



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Jonna Holdings Ltd.  
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes           CNC, O  
                                  CNC, O

### Introduction

This hearing was convened by way of conference call concerning applications made by two tenants for orders cancelling notices to end the tenancies given by the landlord for cause, and the applications have been joined to be heard together.

The hearing did not conclude on its first or second scheduled dates, and prior to the third scheduled date the parties were permitted to provide additional evidence to each other and to the Residential Tenancy Branch, and my Interim Decision was provided to the parties.

An agent for the landlord company attended the hearing on all scheduled dates and called 2 witnesses. Both tenants attended the hearing on all scheduled dates and one of the tenants was also accompanied by his spouse. The other tenant called 3 witnesses. The landlord, the tenants, and the witnesses all gave affirmed testimony. The parties were given the opportunity to question each other and the witnesses respecting the evidence and testimony provided, all of which has been reviewed and is considered in this Decision.

Once the additional evidence had been exchanged, 2 witnesses for the landlord were re-called, with the consent of the tenants.

No further issues with respect to service or delivery of documents or evidence were raised.

### Issue(s) to be Decided

Has the landlord established that the notices to end the tenancy given to each tenant were given in accordance with the *Residential Tenancy Act*, and more specifically with respect to the reasons for issuing them?

### Background and Evidence

**The landlord's agent** testified that the tenancy with tenant, DBC commenced on June 1, 2011 and the tenant still resides in the rental unit. Rent is payable on the 1<sup>st</sup> day of each month in the amount of \$794.00, and there are no rental arrears. At the outset of the tenancy the landlord

collected a security deposit from the tenant in the amount of \$400.00 which is still held in trust by the landlord. A copy of the tenancy agreement has been provided.

The tenancy with tenant, MDY commenced in 2008 when the tenant took over the rental unit from her mother when her mother passed away, and the tenant still resides in her respective rental unit. Rent is currently \$748.00 per month payable on the 1<sup>st</sup> day of each month, and there are no rental arrears. The landlord's agent is not certain about a security deposit, but testified that the tenant refused to sign a tenancy agreement.

The rental units are apartment style suites in a seniors' complex with 37 seniors' units.

Another agent of the landlord served both tenants with a 1 Month Notice to End Tenancy for Cause on June 18, 2015 by posting them to the doors of their respective rental units. Copies of the notices have been provided and they are both dated June 18, 2015 and contain an effective date of vacancy of July 31, 2015. Both contain the same reasons for issuing them:

- 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;
- 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;
  - jeopardize a lawful right or interest of another occupant or the landlord.

The landlord's agent testified that both tenants have been given notices on many occasions to not smoke on their patios. Other tenants have moved out as a result and others have provided evidence that it's still happening and fear that a fire might start by not properly putting out the cigarettes. Those neighbours have written letters provided for this hearing. One neighbour resides beside one of the tenants and above the other, and she states in her letter that she can hear the tenants open the patio doors and then smells smoke. A number of neighbours have signed a Petition which states that it is the Petition of the non smokers, and that the building is advertised in the newspaper and BC Senior's guide as a non-smoking building. The Petition is signed by 11 people, one of which is noted with, "I spoke with her Sept 21/14," and indicates that it's time to enforce the rules that it is a non smoking building.

The landlord's agent further testified that the building was advertised as a non-smoking building and has provided a copy of the complex rules as well as many advertisements. The tenant, MDY will not sign acknowledging receipt of the rules and says she has a "grandfather clause."

With respect to the tenant, DBC, the landlord's agent testified that the tenancy agreement does not specify that smoking is not permitted and it was not mentioned in the rules at the time that the tenancy agreement was signed, but it was advertised as a non smoking building and has been prior to either tenant moving in.

The landlord's agent purchased the rental complex in 2000. The previous caretaker told the tenant, DBC that smoking was only permitted outside in the back of the building and the suite itself is non smoking. The landlord's agent told the tenant, MDY several times that if she wanted to smoke she had to do so outside at the back of the building. The landlord's agent disagrees that there is any grandfather clause, and her mother never smoked.

