



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC, FF

### Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties requested an opportunity to make written submissions. The tenant was given to September 25, 2015 to submit a written submission, the landlord was given to October 2, 2015 to make a written submissions and the tenant was given to October 9, 2015 to respond to the landlord's submissions.

I find that the one month Notice to End Tenancy was sufficiently served on the Tenants by posting on July 31, 2015. Further I find that the Application for Dispute Resolution/Notice of Hearing filed by the Tenants was sufficiently served on the Landlords by mailing, by registered mail on August 7, 2015. With respect to each of the applicant's claims I find as follows:

### Issue(s) to be Decided:

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling the Notice to End Tenancy dated July 31, 2015 and setting the end of tenancy for August 31, 2015?
- b. Whether the tenant is entitled to recover the cost of the filing fee?

Background

The tenancy began in July 2012. The present rent is \$1550 per month payable in advance on the first day of the month. The tenant(s) paid a security deposit of \$750.

Grounds for Termination:

The Notice to End Tenancy relies on section 47(1)(d) of the Residential Tenancy Act.

That section provides as follows:

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(d) the tenant or a person permitted on the residential property by the tenant has  
(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

....

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

Evidence:

The landlord seeks to end the tenancy on the basis of complaints that he has received that there is an excessive amount of marijuana smoke emanating from the tenant's rental unit and that smoke has significantly disturbed other tenants. As well the tenants have caused significant noise disturbances.

The landlord has the burden of proof to establish sufficient cause to end the tenancy on a balance of probabilities. The provided the following evidence:

He testified there is an excessive amount of second hand marijuana smoke coming from the tenants' apartment that has significantly interfered with and unreasonably disturbed other occupants of the rental property.

On May 8, 2015 the landlord received an e-mail from Witness #1 complaining about the tenants causing disturbances as follows:

- Sunday, May 3 – marijuana smoke emanating from their unit was present in the hallway
- Monday, May 4 – marijuana smoke emanating from their unit was present in the hallway.
- Thursday, May 7 marijuana smoking emanating from their unit was present in the hallway.
- Friday, May 8 extremely loud rap music with heavy bass.

On Saturday, May 9, 2015 the landlord received another complaint from witness 1 of overpowering marijuana smoke from the tenant's unit.

The landlord received a letter dated May 18, 2015 expressing her concerns about marijuana coming from the tenants' unit and identifying 5 additional days of excessive marijuana smoke coming from the tenants unit in addition to the days referred to by e-mail.

The landlord received a letter from Witness 1 dated June 1, 2015 making further complaints about noise and marijuana smoke on May 19, May 24, May 25, May 26, May 28, May 31, and June 1.

The landlord received another letter from Witness 1 dated June 16, 2015 complaining about marijuana smoke and noise on June 2, 2015, June 3, 2015, June 4, 2015, June 5, 2015, June 7, 2015, June 11, 2015 and June 16, 2015.

The landlord received a letter from Witness 1 dated August 25, 2015 and complaining about noise and marijuana smoke on July 7, 2015, July 9, 2015, July 10, 2015, July 11, 2015, July 14, 2015, July 19, 2015, July 27, 2015. The letter identifies further problems on many days in August which cannot be considered in this application.

The landlord provided the following warnings:

- A Notice to All Tenants dated January 4, 2015 indicating the landlord had received a number of complaints of marijuana smoke in the hallway and on balconies and stating illegal drug activity is not permitted.
- A Notice dated May 30, 2015 stating the landlord had received a number of complaints which included noise complaints and marijuana smoke.
- He talked to the tenants in person although he was uncertain as to the date.

Witness #1 testified as follows:

- She confirmed that she was the author of the e-mails and letters referred to above.
- She complained that often there is a strong marijuana smoke in the hallways and filtering into her rental unit.
- She has identified the source of the marijuana smoke as coming from the tenants' unit.
- She has observed the tenants or those individuals permitted in the rental unit by the tenants smoking marijuana on the tenants' balcony.
- She has a 6 years old son living with her and she is concerned on the health risk of the excessive marijuana smoke. She is not able to invite friends of her son over to her home because of smoke. Her nanny agreed to take care of her son on the condition the landlord deal with the marijuana smoke.
- She complained about loud and disturbing noise coming from the tenants unit on May 8, 24, and July 19. She acknowledged the tenants turned the music down when she complained to them.

