



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes                      CNC, FF

### Introduction

This hearing was convened to deal with an application by the tenant pursuant to the *Residential Tenancy Act* (the “Act”) for an order cancelling a 1 Month Notice to End Tenancy for Cause dated April 26, 2017 (the “1 Month Notice”) and for recovery of the application filing fee.

Both the tenant and the landlord attended and had full opportunity to be heard, to present affirmed testimony, to make submissions, to present documentary evidence, and to respond to the submissions of the other party.

Service of the tenant's application and notice of hearing was not at issue.

### Issue(s) to be Decided

Is the tenant entitled to an order cancelling the 1 Month Notice?

Is the tenant entitled to recover the application filing fee?

### Background and Evidence

It was agreed that this tenancy began on March 1, 2014 and is a month to month tenancy. Rent is currently \$1,067.00 monthly and due on the first of each month. The tenant has rented from the landlord for approximately seven years.

The written tenancy agreement was in evidence. In it, the tenant agrees to what is characterized as a “material term” of the contract as follows: “No smoking of any combustible material is permitted on the residential property, including the rental unit.”

The 1 Month Notice alleges that the tenant has “significantly interfered with or unreasonably disturbed another occupant or the landlord.” It also alleges that the tenant has breached a material term of the tenancy agreement and failed to correct that breach after written notice and a reasonable amount of time. In the “details” section of the 1 Month Notice, the landlord has

written: "After the issuance of a Caution Notice to Tenant on April 20, 2017, I have since received another complaint of the smell of pot smoke on Sunday April 23 from the downstairs tenant." [Reproduced as written]

The landlord testified that the tenant occupies an upstairs suite and that his suite and another downstairs share a ventilation system. She said that she received a complaint from the then downstairs tenant in February of 2016. That letter was in evidence, and included this: "As I have mentioned to you before, throughout my tenancy, my apartment has been flooded with the smell of marijuana smoke from the tenant with which I share a ventilation/heating system" (reproduced as written).

The landlord further testified that a contractor working in the downstairs unit commented that he smelled marijuana "through the air vent which both suites share" early in 2016. The contractor summarized this at the landlord's request in an email dated May 30, 2017, which was in evidence.

Based on the above, the landlord sent the tenant a caution note dated February 9, 2016. That note was also in evidence.

The landlord testified that the suite below was vacant between January and March of 2017, but that she was advised by another contractor working in the downstairs unit in March that on several days in March he smelled "marijuana smoke late in the afternoon wafting from the suite above . . . [that] started after the upstairs tenant got home from work" (as per contractor's letter, dated May 1, 2017).

The landlord submitted a letter dated April 18, 2017 from the new downstairs tenant, AO:

As requested after our phone conversation regarding the smell of pot smoke, I am writing this letter as my official written complaint. I chose to respond to your ad . . . [because] it was smoke-free. Sadly, the smoke-free part has not proven to be the case. This has become a great frustration to me. Not only am I NOT living in a smoke-free building, but I am also having to put up with the smell of pot smoke in my house.

The landlord issued another caution letter on April 20, 2017. That was also in evidence.

The landlord testified that she received another letter from AO dated April 24, 2017, again complaining of the "pot smoking from upstairs."

On May 19, 2017 the downstairs tenant gave notice, citing the upstairs tenant as her reason for leaving. The landlord submitted two other letters from the downstairs tenant. They are undated and both are lengthy. They reiterate concerns about the smell of smoke in her unit and state that this occurs when windows are closed. One of them also contains this:

It really doesn't bother me if someone wants to smoke pot, I just don't want my place to smell like it. I know some houses across the street smoke pot but there is no way that smell can make my suite smell if all my windows are closed. Also, I have worked in construction for many years; I know that a lot of people who work construction smoke pot and can easily bypass a drug and alcohol test that is standard procedure to initially go to work and in random testing.

The other letter recounts noise complaints about the upstairs tenant, an interaction between the upstairs tenant and the landlord, and another interaction between the upstairs tenant and the writer.

Also in evidence from the landlord were various caution notices, all warning the tenant that he was in breach of a material term for which he would be evicted upon failure to correct or further incident for (a) removal of garbage bag from the back porch (dated November 7, 2016); (b) leaving the thermostat shared with the downstairs tenant on too high (dated November 7, 2016); (c) excessive noise caused by children playing (November 27, 2016); (d) keeping unlicensed vehicle in the parking area (April 20, 2017); (e) refusing entry to a repair person and being "verbally abusive" towards a repair person (two caution notices issued April 21, 2017); (f) aggressive behavior towards repair persons (May 19, 2017); and (g) bag of garbage on back porch and burnt Eggo and slices of cucumber beside the garbage bag (May 25, 2017).

Also in evidence is a copy of an arbitrator's reasons dated May 9, 2016, dismissing a 1 Month Notice dated March 21, 2016 from the same landlord to the same tenant. The March 21, 2016 alleges the same things as the 1 Month Notice under consideration in this dispute. However, there is no mention in the May 9, 2016 reasons of the smell of any sort of smoke originating from the tenant.

The tenant adamantly denied smoking in the unit or at all. He admitted, in response to a question from the landlord, that he used to smoke cigarettes, but said that he quit smoking over two years ago. He said that he is now a "100% non-smoker" and has a non-smoking family and that guests do not smoke in the rental unit.

He further testified that he is a CNC machinist, and undergoes routine drug testing because of safety considerations around his job. He stated that because he undergoes this testing he is aware that marijuana can be detected for up to 30 days, and he has seen coworkers fired "time and again" for failing drug testing.

