



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PACIFICA HOUSING ADVISORY ASSOCIATION  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC OPT MNDC O FF

### Preliminary Issues

Residential Tenancy Rules of Procedure, Rule # 2.3 states that claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Upon review of the Tenant's application I have determined that I will not deal with all the dispute issues the Tenant has placed on their application as not all the claims on this application are sufficiently related to the main issue relating to the Notice to end tenancy. Therefore, I will deal with the Tenant's request to set aside or cancel the Landlord's Notice to End Tenancy issued for cause and the Tenant's request for an Order of Possession; and I dismiss the balance of the Tenant's claim with leave to re-apply.

### Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant on October 29, 2014, to cancel a 1 Month Notice to end tenancy issued for cause and to obtain an Order of Possession for the Tenant.

The hearing was conducted via teleconference and was attended by the Landlord, the Tenant, and the Tenant's legal counsel, hereinafter referred to as Counsel. Each party gave affirmed testimony and confirmed receipt of evidence served by the other.

The Residential Tenancy Branch Rules of Procedure # 3.10 provides that digital evidence includes only photographs, audio recordings, and video recordings. To ensure a fair, efficient and effective process, identical digital evidence and the accompanying printed description must be served on each Respondent and submitted to the Residential Tenancy Branch.

The format of digital evidence must be accessible to all parties. Before the hearing, the party submitting the digital evidence must determine that the other party and the Residential Tenancy Branch have playback equipment or are otherwise able to gain access to the evidence. If a party asks another party about their ability to gain access to a particular format, device or platform, the other party must reply as soon as possible and in any event so that all parties have 7 days with full access to the evidence. If a party is unable to access the digital evidence, the Arbitrator may determine that the digital evidence will not be considered.

Regardless of how evidence is accessed during a hearing, the party providing digital evidence must provide the Residential Tenancy Branch with a copy of the evidence on a memory stick, compact disk or DVD for its permanent files.

As part of his evidence the Tenant submitted a DVD and a Digital Evidence Details sheet which indicated the DVD contained the following: "inter alia, reenactment and explanation of mattress smouldering". As noted above, the Rules of Procedure stipulate that the party submitting the digital evidence must determine that the other party and the Residential Tenancy Branch have playback equipment or are otherwise able to gain access to the evidence, prior to the hearing. In this case Counsel submitted that he had not confirmed if the Landlord or the RTB were able to access the DVD.

The Landlord confirmed she was able to review the DVD which consisted of the Tenant providing his testimony about the events that occurred on August 27, 2014. I was not able to access the contents on the DVD prior to the hearing. The file did not indicate that the Residential Tenancy Branch (RTB) staff had virus scanned the DVD nor was there any indication that the RTB had been able to access the content on the DVD. I explained to both parties that I had scheduled to view the DVD on different electronic equipment on December 11, 2014, and that I would refrain from making my final decision until that time.

On December 11, 2014 I was able to view the contents on the Tenant's DVD and have considered relevant submissions while making my decision.

At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

#### Issue(s) to be Decided

1. Should the 1 Month Notice issued October 28, 2014 be cancelled or upheld?
2. If the 1 Month Notice is cancelled, should the Tenant be granted an Order of Possession?
3. If the 1 Month Notice is upheld, did the Landlord make an oral request for an Order of Possession?

#### Background and Evidence

The Landlord submitted undisputed evidence that the parties executed a written tenancy agreement for a month to month tenancy that commenced on June 3, 2011.

The Tenant is required to pay rent of \$850.00 on the first of each month and on or before June 3, 2011, the Tenant paid \$425.00 as the security deposit.

The Landlord submitted documentary evidence which included, among other things, copies of: the tenancy agreement; Tenant incident reports dated Aug 27/14 and Sept 02/14; an unsigned agreement re: Hazards, issued by the Landlord and dated August 27, 2014; five photographs; and a written statement from the Landlord's Liaison Worker.

The relevant documentary evidence submitted by the Tenant included copies of: the 1 Month Notice issued October 28, 2014; the DVD; and the Digital Evidence Details sheet.

The Landlord testified that they had been contacted by an Outreach Worker back in 2011 and had agreed at that time to enter into a regular tenancy with the Tenant based on his involvement with the Outreach program. The Landlord submitted a brief summary of events which began in January 2014 that related to issues of cigarette burns on the bathroom floor, inside the Tenant's rental unit. She noted the Outreach Worker's involvement and how they worked with the Tenant at that time to try to eliminate future risk relating to cigarette burns.