- She denied the smoke that she is complaining about comes from the downstairs restaurant. That smoke is faint and is not the pungent odor she is complaining of. .

The landlord testified that he does not live in the rental property. However, on May 8, May 13, May 19, June 16, and July 19 he attended and witness the pungent marijuana smoke coming from the tenant's unit.

The landlord produced a number of articles taken from the internet taken from the American Heart Association, Canadian Cancer Society etc. that states that second-hand marijuana smoke poses a severe health and safety risk to people. The article from the American Heart Association states breathing of second hand marijuana smoke could damage your heart and blood vessels as much as secondhand cigarette smoke.

#### Tenants' Evidence:

Briefly, the tenants testified as follows:

- He has a medical license to smoke marijuana because of a medical condition. He is able to control the dosage if he smokes marijuana rather than ingest it.
- He was not home during many of the alleged incident. The solicitor for the tenants went through the Witness #1 letter of June 16 and he denied being home during most of the dates of the incident.
- The marijuana smoke and noise comes from another location.
- He lived in the rental unit for 4 years without any complains. He produced a letter from the tenant who previously resided in the rental unit occupied by Witness 1 that states the tenants were not disrespectful and she did not have any problems with them. The letter further states the rental unit is on a loud main avenue in a busy area in the city.
- He testified he does not allow friends to smoke in his rental unit. He does not allow friends to come over to the rental unit when he is not home.

Briefly the tenant JW gave the following evidence:

- He has a medical marijuana license that allows him to smoke marijuana for a health condition.
- He cannot effectively administer the dosage by ingesting the marijuana.
- He has not received any official noise complaint. After receiving the complaint from the neighbor (Witness #1) he dismantled his home theatre stereo system.
- He testified the smoke must be coming from the restaurant on the street and the ventilation system.
- The landlord HH smoked cigarettes in the rental unit.
- He acknowledged on occasion he has smoked marijuana in the rental unit but was not able to put a specific time frame to it. He testified "It happens when it happens."

Analysis:

The parties requested and were given an opportunity to provide written submissions.

The submission from the tenants set out the following arguments:

- The Notice to End Tenancy failed to properly identify the tenants.
- The landlord failed to provide a tenancy agreement. There is no evidence that it was a condition of tenancy that nothing be smoked in the unit.
- The submission disputes the accuracy of the complaints from Witness #1.
- The actions of the tenants do not amount to illegal behaviour as they have a license that permits them to smoke marijuana.
- The tenants rely on the decision *Fulber v Doll* 2001 BCSC 891 where the Supreme Court of British Columbia held at paragraph 82:

“...illegal activities do not automatically constitute a basis for termination under section 36(1)(f) of the Residential Tenancy Act, nor does “some risk” of any magnitude from trivial to extreme. The legislation requires a “serious impairment” of the landlord’s interest. In one of the cases before

the arbitrator (house #160) she applied the test properly and found that the landlord's interest was seriously impaired."

- The tenants submit the problem could be easily resolved by turning on the fans in the building.
- The submission relies on 3 previous arbitration decisions. In one it stated "In my view a person's right to quiet enjoyment is not breached simply because they can detect the smell of marijuana. Rather, I find that the smell of marijuana must be such that a reasonable person could conclude that the smell adversely affected a person's quiet enjoyment." In the second decision the tenants rely on the statement "While I agree that the smoking of marijuana is still considered to be an illegal activity in Canada the burden of proof falls to the landlords to support how the tenant, smoking marijuana, has damaged the landlords property and how this adversely affected the quiet enjoyment, security, safety, or physical well-being of another occupant or the landlords of the residential property." The third decision states "If the issue was so serious that it was jeopardizing the lawful rights of another occupant, I find that it was the landlord's responsibility to properly investigate the complaint on the date of indicant to ensure legitimacy of the complaint. It was also the landlord's responsibility to inspect the complainants unit to verify that the marijuana smoke is significantly interfering with her rights to quiet enjoyment. The mere smell does not justify the loss of quiet enjoyment. Therefor the landlord has failed to prove the tenant has seriously jeopardized lawful right of an occupant of the landlord.