He further stated that he has been a tenant of this particular landlord for seven years (not always in the same rental unit), and that over that time he has "neighboured" approximately 20 different units, and that the landlord has received only two complaints in total, and the other was not about smoking. The landlord did not dispute this. However, she suggested that the tenant had changed since his separation.

The tenant also submitted that he and his wife had made complaints about other neighbouring tenants smoking, and that it is unlikely they would have done so if they were also smokers.

The tenant provided photographs of homes neighbouring his rental unit and outlined the areas where smokers of cigarettes and marijuana in those homes regularly sit to smoke. He suggested that the downstairs tenant may be smelling smoke from these neighbours, and stated that their smoke enters his own unit, which, like the basement unit, has a window fronting the street. The tenant makes these same comments in text correspondence with the landlord that is in evidence. The tenant also points to the fact that one of AO's undated letters mentions that neighbours smoke.

The landlord in response stated that the properties were too far away to cause smoke to enter the units in question and that the two other tenants on the opposite side of this duplex rental property have never complained about smoke.

The tenant also provided a copy of a text to the landlord dated May 13, 2017, as follows: "Just sending this in order to document the fact that you refused to come outside of the basement suite while you were working [at the rental property] to smell the overbearing and permeating smell of marijuana everywhere. Your excuse was 'you can't because you are busy grouting.' "

The tenant also noted that during the times that the contractors were attending the residential property between June of 2016 and June of 2017, there were 28 scheduled entries into his unit, and that if his unit smelled of smoke, then surely they would have said as much.

The tenant expressed concern that the landlord may be coaching AO, as one of AO's letter states that contractors are able to avoid drug testing by certain means (as quoted above), but the tenant has never told AO that he is required to undergo routine drug testing for work, and the landlord is only aware of this fact because the tenant mentioned it in a prior dispute resolution hearing.

The tenant stated that he was concerned that the landlord wants to evict him so that she can raise the rent, and that she has commented in the past that she could be getting considerably more for the unit.

### Analysis

Section 47(1)(h) of the Act allows the landlord to end a tenancy where the tenant has breached a material term of the tenancy agreement and has failed to correct that breach after written notice and a reasonable amount of time.

I accept that non-smoking is a material term of the tenancy agreement. I also accept that the landlord gave the tenant written notice of a material breach on April 20, 2017. However, the

landlord has not provided sufficient evidence that the tenant has breached this term of the agreement. Although the downstairs tenants and attending contractors have attributed the smell of marihuana smoke to the upstairs unit, the tenant adamantly denies smoking. He has offered a plausible explanation for AO's complaints about smoke. He has also noted that the contractors giving evidence have not reported the smell within his own unit. He has also recorded the landlord's unwillingness to investigate the smell of marihuana smoke in the general area. I also find it significant that over a period of seven years there have not been numerous complaints about this tenant's smoking marijuana.

Additionally, and as set out above, the landlord served the tenant with a 1 Month Notice to End Tenancy for Cause in March of 2016. Material breach and unreasonable disturbance were also alleged there. The landlord's reports of smoke from early 2016 would or should have been addressed in that prior 1 Month Notice and the prior decision on it. There is no mention of smoking in the May 2016 decision. Accordingly, I give the landlord's evidence about smoking in early 2016 very little weight and conclude that those complaints have been or should have been considered already.

Even if I accepted that the tenant has been smoking marihuana in the rental unit, the landlord gave him written notice of the breach on April 20, 2017, and the only date-specific evidence she has of the smell of smoke after that date is AO's letter of April 24, 2017, which references the smell on April 23. I would not necessarily find that three days is a reasonable amount of time to give the tenant to correct the breach.

I do not accept that any of the other caution notices given to the landlord by the tenant concern material terms of the tenancy agreement. Residential Tenancy Policy Guideline #8 describes "material terms" as terms so important that a breach will automatically justify terminating the tenancy. I do not accept that things such as leaving a garbage bag on the back porch or an unlicensed car in parking for a short period of time is a material term.

Section 47(1)(d)(i) of the Act allows a landlord to end a tenancy for cause where the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The landlord did not focus on this in her submissions, although she did reference the downstairs tenant's noise complaints. There was insufficient evidence of disruption of the downstairs tenant before the issuance of the 1 Month Notice however. There are two undated letters from AO. It is not clear AO is describing concerns arising before the dated of the 1 Month Notice under consideration here. Nor do the things set out in those letters rise to the level of unreasonable interference.

## Conclusion

The tenant's application to cancel the 1 Month Notice is allowed. The 1 Month Notice is cancelled and is of no force or effect. This tenancy continues until it is ended in accordance with the Act.

As the tenant has been successful in this application, he is entitled to recovery the \$100.00 application filing fee. I authorize the tenant to withhold \$100.00 from his monthly rent on a one time basis in satisfaction of this amount.

It is clear from the correspondence in evidence and the testimony during the hearing that the landlord and the tenant are conflicting. The tenant is upset with what he regards as unjustified intrusions into his right to quiet enjoyment. The landlord is upset with the tenant's apparent disregard for her requests.

Both parties are advised to attempt to cooperate and communicate more respectfully. The tenant is cautioned that disrespectful communication with the landlord can become serious enough to warrant ending a tenancy. The landlord is reminded of the tenant's right to quiet enjoyment, including the right to reasonable privacy and freedom from unreasonable disturbance, as set out in s. 28 of the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: June 16, 2017

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Residential Tenancy Branch