Since the Petition has been received by the landlord, tenants have been asked to smoke elsewhere, then the landlord received a letter from a neighbouring school stating that children are affected, and the landlord's caretaker banned smoking on the entire property, giving letters to each tenant and posting signs around the property.

The landlord has also provided a copy of a letter given to the tenant, MDY outlining the dates that she's been warned.

The landlord's agent also testified that the notice issued to tenant, DBC alleges illegal activity. The tenant has been drinking alcohol in the parking lot and checks other people's cars to ensure they are locked. He does so as a security check, but other tenants are concerned.

With respect to the illegal activity of the tenant, MDY, the landlord's agent testified that the tenant has slandered and threatened the caretaker of the rental complex who has a local business that may be affected.

**The landlord's first witness** testified that she started employment as caretaker on the rental property in September 1, 2014 and lives there. She and another employee look after maintenance, problems with tenants, try to resolve issues, collect rent, issue receipts, post notices and other such duties. The witness served the notices to end the tenancies to both tenants by posting them to the doors of their respective rental units on June 18, 2015.

Shortly after commencing employment, the witness received some verbal complaints from tenants about smoking in the elevator and about concerns regarding serious health issues. The witness knew it was a non smoking complex when she moved in, however not long after commencing employment, it was apparent that the smoking situation had been going on for several years. Once the witness received the Petition, she talked to some people whom she knew to be smokers. Both of the tenants in this dispute denied that they were not permitted to smoke according to their tenancy agreements.

The witness also testified that on December 6, 2014 she had placed notices in the complex stating where the new designated smoking area was, and the tenant, MDY was at her door at 9:00 a.m. on December 10, 2014 telling the witness that she didn't know what she was talking about or what she was doing, and that she was the spokesperson for smokers in the complex. The witness sent her a letter the next day with some literature about the dangers of second-hand smoke. The witness put the notice up a few times, but it was defaced with black felt pen. Then the witness received a notice under her door which appeared to be written by tenants. The witness asked the tenant, DBC if he had done so or was party to it and told the tenant it

upset a lot of people. At the end of the notice it asks for a meeting with the landlord company. The witness asked the tenant several questions about it but he wouldn't talk to the witness.

Smokers were given a designated smoking letter, but the daycare next door then complained. Smokers called the by-law folks to measure to ensure they smoked far enough away, and they were, but there was no consideration to kids next door. The tenant, MDY took to stomping on the floor due to the complaints about her smoking.

The witness also has a tailor shop in the downtown area and has had for 25 years. About 75% of the clients are seniors, and the witness teaches a fitness class designed for seniors with health or previous health problems. When the tenants received the notices to end the tenancies, they opened a police file and made allegations about the witness, but police referred them to the Residential Tenancy Branch twice. Other evidence of the tenants and witnesses about the witness accosting or assaulting others are not true. The tenants are leading people to believe the accusations, and some it seems are afraid of the witness. After reading the tenants' evidentiary material, the witness sought legal advice because it's affecting her business.

When the letter from the daycare arrived, on June 22 or 23 about smokers and smoke affecting the playground, the witness banned smoking that day. She went to talk to both tenants, as well as others, and left them with a copy of the letter from the daycare, and later asked if they had questions. The tenant, MDY told people to keep quiet and not talk to the witness. Animosity has escalated. However, the reason for issuing the notice to end the tenancy to both tenants was to offer protection to all others who live in the complex with health issues or fear of having some due to second-hand smoke. Some are on oxygen and some have COPD, and the landlord and witness are trying to help them.

The witness also testified that the tenant, DBC has been drinking alcohol in the parking lot almost daily and has been seen with beer in a coffee cup out front on City property. The witness has also seen him extremely intoxicated in the parkade. The witness has not seen him open a car door, but has seen him pull on a door handle.

