



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding CRICHTON HOLDINGS LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC

### Introduction

This hearing dealt with the tenant's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act"), seeking cancellation of the landlord's One Month Notice To End Tenancy for Cause (the "One Month Notice") (the "Tenant's Application").

The landlord and the tenant appeared at the teleconference hearing and gave affirmed testimony. The tenant's partner, witness D.H, gave affirmed testimony after he first identified himself as a support person for the tenant and then, after hearing the testimony of the parties, decided that he wanted to give testimony. During the hearing the landlord and tenant were given a full opportunity to be heard, to present sworn testimony and make submissions. A summary of the testimony is provided below and includes only that which is relevant to the hearing.

### Issue(s) to be Decided

- Should the landlord's One Month Notice be cancelled?

### Background and Evidence

The evidence of the landlord and tenant established that a month to month tenancy started on September 1, 2016 in the tenant's current unit pursuant to a written tenancy agreement that was signed by the tenant on August 31, 2016. The tenant had been residing in a different unit since May 1, 2016 under a previous tenancy agreement with the same landlord.

The landlord and the tenant agree that a One Month Notice dated November 15, 2016 was served on the tenant which required the tenant to vacate the rental unit on December 31, 2016. The landlord testified that the One Month Notice was sent by

registered mail to the tenant's unit on November 15, 2016. The tenant confirmed receipt of the One Month Notice on November 18, 2016.

The reason stated on the One Month Notice is breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

#### Landlord's Testimony:

The landlord testified that pursuant to the tenancy agreement, smoking of any combustible material is not permitted on the residential property, including within the rental unit; and smoking tobacco products is not permitted within three meters of doorways, windows and air intakes as posted on the buildings (the "smoking clause"). The tenancy agreement refers to the smoking clause as a material term of the tenancy. The landlord testified that the smoking clause was explained to the tenant on August 31, 2016 when the tenant signed the new tenancy agreement. The tenant's initials appear next to the smoking clause on the tenancy agreement.

The landlord testified that she sent a breach letter to the tenant on October 13, 2016 as a result of complaints that the tenant or a guest of the tenant had been smoking tobacco and marijuana within the rental unit. The landlord reminded the tenant about the smoking clause and requested that the tenant immediately correct the breach. The landlord testified that the tenant has not done so.

The landlord relied upon photographs taken by a caretaker on November 8, 2016 as evidence of smoking in the unit. The photographs show a small clump of ashes and a small burn mark on the vinyl flooring in the tenant's bathroom. The landlord testified that the photographs combined with the complaints indicate that smoking is taking place in the tenant's unit.

The landlord submitted a copy of the move in inspection report signed by the tenant on August 31, 2016. The landlord pointed out that the inspection report does not mention any burn mark on the floor of the bathroom.

The landlord testified that there were complaints from three separate units. On September 22, 2016 there were complaints from two of these units. The occupants complained that there was smoke entering their suite through open windows most nights around 10:30 p.m. to 11:00 p.m. and mornings around 6:00 a.m. since September 1, 2016.

The landlord also testified that a third occupant made complaints on October 3<sup>rd</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 22<sup>nd</sup> and 24<sup>th</sup>, 2016. According to the landlord, this occupant resides above the tenant's unit and on each of these dates the occupant complained about the smell of marijuana coming from the tenant's unit below. This occupant complained about having to close their windows and not being able to comfortably sit on their balcony.

The landlord testified that the caretaker of the building smelled a strong odor of smoke directly outside of the building entrance door and that he had two other occupants confirm that the smoke was coming from the open windows of the tenant's unit.

The landlord testified that on November 26, 2016, the tenant and her guest were seen by the caretaker smoking outside at the entrance door to the apartment building filling the building hallway with smoke. The landlord testified that the caretaker told the tenant that she isn't supposed to be smoking there and the tenant replied "I know".

#### Tenant's Testimony:

The tenant denied smoking in her unit or permitting anyone else to smoke in her unit. The tenant testified that she has medical issues that require a CPAP machine to help the tenant breath at night. The tenant testified that she can't smoke in her unit as the machine will pick up odors and trap them in the filter causing her to breath in smoke all night. The tenant testified that she smokes in her van or at the end of the building in accordance with the posted smoking restrictions.

The tenant testified that she also does not smoke marijuana at all and that she does not tolerate it. The tenant testified that she just had testing done to establish that she does not have marijuana in her system, however, the tenant did not submit the test results as evidence. The tenant testified that she just received the results of the testing that morning which did not provide her with sufficient time to submit the documents as evidence at the hearing.

The tenant testified that she had been burning incense in her unit and that she was not sure if the incense was being mistaken for marijuana. However, the tenant also testified that she had stopped burning incense after receiving the letter dated October 13, 2016.

