



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC

### Introduction

This hearing dealt with the tenant's Application for Dispute Resolution for an order cancelling a 1 Month Notice to End Tenancy for Cause issued by the landlord.

The tenant, his advocate and witnesses and the landlord and witness appeared and the hearing process was explained. Thereafter the parties gave affirmed testimony and were provided the opportunity to present their evidence orally and in documentary form, and to respond each to the other party, and make submissions to me.

### **Preliminary Issue:**

The testimony confirmed that that the tenant had been served with at least one prior Notice, on October 19, 2011, and that the tenant filed an application in dispute of that Notice. However, the Notice contained an incorrect date and the landlord amended the Notice and served it upon the tenant.

I have amended the tenant's application to a dispute of the latest Notice, October 20, 2011.

### Issue(s) to be Decided

Has the tenant established an entitlement to have the Notice to End Tenancy for Cause cancelled and to recover the filing fee?

### Background and Evidence

This month to month tenancy started on March 1, 2006, and monthly rent is \$845.00, although the tenant's portion is \$365.00.

The rental unit is one of approximately 36 units in a 30+ year old building.

These parties were in prior dispute resolution in which the tenant sought to cancel a 1 Month Notice to End Tenancy (the "Notice"), resulting in a Decision by another Dispute Resolution Officer (DRO) issued on October 26, 2010.

The Decision resulted in the parties reaching a settlement wherein the landlord withdrew the Notice, and the tenant agreed that that neither he nor any of his guests would smoke in his apartment unless the door was closed. The Decision went on to state that tenant acknowledged that to do so is a breach of his tenancy agreement and municipal bylaw and may serve as the basis for an eviction.

Pursuant to the Residential Tenancy Branch rules of procedure, the landlord proceeded first in the hearing and testified in support of issuing the tenant a 1 Month Notice to End Tenancy for Cause.

The landlord issued a corrected 1 Month Notice to End Tenancy for Cause (the "Notice") to the tenant on October 20, 2011, via personal service, with a stated effective vacancy date of November 30, 2011.

The cause as stated on the Notice alleged that the tenant significantly interfered with or unreasonably disturbed another occupant or the landlord, seriously jeopardized the health or safety or lawful right of another occupant or the landlord, and breached a material term of the tenancy agreement which was not corrected within a reasonable time after written notice to do so.

After discussion, the landlord acknowledged the tenant had not received written notice to correct an alleged breach of the tenancy agreement and as a result, that issue was not considered.

The landlord submitted evidence which included documentation surrounding the issue of smoking in 2010, leading to the application for dispute resolution in 2010.

In support of the Notice, the Executive Director for the landlord testified that she was informed by her property manager, the other attending witness for the landlord, that he saw smoke in the hallway around the tenant's rental unit with the door open and reported that to the Executive Director. She in turn directed him to make sure the next time which unit the smoke was coming from as there had been problems with other tenants in the building.

The Executive Director stated that it was important to determine the source of the smoking as the tenant had been through the entire process of receiving warnings and a final warning in 2010, resulting in receiving a 1 Month Notice to End Tenancy for Cause.

However, the other tenants who had been smoking with their doors open had not yet been through the final termination phase as had the tenant, in 2010.

The property manager then attended the rental unit, noticed that the tenant's door was propped open and observed two guests and smoke coming from the rental unit. The property manager then reported that the tenant had been smoking in his rental unit with the door open.

The Executive Director stated that the entire issue hinged around the tenant smoking with the door open and that she believed the Decision of October 26, 2010, allowed her to issue the Notice without any further warning.

The property manager testified he attended the rental unit to speak with the building manager and when passing the tenant's rental unit, observed the tenant with two guests seated around the table. The witness stated that he saw smoke, told the tenant and his guests they could not smoke with the door open and then proceeded to close the door.

In response, the tenant testified that he quit smoking a year ago and has not smoked since that time. The tenant stated that he was not smoking the day of the incidence referred to by the property manager, nor were his guests smoking that day.

The tenant stated that there is a problem with smoke in the hallways in the building as other tenants smoked; however he had to prop open his door to allow ventilation in his rental unit.

The tenant pointed out that he lived in the rental unit problem free for 4 years prior to the warnings in 2010, and has not had any problems since that time.

The tenant's witness, JM, testified that he was one to the guests in the rental unit on the day in question and that he has never smoked a day in his life. Therefore he was not smoking that day nor was the tenant or the other guest.

The witness stated that on the day in question, they had just returned to the rental unit and were "airing out" the rental unit due to the heat.

The tenant's witness, AD, testified that he was the other guest on the day in question, that he has a lung disease and that he does not smoke. The witness submitted that the neither the tenant nor the other guest was smoking that day.

In summation, the tenant's advocate pointed out that the property manager testified that he saw smoke in the hallway, but did not say he observed the tenant or his guests smoking.

### Analysis

Based on the foregoing testimony and evidence, and on a balance of probabilities, I find as follows:

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Once the tenant made an Application to dispute the Notice, the landlord became responsible to prove the Notice to End Tenancy is valid.

In this instance, the burden of proof is on the landlord to prove the tenant significantly interfered with or unreasonably disturbed another occupant or the landlord or seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

After considering all of the written and oral evidence submitted at this hearing, I find that the landlord has provided insufficient evidence to show that the tenant significantly interfered with or unreasonably disturbed another occupant or the landlord or seriously jeopardized the health or safety or lawful right of another occupant or the landlord. In reaching this conclusion I was persuaded by the lack of written substantiation in the landlord's records or any conclusive proof that the tenant was smoking in his rental unit with the door open.

I accept the testimony of the tenant and his witnesses that they were not smoking in the rental unit that day and also accept that the tenant quit smoking more than a year ago. I reached this conclusion by the lack of proof of any further problems for a duration of more than a year.

I also find it highly likely that the smoke in the hallway that day in question came from other tenants in the building, with whom the Executive Director has acknowledged having recent problems with as well.

I also was persuaded by the property manager's testimony in which he never stated he observed the tenant or his guests smoking, only that he saw smoke.

Due to lack of written proof since the last hearing in October 2010, the landlord's evidence was disputed verbal testimony.

I find that, in any dispute when the evidence consists of conflicting and disputed verbal testimony, in the absence of independent documentary evidence, then the party who bears the burden of proof cannot prevail on the balance of probabilities. Therefore it is not necessary for me to determine credibility or assess which set of "facts" is more believable because disputed oral testimony does not sufficiently meet the burden of proof.

I therefore find that the landlord has submitted insufficient proof to establish the causes listed on the Notice.

### Conclusion

As a result, I find the landlord's 1 Month Notice to End Tenancy for Cause is not valid and not supported by the evidence, and therefore has no force and effect. **I order that the Notice be cancelled, with the effect that the tenancy will continue until ended in accordance with the Act.**

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 12, 2011.

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Residential Tenancy Branch