**The landlord's second witness** testified that he has seen tenant, DBC drinking in the parking lot, but has never found him to be abusive. He has heard other tenants complain of DBC and MDY smoking on their patios, which has been going on for some time. The smokers did smoke in the gazebo on the property for about 2 years, and non smokers joined the smokers for happy hour for wine or beer.

**The first tenant, DBC** testified that the landlord wrote a letter on July 9, 2015 stating that the tenant next door was afraid and couldn't open doors due to smoke and that's why she moved out which is incorrect. Another tenant, whom the landlord claims moved out due to smoking actually moved out because the gate the landlord installed was too hard to handle. The tenant states that the landlord's letter dated July 9, 2015 is not true.

The tenant agrees that he has checked to ensure car doors are locked and he asked each tenant individually about it. Only about 5 don't want the tenant to check their cars. The tenant has also provided letters from tenants to confirm that.

The tenant does not smoke on the patio, but in winter smokes in his truck. The smokers are now required to smoke out front at a bus stop, but used to be permitted to smoke at the gazebo. People complained so smokers went back to the dumpster and now they're kicked out of the whole yard.

**The second tenant, MDY** testified that she received the letter of the landlord's caretaker on December 6, 2014. The tenant had contacted the Residential Tenancy Branch to educate herself about the rules, and made an appointment with the landlord's caretaker. They had a nice conversation but the letter she sent says that the tenant was spokesperson for others, but that wasn't the case.

On December 10, 2014 there were rules of conduct and the caretaker wanted the tenant to sign it. Pets are now allowed but smoking is not. New rules also say that guests cannot do laundry, but tenants pay for that; it's not free and now the landlord's notice contains a fine of \$150.00. It's confusing, and the caretaker promised new rules but said these would remain in place until new ones were posted, which was on June 13, 2015. That notice gave a designated smoking area outside and mentioned forfeiture of the security deposit and other stuff that didn't ring true. The smoking area has since been rescinded again, and it's confusing to people.

Tenants decided as a group that they need rules that make sense and are enforceable. They were going to ask the landlord, the caretaker and other tenants about having a meeting to clarify them. A group of about 6 tenants prepared the new rules and delivered them to everyone in the building.

The landlord left the country about the 13<sup>th</sup> or 14<sup>th</sup> of June, 2015 and returned about July 6. While he was gone, the caretaker issued letters threatening eviction and the notices to end the tenancies. The tenants had no one to complain to so they had to go to the police.

Suites were being rented as non-smoking for a few years, and the landlord quit smoking 3 or 4 years ago. He wants it to go non-smoking, but has not told new tenants that other tenants live there who have been allowed to smoke. Those in ill-health have not been told, and the landlord has been dishonest with them and moved them in. People with prior tenancies don't have that restriction but the landlord doesn't tell new tenants that.

The tenant moved into the rental unit in 2003 and does not have a written tenancy agreement. The tenant went to live with her mother who moved into the same rental unit in 1996, but passed away in 2006. To the best of the tenant's knowledge, her mother didn't have a tenancy agreement either. On May 30, 2006 the tenant received a cheque back from the landlord so that she could finish her mother's estate, and the tenant paid a security deposit herself. She was never asked to sign anything.

The tenant's mother didn't smoke, but it was a smoking building when the tenant moved in and her mother had ashtrays out for guests who did smoke. In 2000 the tenant's sister visited at Christmas time and they smoked in another apartment tenanted by their mother's friend.

The tenant is not sure when it turned to a non smoking building, but the tenant smokes on her deck or on the street and has done so for 12 years.

**The tenant's first witness** is also a tenant of the complex and testified that she was walking with the tenant, MDY into the building from the back entrance at 9:25 p.m. on June 17, 2015. The caretaker jumped out and took no time at all to yell, accusing the tenant of writing a letter about a meeting. She was loud and kept yelling, accusing and said there would be evictions.

The witness signed her tenancy agreement in June, 2011 and there was nothing in it about smoking. The tenant, DBC moved in the same day.

**The tenant's second witness** testified that she was present on June 23, 2015 when the caretaker slapped rules on the table, and the witness tried 3 times to ask questions, but was cut off by the caretaker.

