease). The tenant testified that she took measures to try and mitigate the smoke from entering her rental unit, but she was ultimately forced to move out due to her health concerns.

The landlord testified that the building was not designated as a non-smoking building and that there was no bylaw preventing smoking in individual rental units, only in the common areas, which was the reason for the "no smoking" sign in the lobby.

I clarified the following information with both parties:

- There is nothing in the tenant's tenancy agreement that specifically references that smoking is not allowed in the rental units.
- There was nothing in writing provided to the tenant that the apartment building was designated as a non-smoking building.
- There was no evidence submitted as to when the tenant brought her concerns regarding about the smoking to the building manager as the tenant discussed the issue verbally with the manager, not in writing.

### Analysis

The tenant is seeking compensation for damages which she claims have been caused by the landlord's failure to comply with sections 28(b) and 32(1) of the *Act*.

In this case, the tenant has claimed that the rental building was a smoke-free building because there was sign in the building that had a cigarette with a line through it as an indication that no smoking was allowed. The landlord disputes this and testified that the building was not a smoke-free building.

Section 28(b) of the *Act* provides that a tenant is entitled to quiet enjoyment, including the right to freedom from unreasonable disturbance.

Section 32(1) of the *Act* states that a landlord must provide and maintain residential property in a state of decoration and repair that:

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 67 of the *Act* provides that an arbitrator may determine the amount of the damage or loss and order compensation to the claimant, if an arbitrator has found that damages or loss results from a party not complying with the *Act*, regulations, or tenancy agreement.

The burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the tenancy agreement or contravention of the *Act* on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally, it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

Section C of Residential Tenancy Policy Guideline #16. Compensation for Damage or Loss examines the issues of compensation in detail, and explains as follows:

*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.*

As explained at the beginning of the “Analysis” section, a claimant must prove that the damage or loss **stemmed directly from a violation of the tenancy agreement or contravention of the Act on the part of the respondent.**

Although I am sympathetic to the fact that the tenant has suffered serious health issues, based on the testimony and evidence before me, on a balance of probabilities, I find that there is not sufficient evidence to establish that the landlord contravened the *Act*, regulations or tenancy agreement.

I find that there is insufficient evidence to establish that the building was a smoke-free building based on the fact that the tenant confirmed there was nothing in her tenancy agreement specifically prohibiting a tenant from smoking in their own rental unit in the rental property. As well, the tenant confirmed that there was smoking in the building from the start of her tenancy, but she did not find it noticeable until the last two years of her tenancy.

The rental building was at least 50 years old at the beginning of the tenancy. I find that there is insufficient evidence presented to establish that the landlords failed to maintain the apartment building in a state of repair, in keeping with the age and character of the building, that resulted in excessive smoke transference between rental units.

The tenant did not present sufficient evidence that smoking was taking place in the common areas, in contravention of the rental building rule prohibiting smoking in common areas, to such an extent or degree that could reasonably be found to have caused the tenant’s health issues over the course of a couple of years.

Therefore, having found that the landlord did not fail to comply with the *Act*, regulations or tenancy agreement, I do not find that the damages claimed by the tenant are a result of the landlord’s failure to comply with the *Act*, regulations or tenancy agreement. As such, the tenant’s claim for compensation is dismissed without leave to reapply.

Conclusion

The tenant's application is dismissed 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 14, 2018

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Residential Tenancy Branch