



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes:

CNC, RP, OLC, FF

### Introduction

This hearing was convened in response to the Tenant's Application for Dispute Resolution, in which the Tenant applied to set aside a Notice to End Tenancy for Cause; for an Order requiring the Landlord to make repairs to the rental unit; for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)* or the tenancy agreement; and to recover the fee for filing this Application for Dispute Resolution.

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. In these circumstances the Tenant indicated several matters of dispute on the Application for Dispute Resolution, the most urgent of which is the application to set aside the Notice to End Tenancy. I find that not all the claims on this Application for Dispute Resolution are sufficiently related to be determined during these proceedings. I will, therefore, only consider the Tenant's request to set aside the Notice to End Tenancy and the Tenant's application to recover the filing fee at these proceedings. The balance of the Tenant's applications are dismissed, with leave to re-apply.

All parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, to call witnesses, and to make submissions to me.

The male Tenant stated that one package containing the Notice of Hearing and the Application for Dispute Resolution were sent to the service address on the Application for Dispute Resolution. The male Landlord acknowledged receipt of these documents.

The female Landlord stated that she has been separated from the male Landlord for approximately 2.5 years and that she did not receive this package in the mail. She stated that the male Landlord did provide her with a copy of the Notice of Hearing but she did not receive the Application for Dispute Resolution. As the female Landlord was not properly served with the Application for Dispute Resolution, I find that she should be removed as a named Respondent in this matter.

The Landlord submitted documents to the Residential Tenancy Branch, copies of which were served to the Tenant. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for these proceedings. The Tenant

submitted documents to the Residential Tenancy Branch, copies of which were served to the Landlord. The male Landlord acknowledged receipt of the Tenant's evidence and it was accepted as evidence for these proceedings.

### Issue(s) to be Decided

The issues to be decided are whether the Notice to End Tenancy for Cause, served pursuant to section 47 of the *Residential Tenancy Act (Act)*, should be set aside and whether the Tenant is entitled to recover the fee for filing this Application for Dispute Resolution.

### Background and Evidence

The Landlord and the Tenant agree that this tenancy began on March 01, 2007. The parties agree that there was an understanding that smoking was not permitted in the rental unit.

The Landlord stated that he placed a One Month Notice to End Tenancy for Cause in the Tenant's mail slot on May 18, 2012. The male tenant stated that he received the Notice to End Tenancy on May 23, 2012.

The Landlord and the Tenant agree that the One Month Notice to End Tenancy declared that the Tenant must vacate the unit by June 30, 2012. The reasons stated for the Notice to End Tenancy were that the Tenant or a person permitted on the property by the Tenant has seriously jeopardized the health or safety or lawful interest of another occupant or the landlord the Tenant has breached a material term of the tenancy that was not corrected within a reasonable time.

The male Landlord stated that he wishes to end the tenancy because he believes the Tenants have been smoking cigarettes in the unit and marijuana in the rental unit and/or on the residential property. He presented the following evidence and arguments to support the Notice to End Tenancy for Cause:

- On April 04, 2012 the occupant living in the upper unit of the complex informed him that the Tenant's were smoking in their unit
- That he had never received a report of the Tenant's smoking in their unit prior to this report
- When he went to the rental unit on April 04, 2012 he could smell marijuana while he was standing outside the door of the unit
- The Tenant allowed him to enter the unit and he noticed a strong smell of marijuana in the rental unit
- On April 04, 2012 the male Tenant admitted to smoking marijuana in the rental unit
- On April 05, 2012 at 12:06 a.m. the upper occupant sent him an email declaring that smoke was billowing into her rental unit, although she does not identify the location of the smoke

- On April 05, 2012 at 9:25 a.m. the upper occupant sent him an email declaring that the Tenant “smoked all last evening so I am going to have to move”
- On April 06, 2012 at 8:12 a.m. the upper occupant sent him an email declaring that someone had smoked indoors
- On April 06, 2012 at 1:12 p.m. the upper occupant sent him an email declaring that there is an intolerable amount of smoke in her place
- The upper occupant provided him with a letter, dated April 30, 2012, in which she declared that the Tenant has continued to smoke in the rental unit since April 04, 2012
- He sent an email to the Tenant on April 04, 2012 advising him not to smoke or use illegal drugs on the premises and that he should smoke cigarettes “by the yard way”
- He sent a letter to the Tenant, dated April 30, 2012, in which he informed the Tenant he would serve an eviction notice because he believed the Tenant was continuing to smoke, possibly marijuana
- On April 04, 2012 he sent an email to the female Landlord in which he informed the Landlord that the upper occupant told him that she would be “disputing any claims we have for damages for lost rent etc, etc due to the smoke issue”
- He has inspected the rental unit on approximately 20 occasions during this tenancy and has never noticed a smell of smoke in the unit
- The occupant in the lower unit of the complex has never reported that the Tenant smokes in the rental unit
- He has never asked the occupant in the lower unit of the complex if the Tenant smokes in the rental unit

The female Landlord stated that she advised the male Landlord not to serve the Tenant’s with a Notice to End Tenancy for the following reasons:

