

## **DECISION AND REASONS**

This hearing was convened upon the application of the tenant who says that the landlord changed the terms of the tenancy agreement without consulting her. The tenant says she has already been able to smoke on the balcony yet the landlord is now insisting that the rental unit is non-smoking.

The tenant testified that she signed a tenancy agreement November 6, 2005 to commence the tenancy on December 1, 2005. The tenancy agreement was submitted in evidence. The tenant pointed out that the original agreement does not contain a prohibition against smoking but, regardless of that, she has never smoked in the suite and always smokes on the balcony.

The tenant testified that when the landlord sold the rental building to this landlord this landlord created a new tenancy agreement. The agreement, dated July 22, 2008 was submitted in evidence. On the top of page six additional terms are noted as

no pets, non-smoking suite, tenant + child in suite

The tenant testified that she has no concerns regarding the term “non smoking suite” because she has never smoked in the suite and did not intend to. However, in January 2009, the tenant received a memorandum addressed to the residents of the rental building which states in part

Please be reminded that the property is designated non-smoking. Smoking is not permitted in the suites, balconies, decks, common areas, (hallways, garage, entranceways, etc.) and within 6 meters of the property.

The landlord testified that she does not understand why the tenant is refusing to comply with a term she had previously agreed to twice. The landlord testified that the rental building has always been non-smoking. The landlord submitted a copy of the Application for Tenancy that the tenant originally signed in November 2005 which says “All applicants agree not to smoke on the property”. The landlord testified that she believes this “Application” forms part of the initial Tenancy Agreement. In any event, the landlord says that the current tenancy agreement signed July 22, 2008 is clear that the suite is non-smoking. The landlord says that the “suite” includes the balcony. The landlord submits that she believes this to be the case because she (the landlord) cannot go onto the balcony without the tenant’s permission and therefore it forms part of the suite.

The tenant responded that the “Application for Tenancy” is not part of the original tenancy agreement. The tenant says the original agreement makes no mention of having any addendums such as the application. The tenant testified that while she was provided with a copy of that Agreement she has never received a copy of the application. The tenant submits that the application is simply an application; one of many she completed during her search for suitable accommodations and not an agreement.

**Analysis**

The parties agree that the rental building and suite are non-smoking. Where their interpretations part company is with respect to whether or not the non-smoking suite includes the balcony area where, the tenant says, she has smoked since moving into the rental unit in 2005. The landlord has not given the tenant a Notice to End Tenancy for smoking. By this application the tenant is seeking a prospective declaration that her balcony is not part of her suite. I find that this application is pre-emptory and brought to prevent the landlord from giving a Notice to End Tenancy. I decline to make a determination in the abstract when a determination is more appropriately made in the context of ending the tenancy.

The tenant's application is therefore dismissed.