**Victoria File No. 233968**
**Decision Date: 2005-12-18**

In the matter of the *Residential Tenancy Act,* SBC 2002, c. 78.

between

[redacted] Applicant(s)

and

[redacted], **Landlord(s),** Respondent(s)

Re: An application pursuant to section 67 of the *Residential Tenancy Act* regarding the premises at:

[redacted] **VICTORIA, British Columbia**

Date and place of hearing: November 25, 2005 and December 12, 2005, VICTORIA.

## DECISION AND REASONS

**Appearances:**

For the tenant: [redacted]
For the landlord: [redacted], counsel for the landlord

**THE CLAIMS**

The tenant seeks a monetary order for the following items:

1. $72.50 for change of address for 1 year Canada Post
2. $10.50 to change hydro
3. $45.00 telephone change to Niagara address
4. $45.00 telephone change to new address
5. $767.00 cost of first move to Niagara address
6. $362.50 deposit for Niagara address
7. $725.00 first month rent (April) for Niagara address
8. $725.00 May rent for Niagara address
9. $767.00 second moving costs on June 1, 2005
10. $410.00 deposit for new apartment
11. $810.00 June 1, 2005 rent for new apartment
12. $175.00 Chiropractor visits
13. $280.00 Massage treatments

The total of the tenant's claims is $5,194.50.

## BACKGROUND

1. The tenancy started on April 1, 2005. The monthly rent was $725.00. The parties signed a fixed term tenancy agreement on March 9, 2005. The agreement was to start on April 1, 2005 and end on March 31, 2006. The tenant alleges that she entered into this tenancy agreement on the basis that the building was a non-smoking building and that if she lived there, she would not be exposed to second hand smoke. The tenancy ended on June 1, 2005 because the tenant alleges that she discovered that the building was a smoking building and if she remained in occupation, she would be exposed to second hand smoke.

## PRELIMINARY MATTERS

2. On November 25, 2005 the tenant gave evidence concerning the alleged misrepresentation of the former manager who the tenant says told her that the building was a non-smoking building. The landlord chose to call the former manager as a witness before the tenant had finished her evidence. The former manager testified and then another witness for the landlord was called. That witness also gave evidence. As time was running out, the matter had to be adjourned and a new date was set. The matter was scheduled to be reconvened on December 12, 2005.

3. On December 12, 2005, I advised the landlord that I had heard sufficient evidence to conclude that the former manager did in fact misrepresent the building as being a non-smoking building. Furthermore, I advised the landlord that I had four reasons upon which I reached that finding (as set out in paragraphs 4 to 7 inclusive):

4. The former manager's evidence was equivocal because when he was first asked what he told the tenant, he said that he told her it was a non-smoking building. He then corrected himself and said that he told her that no one smoked in her apartment. That evidence is not believable because throughout the tenant's evidence she talked about her ill health and how second hand smoke would exacerbate her health condition. She told the former manager that she had suffered cancer on at least two occasions in the past. She also told the former manager that she could not handle second hand smoke and therefore she must live in a non-smoking building. When the former manager testified none of this information was reported. On a balance of probabilities, I believe the tenant.

5. When the former manager's partner testified, she confirmed that on the day that the tenant was moving into the unit on April 1, 2005, she and the former manager were moving out. She told the tenant that no one smoked on the fourth floor, that is, the floor where the tenant's suite is located. This was false because on April 1, 2005 the new manager moved into the suite formerly occupied by the former manager and his partner and the new manager smoked. The new manager's suite is located on the fourth floor.

6. The tenant's evidence orally and in writing is convincing. I believe that the former manager knew full well that the tenant had to live in a non-smoking building and that the tenant could not tolerate second hand smoke.

7. When the tenant informed the new manager that she believed that the landlord had misrepresented the building as being a non-smoking building and that as a result of the misrepresentation, the tenant must vacate the suite, the landlord agreed to release the tenant from any obligations under the fixed term tenancy agreement. I believe that the landlord took that action because the landlord believed that the former manager had misrepresented the building. The landlord argued that there are signs in the building indicating that smoking is not permitted in common areas but only in the suites. I agree that those signs were posted on the day that the tenant was told the building is a non-smoking building. The tenant says she not see the signs and the former manager did not point any signs out to her. I believe the tenant. Also, it is not inconceivable that those signs would be posted in a building where no one smoked. According to the tenant, the former manager told her he wanted non-smokers only. Furthermore, that is precisely what the tenant believed based on what she was told.