The landlord also provided a lengthy submission. Given my determination below it is not necessary to go through the landlord's submission in detail:

After carefully considering all of the evidence I determined the landlord has established sufficient cause to end the tenancy. I do not accept the submission of the tenant that the Notice should be set aside because it failed to properly identify the tenants. The

tenants were aware the Notice was directed at them and they filed an appropriate application to have Notice set aside in a timely manner. They have not been prejudiced in any way by any flaw in the Notice. To set aside the Notice on such a ground would unreasonably delay these proceedings longer than has already occurred.

Section 47(1)(d)(i)

I am satisfied there is sufficient grounds to end the tenancy under section 47(1)(d)(i) which provides as follows:

Section 47(1)(d)(i) provides as follows:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(d) the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

“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 carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently 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. (page 357)”

The oral evidence of Witness #1 was candid and precise. Her e-mails and letters to the landlord support the finding that she kept a careful record of the dates in which she was disturbed and the types of disturbances. She did not exaggerate her evidence and gave the tenants their due when appropriate. For example, she freely admitted that the tenants turned the music down when she asked that they do so. I prefer the evidence to



Witness #1 to the tenants when in conflict. I found the evidence of the tenants to be less than precise. In particular I find as follows:

- I am satisfied the marijuana smoke emanated from the tenants rental unit on many occasions and this was caused by the tenants or those permitted in the rental unit by the tenants were smoking marijuana in the unit. I accept the testimony of Witness #1 that her investigation indicates that the smell in the hallway filtering into her rental unit came from the tenant's unit. This testimony is corroborated by the landlord on his visits to the rental unit.
- I do not accept the testimony of the tenants when they attempted to minimize the use of marijuana in the rental unit. This testimony is not in harmony with the preponderance of probabilities given the precise testimony of Witness #1.
- I do not accept the submission of the tenants that the marijuana smoke came from the restaurant downstairs or other rental units in the rental property. Further, I do not accept the submission of the tenants the problem can be resolved by the use of the fan. Insufficient evidence was presented to support that allegation.
- The landlord produced 4 letters and a few e-mails from Witness #1. Witness #1 acknowledged she was the author of those letters and e-mails in her oral testimony. The cross examination of Witness #1 was short and did not significantly limit the effect of her testimony. The solicitor for the tenants on her examination in chief of the tenants disputed the allegations of the June 16, 2015. She did not question the tenants on the dates contained in the three other letters.

I am satisfied that marijuana smell was extensive and significantly interfered with and unreasonably disturbed her enjoyment of the rental property to such an extent that it would amount to a breach of the covenant of quiet enjoyment for the following reasons:

- I accept the testimony of Witness #1 that the heavy presence of marijuana smoke has limited the ability of her son to bring home friends and has put her employment of her nanny at risk.

- I accept the testimony of Witness #1 that the presence of marijuana smoke coming from the tenant's balcony has significantly interfered with her ability to enjoy her rental property. Her enjoyment of her rental unit has been unreasonably disturbed.
- I accept the evidence presented by the landlord that second hand marijuana smoke can be a serious health risk. The articles amount to hearsay evidence. However, the Act specifically provides that the rules of evidence do not apply. The tenant's solicitor did not present evidence to dispute this evidence. Such evidence is consistent with knowledge on second hand smoke in general.

I am satisfied there is sufficient grounds to end the tenancy under section 47(1)(d)(i) even though there is no specific term in the tenancy agreement prohibiting smoking.

As I determined the landlord has established sufficient grounds to end the tenancy under section 47(1)(d)(i), I determined it is not necessary to consider whether there is grounds under section 47(1)(e) of the Act. It is worth noting that while the tenants testified they both have a license to smoke medical marijuana neither of them produced a copy of that license to corroborate this testimony.

#### Determination and Orders:

After carefully considering all of the evidence I determined that the landlord has established sufficient cause to end the tenancy. As a result I dismissed the tenants' application to cancel the Notice to End Tenancy. The tenancy shall come to an end. I further order that the application of the tenant for the cost of the filing fee be dismissed.

#### Order for Possession:

The Residential Tenancy Act provides that where a landlord has made an oral request for an Order for Possession at a hearing where a dispute resolution officer has dismissed a tenant's application to set aside a Notice to End Tenancy, the dispute resolution officer must grant an Order for Possession. The landlord made this request

at the hearing. **As a result I granted the landlord an Order for Possession effective October 31, 2015.**

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

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: October 19, 2015

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Residential Tenancy Branch