The witness also talked to the lady from the daycare who advised that the letter from the daycare was not written by her, but by her assistant, and that she was away on vacation at the time. The lady also said she didn't know why smokers were no longer able to smoke under the gazebo; it didn't bother the kids. She also said she didn't know why there wasn't a smoking area for tenants because there was one for staff.

The witness also testified that 29 tenants met, and the witness was the spokesperson. A copy of the Minutes was given to the landlord's agent. The witness pointed out an area way from the daycare for smokers, and the landlord's agent said he'd have to talk to people who lived above that, and would talk to the daycare person to see if that would be far enough away, but that has never happened.

When the witness moved in 2 ½ years ago the landlord said smoking was not allowed on the balcony or inside the building, and that was consistent with her tenancy agreement. There was a courtyard area, but now it's covered, where tenants could smoke. If non smokers came out, smokers moved to the parking lot. However, as of June 23, 2015 tenants are not permitted to smoke anywhere. Smokers could use the gazebo until 8:00, then tenants got the notice that the smoking area was moved to the garbage bins, then were told to move to the street. In the summer of 2014 the landlord had promised he would establish a smoking area at the back of the property for smokers but that hasn't happened at all.

Apparently the smoking rule changed because 2 people complained and it made 2 others uncomfortable.

**The tenant's third witness** testified that she was present on June 23, 2015 when the caretaker verbally attacked people by the garbage bins. She was very angry.

The witness was also present for a conversation with the daycare person who said she did not write the letter about smoking and that her assistant wrote it. At no time did she complain about smoking.

The witness has been a tenant since August 15, 2012 and has a written tenancy agreement, but there is not a smoking restriction in it.

### Analysis

The *Residential Tenancy Act* states that a tenancy agreement exists even if it's not in writing. The tenancy agreement is a contract that is binding on the landlord and the tenant. In this case, I see no evidence whatsoever that either tenant ever entered into a tenancy agreement stating that they couldn't smoke anywhere on the property. The landlord cannot change the rules during a tenancy unless the tenant agrees.

It is not for me to decide if smoking is permitted on the property. The issue before me is whether or not the landlord had cause to issue the notices to end the tenancies. I do not accept the testimony of the tenant, MDY that her tenancy agreement is "grandfathered." There is no evidence before me that smoking was ever permitted, however there is no evidence before me that smoking was prohibited at the time the tenancy commenced.

I accept the evidence provided by the landlord that the rental units were advertised as non smoking prior to the commencement of the tenancy with tenant, DBC, but there is no evidence to satisfy me that the rules at the commencement of the tenancy indicated that smoking was not permitted anywhere on the property and it's clear in the evidence that the landlord's agents have changed the rules, and considering the testimony of the witnesses, some tenancy agreements contain a no smoking clause and some do not. It is not sufficient to advertise something and fail to include it in a tenancy agreement. I do not accept that the non smoking clause is a material term of the tenancy if it does not exist in the tenancy agreement.

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was issued in accordance with the *Residential Tenancy Act*, which can include the reasons for issuing it. The reasons are in dispute. I have reviewed the notices and I find that both are in the approved form and contain information required by the *Act*.

In the circumstances, I am not satisfied that the landlord has established that either tenant has engaged in any illegal activity. The tenant, DBC has not been accused of stealing or driving while impaired, nor have any behaviours while drinking alcohol jeopardized another tenant or adversely affect any other tenants. The landlord's witness testified that he has seen the tenant intoxicated but never abusive. I also find that the landlord has failed to establish that either tenant has interfered with or jeopardized the health or safety or lawful right of another occupant. The landlord did not enter into tenancy agreements that prohibit smoking anywhere on the property, and I find that the landlord has failed to establish any of the reasons for issuing the notices, and they are both hereby cancelled.

Conclusion

For the reasons set out above, both 1 Month Notices to End Tenancy for Cause issued on June 18, 2015 are hereby cancelled, and both tenancies continue.

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: September 16, 2015

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Residential Tenancy Branch