The Landlord stated that it was not until August 27, 2014 that they were alerted to the fact that the Tenant smokes cigarettes in his bed. She pointed to the incident reports in her evidence which outlined the events that occurred August 27, 2014 where they received a report from another tenant who had seen smoke coming out of the Tenant's rental unit. The Landlord's staff entered the Tenant's rental unit and found it filled with smoke and found the Tenant's bedding and mattress smoldering which resulted from the Tenant smoking a cigarette while lying in bed. The incident report states how the bedding and mattress were dealt with and continued stating as follows:

*...(PICTURES TAKEN). NUMEROUS CIGARETTE BURNS (PICTURES TAKEN) ON MATTRESS/CARPET/LINO. TENANT ADVISED THAT HE ALWAYS KEPT A GALLON OF WATER BY HIS BED 'JUST IN CASE' IT APPEARS HE WAS ASLEEP AND A CIGARETTE CAUGHT HIS BED/BEDDING ON FIRE. THERE IS A HISTORY OF CARELESS SMOKING IN THE UNIT...*

The Landlord adduced that the Tenant had told them that on August 27, 2014 he had thought he put his cigarette out in an ashtray and he went back to sleep. They now know that what actually happened, based on the Tenant's DVD submission, was that the Tenant put out his cigarette on his bedding and he did not wake up immediately when his bedding began to smoulder and his apartment filled with smoke.

The Landlord pointed to the photographs provided in their evidence and confirmed those were the photos that had been taken on August 27, 2014. She noted that each red circle identified a cigarette burn on the Tenant's bedding, mattress, and carpet. She submitted that the last picture showed a cigarette butt that was lying on the floor in close contact with a pile of paper.

The Landlord submitted that in the Tenant's DVD recorded testimony he stated "oh no not again" when describing the fire incident of August 27, 2014. She argued that this was proof that he had caused previous burns.

The Landlord testified that when the events happened on August 27, 2014 they were alerted to the significant risk of a fire hazard so they spoke with the Tenant's Outreach Worker who confirmed the Tenant was at risk. The Landlord submitted that the Outreach Worker told her that they would seek other accommodations for the Tenant. The Landlord submitted that they were later told that the Tenant refused to work with the Outreach Workers in finding a new residence.

The Landlord stated that they continued to work with the Tenant; however they had to consider the safety of the other tenants in this building. She noted that this building includes 15 units designated to house tenants with mobility issues who would be at significant risk in a building where there was a potential fire risk. She submitted that the Tenant is not housed by the health authority in one of those 15 units; rather, the Tenant is occupying the rental unit based on his own independent tenancy agreement with the Landlord.

The Landlord adduced that in their attempts to take action to ensure a safe environment for all their tenants they composed a written agreement dated August 27, 2014, and encouraged the Tenant to sign the document which indicated that "There will be no smoking within your unit/ or building". This document also included the following:

*We remind your behaviour affects the safety of all your neighbours' and is a direct breach of your Tenancy agreement. We would like to remind you of Section 19 (Hazards) of the Tenancy Agreement that you signed:*

In that same letter the Landlord copied Section 19 from the tenancy agreement and highlighted the last sentence which read:

***Any dangerous or damaging act or omission of any Resident is cause of immediate termination of this agreement.***

*...should you fail to meet this condition, you will be issued a final notice of eviction which our office **will enforce***

The Landlord submitted that the Tenant refused to sign the agreement as he would continue to smoke in his unit. The Landlord stated that since that date, and despite their efforts to work with the Tenant's Outreach Worker, the Tenant threatened one of their employees on September 12, 2014, when he told another employee that their Director "better watch his back and he better get life insurance". On October 20, 2014 the Tenant was aggressive to the staff again and on October 21, 2014 the Tenant's Outreach Worker told the Landlord they would no longer be working with the Tenant because the Tenant has now become abusive towards the Outreach Worker.

The Landlord stated that when considering that the Tenant was no longer going to be monitored by an Outreach Worker, and he was continuing to smoke in his bed, they

served the Tenant a 1 Month Notice to end tenancy when they posted it to his door on October 28, 2014.

The 1 Month Notice was issued pursuant to Section 47(1) of the Act for the following reasons:

- Tenant or a person permitted on the property by the tenant has:
  - 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
  - Put the Landlord's property at significant risk

In response to the Landlord's submissions, Counsel argued that the tenancy agreement does not prevent smoking. Counsel submitted that the Tenant has smoked for decades and has limited mobility himself. Counsel stated that the Tenant has told him that he can be confined to bed for several days at a time so it would be impractical for him to have to go outside to smoke.

Counsel argued that the events of August 27, 2014 were not a fire. Yes the Tenant confirms that his bedding was smoldering but there were no flames. He argued that this was an isolated incident and that the Tenant mitigates risk by having a gallon of water by his bed and he has recently purchased an electronic cigarette. Counsel submitted that the Tenant is using the electronic cigarette to transition from smoking cigarettes and noted that the electronic cigarette would cause no risk of fire. Counsel stated that the Tenant admitted that he got angry and made intemperate remarks but argued that the grounds set out for eviction in the *Residential Tenancy Act* have not been met in this circumstance.