8. Counsel for the landlord argued that I should not have made a finding regarding the misrepresentation because counsel has not had an opportunity to cross-examine the tenant. In other words, counsel for the landlord challenged my jurisdiction to make a finding despite his inability to cross-examine the tenant. As noted above, it was the landlord who wanted to call his witnesses on November 25, 2005 and it was the landlord who chose not to cross-examine the tenant on that day. Arbitration hearings are designed to be expeditious and if at all possible, concluded within the one hour allotted for the hearing. Often it is necessary to adjourn but it is not the purpose of adjourning to turn the proceedings into a court of law. Once the parties enter evidence concerning a material aspect of the proceedings, it is the duty of the arbitrator to make a finding and move the proceedings forward. In this case, the evidence of the tenant and the landlord provided a reasonable basis upon which I could make a finding regarding the allegation that the landlord misrepresented the building. I made that finding based on the evidence of both the tenant and the landlord. The fact that the landlord did not cross-examine the tenant before that finding was made was a decision made by the landlord not myself.

9. Counsel for the landlord also argued that the former manager wanted to make a statement on December 12, 2005. Apparently, the former manager takes exception to some of the comments made by the tenant in her written submissions. I advised counsel that a witness is not a party to these proceedings and as the former manager has already been called as a witness, it would be inappropriate to call him again just so that he can set the record straight. The record is the record for the parties not the witnesses.

10. Finally, counsel for the landlord argued that I should not have made a finding regarding the alleged misrepresentation until I heard all of the landlord's witnesses. In particular, on December 12, 2005 the landlord brought the new tenant (who occupies this tenant's former suite) to testify about how she does not

smell any second hand smoke. Counsel argued that I should have heard from this witness before I made any finding regarding the alleged misrepresentation. I disagree. I fail to see how this witness' evidence is relevant to the issue of the alleged misrepresentation. Furthermore, even if this witness has not smelled any second hand smoke, that fact alone does not mean that the tenant did not smell second hand smoke. There are simply too many variables involved and as I noted above, an arbitration hearing is not a court of law. My task is to hear the evidence as expeditiously and as fairly as possible. Relevance is my guide and regarding the possible evidence of the new tenant, I am uncertain whether her evidence would be relevant in any event.

**ANALYSIS**

11. The meeting on March 9, 2006 between the tenant and her friend and the former manager of the building is a critical aspect of this proceeding. The tenant and her friend were looking for a non-smoking building for the tenant to rent an apartment. The tenant says she has suffered from cancer on at least two occasions previously. The tenant says that she has a low or zero tolerance to second hand smoke and if she is exposed, she becomes ill. According to the tenant, the manager assured her that this was a non-smoking building and that he, the manager, was committed to renting units to non-smokers. The tenant was shown her new apartment and then the parties signed the fixed term tenancy agreement.

12. On April 4, 2005, the tenant called the landlord and said that the landlord had misrepresented the residential property as a non-smoking building and therefore the tenant must move. The landlord then released the tenant from any obligations flowing from the fixed term tenancy agreement.

13. The tenant also alleges that upon moving into the building on April 1, 2005, the tenant discovered that the building was not a non-smoking building and that in fact the tenants or occupants next door to her were smokers. Finally, the tenant alleges that when she discovered that she was being exposed to second hand smoke, she advised the landlord who informed the tenant that the tenant could vacate and the tenancy agreement would come to an end. As noted above, the landlord assured the tenant that she was released from any obligations flowing from the fixed term tenancy agreement. On April 27, 2005 the tenant wrote a long letter to the landlord explaining why she had to move and in that letter that tenant requested compensation.

14. On November 25, 2005 the former manager testified. I am troubled by his evidence for two reasons. First, when he was asked what he said to the tenant, he stumbled and said at first that he told her it was a non-smoking building and then he changed it and said I mean no one smoked in her apartment. Normally, I would not consider a stumble as described as meaningful. However, when you consider that the tenant's evidence and her friend's statement both contain repeated references to a long conversation about the tenant's illness, her inability to breathe second hand smoke and the fact that the tenant must live in a non-smoking building, it is troubling that the former manager remembers none of that

conversation. I can only conclude that the former manager was telling the truth when he first answered the question about what he told the tenant and that is that the building was a non-smoking building.

15. It is important to note that the landlord may not have opposed some of the tenant's claims with evidence or argument but the landlord made it perfectly clear that the landlord opposes all of the claims because the landlord still believes that the former manager did not misrepresent the building as being a non-smoking building. Furthermore the landlord disputes the allegation that the tenant smelled any smoke at all. Finally, the landlord argues that the signs posted in the building stating that smoking is not allowed in the common areas but only in the suites is conclusive. As noted above, I have dealt with all of those concerns or arguments of the landlord and I found in favour of the tenant on each of those points.

16. On the question of whether the tenant smelled any second hand smoke, I find that the tenant did in fact smell smoke after she moved into the premises on April 1, 2005. The tenant refers to the fact that the new manager smoked on the deck next door to the tenant and the smoke travelled into her suite. One witness reported how the tenant's suite was covered with tape and material so that the smoke could not enter her suite. The suite smelled stuffy because no air was circulating. The tenant also alleges that the smoke was coming through her vents. In my view, it is unnecessary to make any findings regarding whether smoke travelled through the vents. There are 62 suites in this building and eight or ten of those tenants smoke. One of the tenants smokes next door to the tenant.