The tenant testified that the burn mark shown in the photos had to be there when she moved in. She testified that she has a bathroom rug that covers the area of the vinyl flooring where the burn mark is located and that she did not notice the mark at all.

The tenant testified that she has to use a wheelchair and that sometimes ashes get caught in her coat when she smokes. The tenant testified that she typically uses the bathroom immediately after smoking outside. The tenant testified that the ashes must have fallen off her coat in the bathroom where she takes it off. The tenant testified that she sees this happen often.

The tenant testified that the occupant next door to her unit is allowed to smoke inside her apartment.

The tenant agreed that she might not have been smoking far enough from the building entrance on November 26, 2016 when the caretaker spotted her.

#### Witness Testimony:

Witness D.H. testified that he moved into the unit on September 1, 2016 and that he is a smoker too. The witness denied the allegations of smoking in the unit and causing the burn mark on the bathroom floor. The witness did not have any explanation as to how the burn mark on the bathroom floor was made.

#### Landlord's Further Testimony:

The landlord confirmed that the tenant's neighbor is allowed to smoke in her apartment. The landlord explained that the building is in the process of becoming a non-smoking building. The landlord explained that new tenants are subject to the smoking clause while other tenants are permitted to smoke in their units because their original tenancy agreement allows for it.

#### Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows.

Section 47(1)(h) of the *Act* entitles a landlord to end a tenancy if the tenant:

- (i) has failed to comply with a material term, and
- (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

I find that the tenancy agreement is quite clear that smoking in the rental unit is not permitted and neither is smoking within three meters of the entrance doorways as

posted. The tenancy agreement explicitly states that the smoking clause is a material term of the tenancy. Given the landlord's agenda to transform the building into a non-smoking building, I accept that the smoking restriction is a material term of the tenancy.

I find that the tenant or a guest of the tenant has failed to comply with a material term of the tenancy agreement by breaching the smoking clause. In making this finding I have taken into consideration the physical evidence shown in the photographs submitted by the landlord along with the copy of the move in condition inspection report signed by the tenant on August 31, 2016. The move in condition inspection report does not support the tenant's claim that the burn mark on the bathroom linoleum floor, shown in the photographs, was there when she moved in. Accordingly, I accept the landlord's testimony that the tenant or a guest of the tenant caused the burn mark. Therefore, I find that the tenant or a guest of the tenant had smoked in the rental unit.

I find that the landlord gave written notice on October 13, 2016 requesting that the tenant correct the situation. I also find, however, that the tenant did not make the necessary corrections within a reasonable time after receiving the written notice.

In making my finding, I have taken into consideration that the occupant above the tenant continued to complain about the smoke from below on two further occasions after the date the tenant received the written notice.

I also have taken into consideration the fact that the ashes in the photograph appear intact suggesting that they were deposited close in time to their being photographed on November 8, 2016. This suggests that the ashes would not have likely been there before the notice was received.

I find the tenant's innocent explanation as to how the ashes were deposited highly doubtful in light of all the evidence before me, including complaints and photographs, that indicate there is smoking in the unit.

I also have taken into consideration the fact that the caretaker spotted the tenant on November 26, 2016 smoking within three meters of the entrance doorway where the tenant knew she wasn't supposed to smoke. The tenant didn't dispute the landlord's account of what the caretaker reported. I find that the tenant was in breach of the smoking clause on this occasion too.

As witness D.H. only identified himself as a witness after first having heard the testimony of the landlord and tenant, I did not give his testimony the same weight that it would otherwise have if the witness had been excluded before giving his evidence.

Based on the foregoing, I am satisfied that there is sufficient evidence to support a finding that the tenant did not comply with a material term of the tenancy and that she did not correct the situation within a reasonable time of receiving written notice. Therefore, I dismiss the tenant's application and uphold the One Month Notice ending the tenancy.

When a tenant's application to dispute a landlord's notice to end a tenancy is dismissed, s.55 of the *Act* requires me to grant an order of possession if the landlord's notice to end a tenancy complies with s.52 of the *Act*.

I find that the landlord's One Month Notice was served in accordance with section 88 of the *Act* and that the Notice is valid in accordance with s.52 of the *Act*. As a result, I find the landlord is entitled to an order of possession.

### Conclusion

The tenant's application is dismissed and the One Month Notice is upheld ending the tenancy.

Pursuant to s.55 of the *Act*, I grant an Order of Possession to the landlord **effective two days after service of this Order** on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

This decision is final and binding on the parties, unless otherwise provided under the *Act*, and 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: January 31, 2017

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Residential Tenancy Branch