



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing and Social Development

## **DECISION**

Dispute Codes      CNC, FF

### Introduction

This hearing dealt with the tenant's application to cancel a *1 Month Notice to End Tenancy for Cause* and recover the filing fee from the landlord. Both parties appeared at the hearing and were provided the opportunity to be heard and to respond to the other party's submissions.

### Issues(s) to be Decided

1. Has the landlord established sufficient grounds to end the tenancy for cause?
2. Mutually agreeable terms between the parties.
3. Award of the filing fee.

### Background and Evidence

Upon hearing undisputed testimony of the parties and review of the evidence, I make the following findings. The parties entered into a tenancy agreement on October 28, 2007. The tenant is required to pay rent on the 1<sup>st</sup> day of the month according to the tenancy agreement; however, the landlord has permitted the tenant to make partial rent payments on the 1<sup>st</sup> and 15<sup>th</sup> of the month. On March 17, 2009 the landlord posted a *1 Month Notice to End Tenancy for Cause* (the Notice) on the tenant's door. The Notice has an effective date of April 30, 2009 and indicates the reasons for ending the tenancy are that

- the tenant, or a person permitted on the property by the tenant, has seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and,

- the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord.

The rental unit is a basement suite. There is an adjacent basement suite in the residential property that is rented and the landlord resides in the main living unit on the property which is located above the rental unit.

The landlord testified that the residential property is non-smoking and that smells of burning herbs or tobacco can be smelt coming from the rental unit. The landlord testified that there is an irregular pattern to the smell. The landlord described the frequency as not daily or even weekly, rather the smell disappears for a period of time after the landlord comments on smelling it and then it returns. The landlord testified that the rental unit was advertised as non-smoking and the tenant had assured her that he did not smoke. The landlord submitted she is highly allergic to smoke of any kind. The landlord submitted that burning incense is also a fire hazard.

The landlord submitted that she had warned the tenant 3 or 4 times to cease burning incense, including two written warnings.

The tenant testified that he burns incense in the rental unit approximately two times per month; however, recently he had burned it more frequently when his dog was ill. The tenant testified that he does not smoke or do drugs. The tenant provided a drug test showing he was clean; however, the test does not test for nicotine.

The tenant was willing to agree to cease burning any incense in the rental unit if the landlord would agree to continue with the tenancy. The landlord was unwilling to

continue with the tenancy past June 30, 2009. Neither party was agreeable to the terms offered by the other party.

The tenancy agreement was provided as evidence for the hearing. As both parties agreed that smoking was discussed prior to the tenancy commenced and that the house is to be occupied by non-smokers I accept that smoking is not permitted in the rental unit.

The landlord stated that if she is not successful in ending the tenancy for cause, the landlord will find another way to end the tenancy, including serving a *2 Month Notice for Landlord's Use of Property*. The parties were briefly informed of their rights and obligations with respect of to the issuance of such a Notice.

## Analysis

A mutual resolution was attempted during the hearing; however, the parties could not reach a mutual agreement and it is before me to decide whether the landlord has established that the tenant's actions are grounds for ending the tenancy.

I accept the landlord's position that the parties had discussed that smoking was not permitted in the rental unit before the tenancy commenced. I accept the tenant's position that the tenant does not smoke cigarettes or drugs. I find that the smell detected by the landlord is that of incense burning. I do not find that burning incense is the same as smoking. Burning incense is not an illegal activity and I reject the second reason given on the Notice as a basis for ending the tenancy. Therefore, at issue for this hearing is whether the landlord has established that the burning of incense in the rental unit has seriously jeopardized the health or safety or lawful right of another occupant or the landlord, as indicated on the Notice.

The written tenancy agreement does not prohibit burning of incense or candles. The landlord submitted that she is allergic to any form of smoke. It is unclear to me how the incense smoke penetrates the landlord's living unit. Perhaps the rental unit is not properly sealed; however, if this is the case, the landlord would be responsible for ensuring it is to minimize the transference of smells. The landlord did not describe the adverse health effects she has suffered as a result of the incense burning or provide any form of medical documentation to substantiate her position. Therefore, I am not satisfied that her health has been "seriously jeopardized" by the tenant burning incense.

I do not find the burning of incense in itself to seriously jeopardize the landlord's or other occupant's safety. As with burning anything, including candles, or even cooking, there is potential for a fire hazard; however, if done in a responsible manner, the risk is relatively small. I did not hear sufficient evidence to find that the tenant was burning incense irresponsibly or leaving it unattended. Therefore, the landlord has failed to establish that the tenant has seriously jeopardized the safety of the landlord or other occupants.

In light of the above, the landlord has not satisfied me that the tenant has done anything illegal or seriously jeopardized the health or safety of the landlord or another occupant. Therefore, I cancel the Notice to End Tenancy with the effect that this tenancy continues.

As the tenant was successful in this application, the tenant is awarded the filing fee. The tenant is authorized to deduct \$50.00 from a subsequent month's rent in satisfaction of this award and the landlord must consider the rent paid in full.



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## Conclusion

The Notice to End Tenancy is cancelled with the effect that this tenancy continues.

The tenant is awarded the filing fee paid for this application and is authorized to deduct \$50.00 from a subsequent month's rent in satisfaction of this award.

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: May 13, 2009.

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Dispute Resolution Officer