17. On that basis, I find that the tenant smelled smoke, that the tenant was exposed to second hand smoke and that the tenant had to move from the premises because of the second hand smoke and because the second hand smoke made her feel ill and caused her discomfort. The tenant has provided some medical evidence supporting the allegation that she became ill because of the second hand smoke. It is unnecessary to say with certainty where the smoke was coming from in every instance. It is sufficient to say that the smoke was coming from the balcony of the suite next door and probably from other sources.

18. I am satisfied that the misrepresentation and the corresponding facts: including the fact that the tenant was exposed to second hand smoke; the fact that the tenant suffered illness and discomfort and finally the fact that the tenant had to move again after a tenancy of only two months all give rise to a claim for compensation. I will now deal with each item as claimed.

19. The tenant seeks $72.50 for a change of address for 1 year from Canada Post. The tenant will have $72.50.

20. The tenant seeks $10.50 to change hydro connections in her new home after vacating the dispute premises. The tenant will have $10.50.

21. The tenant seeks $45.00 for arranging a telephone hook up in the disputed premises. The tenant is not entitled to this claim. The tenant however is entitled

to the next claim for a telephone hook up charge. Only one telephone hook up charge is compensable.

22. The tenant will have $45.00 for a new telephone hook up charge for her new home after leaving the dispute premises.

23. The tenant is not entitled to recover the moving charge to the dispute premises. She is however entitled to the moving charge for moving out of the disputed premises. That claim is dealt with below.

24. The tenant withdraws her claim for the security deposit paid to the landlord. As I understand that issue, the parties have already dealt with the security deposit.

25. The tenant seeks reimbursement of the April and May rent paid to the landlord on the basis that she was unable to enjoy any peace and quiet enjoyment because of the presence of second hand smoke. I am not inclined to make any such order. The evidence is that the tenant slept at a friend's home several nights and that she avoided being in the suite during the day. However, the tenant never lost the use and occupation of the suite during her tenancy. She became ill but the illness does not appear to have been so bad that she had to stop living in the suite immediately. She was able to find a new home and on June 1, 2005, she vacated. Under these circumstances, the landlord should not be required to reimburse any rent since the tenant had full and unrestricted access to the premises during the tenancy and because her illness was not so serious that she was required to vacate immediately. For all of these reasons, the tenant's claims for the reimbursement of the April and May rent is dismissed.

26. The tenant seeks $767.00 her second moving costs on June 1, 2005. The tenant is entitled to this expense.

27. The tenant seeks $410.00 for the security deposit for the new apartment after she vacated this unit. The tenant is not entitled to this money because the security deposit paid to her new landlord is still the tenant's money and therefore the tenant has lost nothing.

28. The tenant seeks $810.00 for the rent paid for her new apartment on June 1, 2005. The tenant is not entitled to this money because she is paying rent for the premises in which she is now the occupant. It is has nothing to do with this landlord.

29. The landlord objects to the evidence supporting the claim for the chiropractor bill in the amount of $175.00. The landlord argues that the chiropractor is not qualified to state an opinion about the tenant's lungs. I agree but the chiropractor is probably only repeating what the tenant told her when the tenant went for treatment. In addition, when the chiropractor was treating the tenant for back pain, it is not unreasonable for the chiropractor to speculate on what the tenant's medical condition might be particularly when as in this case, the medical condition is somehow exacerbated by second hand smoke and the back pain is simply a consequence of those conditions. I agree that the chiropractor is

overstepping her expertise but under the circumstances it is not an outrageous or unreasonable opinion. The alternative would be to have the medical doctor give direct evidence and then these proceedings would be protracted. As I have said before, arbitration proceedings are not a court of law. Arbitrators are not required to comply with the rules of evidence as those rules are known to courts of law. See section 75 of the Residential Tenancy Act:

> 75. An arbitrator may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the arbitrator considers to be
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> (a) necessary and appropriate, and
>
> (b) relevant to the arbitration.

30. I am satisfied that the tenant was required to receive chiropractic treatments because the second hand smoke she encountered at the dispute premises made her cough and because the coughing caused back pain. The tenant will have $175.00 for this expense.

31. The evidence regarding the massage treatments indicates that the tenant was receiving the massage treatment before this tenancy started. On that basis and without any other evidence establishing a connection, the tenant's claim for massage treatments in the amount of $280.00 is dismissed because I am not satisfied that the massage treatments were caused by the second hand smoke in the building.

**CONCLUSION**

32. In summary, the tenant will have an order for $1,070.00 for damages. The landlord will be ordered to pay the tenant's costs in the amount of $50.00. The tenant is ordered to serve the landlord with the attached order as soon as possible.

Dated: December 18, 2005.

Larry Gilbert
Arbitrator