- The upper occupant has been a “difficult tenant” who has made “one complaint after another”
- She believes the upper occupant has a very sensitive sense of smell, as she previously reported a smell emanating from her bathroom sink which could not be detected by her, the male Landlord
- She believes the upper occupant may be complaining about smoke emanating from outside the Tenant’s rental unit
- She is aware that the female Tenant is pregnant and she does not believe they would be smoking indoors during a pregnancy

The male Tenant presented the following evidence and arguments in support the application to cancel the Notice to End Tenancy for Cause:

- He has never smoked cigarettes or marijuana in the rental unit
- He does smoke cigarettes but always outside the rental unit

- On April 04, 2012 the Landlord walked through the rental unit; that the Landlord informed him that the upper occupant had complained about the smell of smoke; and that the Landlord never asked him if he had smoked marijuana during that conversation
- That he had been smoking a cigarette, outside, approximately 20 minutes before the Landlord entered his unit on April 04, 2012
- The Landlord did subsequently ask him, via email, if he had smoked in the unit and he has repeatedly denied those allegations
- The Tenant collects utility payment from other occupants of the residential complex and that the upper occupant only began complaining after her utility payments were overdue
- He believes the complaints began because the upper occupant was angry over his attempts to collect the utility payments

The female Tenant presented the following evidence and arguments in support the application to cancel the Notice to End Tenancy for Cause:

- She has never smoked cigarettes or marijuana in the rental unit
- She quit smoking approximately one year ago
- She is pregnant and does not allow smoking in the rental unit

### Analysis

After considering all of the written and oral evidence submitted at this hearing, I find that the Landlord has provided insufficient evidence that there are grounds to end this tenancy.

In reaching this conclusion some of the factors I considered were:

- The upper occupant is the only person who has ever reported that the Tenant is smoking in the rental unit and the Landlord has never noticed evidence of smoking in the rental unit, with the exception of April 04, 2012. I find it highly unlikely that the Landlord would not have previously detected evidence of smoking if the Tenant regularly smoked in the rental unit
- The upper occupant did not report concerns about smoking until April 04, 2012 after the Tenant and the upper occupant had a dispute over a utility bill, which lends credibility to the Tenant's argument that the complaints are retaliatory
- The upper occupant told the male Landlord that she would be "disputing any claims we have for damages for lost rent etc, etc due to the smoke issue", which causes me to believe there may be an ulterior motive for the complaint made to the Landlord
- The upper occupant was not present during the hearing so I am unable to make an independent assessment of the veracity of her observations, specifically in regards to her determinations that the smoke was emanating from inside the Tenant's rental unit and that the Tenant was smoking marijuana,
- The female Landlord has identified that the upper occupant has previously reported smells and that her reports could not be substantiated

- The Landlord has not attempted to corroborate the complaints made by the upper occupant by speaking with the occupant of the lower rental unit which, in my view, would have been a reasonable course of action, particularly since the female Landlord suspected the veracity of the reports

In *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In the circumstances before me, I find the Tenants' testimony that they do not smoke in the rental unit to be quite probable, given that the Landlord has never detected a smell of smoke in the rental unit prior to April 04, 2012, although they have lived in the unit for over five years. I find that the fact that the female Tenant quit smoking over one year ago and that she is currently pregnant gives additional credibility to her testimony that she does not allow smoking in the unit.

In determining this matter I find that the Landlord submitted insufficient evidence to prove that the Tenant was smoking inside the rental unit on April 04, 2012. While I accept that the male Landlord smelled smoke inside the rental unit, I find that it is entirely possible that this smell had filtered into the rental unit while the Tenant was smoking outside the rental unit.

In determining this matter I have given little consideration to the Landlord's argument that this tenancy should end because the Tenant has been smoking marijuana on the residential property. In the absence of proof that the Tenant has been smoking marijuana inside the rental unit, I find that the Landlord has submitted insufficient evidence to show that there are grounds to end the tenancy as a result of the marijuana use.

Section 47(1)(e) of the Act stipulates that a landlord may end a tenancy if the tenant or a person permitted on the property by the tenant has engaged in an illegal activity that has adversely affected, or is likely to adversely affect, the quiet enjoyment of another occupant. Given that the upper occupant was not present at the hearing for cross examination and the credibility of her reports have been called into question, I find that the Landlord has submitted insufficient evidence to show that marijuana smoke has adversely affected her quiet enjoyment.

I specifically note that the Act does not authorize a landlord to end a tenancy for smoking marijuana in circumstances where it does not adversely affect the quiet enjoyment, security, or safety of another occupant; where it has not caused or is likely to cause damage to the landlord's property; or where it has not jeopardized the lawful right of the landlord or another occupant..

### Conclusion

As I have determined that the Landlord has submitted insufficient evidence to establish that there are grounds to end this tenancy pursuant to section 47 of the Act, I hereby set aside the One Month Notice to End Tenancy, dated May 18, 2012, and I order that this tenancy continue until it is ended in accordance with the Act.

As I find the Tenant's application has merit, I hereby authorize the Tenant to deduct \$50.00 from their next rent payment, as compensation for the filing fee paid for this Application for Dispute Resolution.

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: June 14, 2012.

---

Residential Tenancy Branch