The Tenant testified that there have been two times when he had caused cigarette burns. The first time involved the bathroom floor which he offered to fix but was told not to. The Second time he was sick and was in bed. He argued that he knows how to take care of fires and noted that the water by his bed was used to prevent dehydration during the long periods he is confined to his bed. The Tenant submitted that he now smokes in his bed with an ashtray. The Tenant confirmed that the Outreach Worker is no longer working with him and stated that "she abandoned me and walked away".

The Landlord confirmed that the tenancy agreement did not stipulate that there was no smoking in the rental unit or building. She pointed to the tenancy agreement section #19 titled Hazards and argued that the Tenant now presents as a great concern for the safety of other tenants and the building as he refuses to stop smoking in his unit or bed. She submitted that the Tenant is hard to house given his current medical situation and the amount of medication he takes. She argued that he is no longer a good fit in their building and he now needs supportive housing.

Counsel argued that not being a good fit was not proper grounds for eviction and the Landlord cannot change the terms of the tenancy to accommodate an eviction. Counsel requested that if the decision is in favor to evict the Tenant that the eviction date be determined based on the fact that the Tenant needs to find alternative housing.

The parties were given the opportunity to settle these matters however they were unable to reach agreement as the Tenant would not agree to stop smoking in his unit or in his bed.

In closing, the Landlord stated that the Tenant has not paid rent for December 2014; therefore, if the Notice was upheld, she was requesting that an Order of Possession be issued for as soon as possible.

In the DVD statement the Tenant described the events that occurred on August 27, 2014 and stated that the smoke had filled his room right up to the ceiling. He displayed how he used the container of water by his bed to pour it on his bedding and mattress when burns occur.

### Analysis

Upon review of the 1 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the Act and I find that it was served upon the Tenant in a manner that complies with section 89 of the Act.

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice. Where more than one reason is indicated on the Notice the landlord need only prove one of the reasons. The burden of proof is based on the balance of probabilities, meaning the events as described by one party are more likely than not.

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Notwithstanding the Tenant's arguments that there were no flames during the August 27, 2014 incident or that he is mitigating the risk of fire by having a gallon of water by his bed, I accept the submissions of the Landlord that the incident of August 27, 2014, posed a significant risk of fire and danger to the wellbeing to other tenants and to the Landlord's property. There was overwhelming evidence of previous occurrences where the Tenant's bedding and or mattress suffered burns from cigarettes which supports the Landlord's submission that it will continue as long as the Tenant continues to smoke in his unit or until a time when the dropped cigarette will cause significant harm or damage.

Upon review of the Landlord's letter written August 27, 2014, I find the letter informs the Tenant that the Landlord has now determined that smoking in his unit creates a hazard. The last paragraph of that letter notifies the Tenant that he would be issued a final notice of eviction if he continued to smoke inside his unit. The undisputed evidence was that despite that letter, the Tenant has continued to smoke cigarettes inside his unit and while he is in bed.

Despite the Landlord's and Outreach Worker's efforts, I find it is the Tenant's behaviour that has created the current situation where no one is assisting or monitoring the

Tenant, which I find creates further risk. The Tenant continues to smoke in his unit and in his bed, and when combined with the Tenant's current medicated state, I find this puts all other tenants' health and safety at significant risk and puts the Landlord's property at risk of significant loss due to the potential for fire.

Based on the above, I find the Landlord provided sufficient evidence to uphold the 1 Month Notice, pursuant to sections 47(1)(d)(ii) and 47(1)(d)(iii) of the Act, on the grounds that the Tenant has, and continues to, seriously jeopardized the health or safety or lawful right of another occupant or the landlord and has, and continues to, put the Landlord's property at significant risk. Accordingly, I dismiss the Tenant's request to cancel the 1 Month Notice issued October 28, 2014, and I dismiss his request for an Order of Possession, without leave to reapply.

Section 55 of the Act provides that an Order of Possession **must** be provided to a Landlord if a Tenant's request to dispute a Notice to End Tenancy is dismissed and the Landlord makes an oral request for an Order of Possession during the scheduled hearing.

The Landlord attended this hearing and made an oral request that they be issued an Order of Possession effective as soon as possible. Accordingly I award the Landlord an Order of Possession.

### Conclusion

I HEREBY DISMISS the Tenant's application to cancel the 1 Month Notice and obtain an Order of Possession, without leave to reapply.

The Landlord has been issued an Order of Possession effective **Two (2) Days after service upon the Tenant**. In the event that the Tenant does not comply with this Order it may be filed with the Province of British Columbia Supreme Court and enforced as an Order of that Court.

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: December 11, 2014

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Residential Tenancy Branch

