



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding WENTWORTH PROPERTIES LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC

### Introduction

This is an Application for Dispute Resolution (“Application”) by the Tenant to cancel a One Month Notice to End Tenancy for Cause dated April 20, 2018 with an effective date of May 31<sup>st</sup>.

The Landlord had two representatives present and the Tenant (along with his advocate) appeared for the scheduled hearing. I find that the notice of hearing was properly served and that evidence was submitted by all parties. The Tenant did raise a concern that he had not received the evidence package from the Landlord, which was submitted to the branch approximately a week prior to the hearing date; the Landlord admitted that he had failed to deliver the package of evidence to the Tenant. Accordingly, I am not prepared to consider the documentary evidence filed on May 10, 2018 as it would be prejudicial to the Tenant, although the affirmed testimony of the Landlord’s agent and building manager was considered.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present affirmed evidence, make submissions, and to cross-examine the other party on the relevant evidence provided in this hearing.

### Issue(s) to be Decided

Is the Tenant entitled to a cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the *Residential Tenancy Act* (“Act”)?

If not, is the Landlord entitled to an Order for Possession?

### Background and Evidence

The tenancy began on July 15, 2010 and the Tenant submitted a copy of his tenancy agreement, which contains no clause restricting smoking on the premises. He states

that he has always smoked and had no complaints until this year. In 2016, new owners took over management of the building and began renovating certain suites for rental purposes, and declared the building to be non-smoking as of January of 2018 (with the exception of those tenants grandfathered under old tenancy agreements).

The January 2018 notice to all tenants simply states that *"the smell of any smoke emitting from any unit into the common area (inside or exterior) will constitute a odor nuisance which interferes with the tenants right to quiet enjoyment...Failure to comply with our smoking rules will result in a dispute resolution application, requesting termination of your Tenancy Agreement through the Residential Tenancy Arbitration Process."*

Warning letters were sent to the Tenant on February 20 and March 8, 2018 stating that *"smoking in the building will not be tolerated"* and that *"the landlord can and will take necessary steps to stop you from smoking, including and not limited to terminating your tenancy"*.

The Tenant provided photographs showing that he uses plug-in air fresheners, a fan and a diffuser to reduce the scent of smoke in his unit. He states that he has a chair and table set up on his private deck where he smokes and that he has his window open all the time. He is away at work most of the day. He understands that his smoking is not welcomed and is looking for a new place to reside, but would like the tenancy to continue as he is under doctor's care and cannot move at present. He argues that he is doing what is necessary to minimize any smoke odour that might offend others.

The building manager states that the Tenant has not been viewed smoking on the deck, that his window is only open about 10% and that there are heavy blackout drapes across the deck doors which prevents smoke from leaving the apartment. The building manager states that this section of the building on the second floor contains several smokers, and the ventilation is poor; and smoke odour emanate from units #209, 210 and 212. The walls were recently painted and the carpeting changed out in the hallway, but not in the Tenant's unit which he states is in poor condition. The people in unit 211 moved out earlier this year, complaining of health issues due to the smokers in that part of the building; the building manager states renter prospects noted the heavy smoke smell when shown the unit, and the new renters in #211 place a towel under their hallway door to prevent smoke odour from entering from the interior hallway.

The Landlord served a Notice to End Tenancy on April 20<sup>th</sup> which was left in the Tenant's mailbox. Service is deemed accepted on April 23<sup>rd</sup>. The Tenant applied to

dispute the notice with the Residential Tenancy Branch that same day. The reason noted on the One Month Notice was that the tenant had “significantly interfered with or unreasonably disturbed another occupant or the landlord”.

### Analysis

The Tenant asks that the notice be cancelled and that the tenancy continue until he is able to find a new place to live and gives notice to move out.

The Landlord feels obligated to address the concerns of the building manager and residents who understand this to be a “non-smoking” building, and although the complaints dropped for a time, they resumed in April necessitating the removal of the Tenant by way of a One Month’s Notice; that notice permits a Landlord to end a tenancy under section 47 of the Act, which reads in part:

### ***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...*

The burden of proof falls to the Landlord to prove the validity of the Notice.

It is clear from the evidence that the Tenant moved into this building and signed a tenancy agreement with the understanding that he would be permitted to smoke. In fact, in the six years he resided in the unit prior to the change in ownership, he had no complaints about his smoking whatsoever. It is only when the building changed hands and decided to convert it to a “non-smoking building” that the complaints emerged in 2018. I find that the Tenant is not in breach of his tenancy agreement and that his right to smoke is to be grandfathered. The desire of the new owner to convert the building to a non-smoking building must be balanced with the rights of the renters who have been there for years as known smokers.

However, the Tenant’s rights do not permit him to unreasonably disturb or interfere with others. It seems apparent that the building has poor ventilation in this particular area and that there are several smokers in the units of that corner section of the second floor.

Until such time as these renters decide to end their tenancy, they have the right to smoke - so long as they do not "significantly interfere" or "unreasonably disturb" others.

The new renters in unit 211 who use the towel under the door were unwilling to come forward to be a witness against this Tenant. There were no independent occupants who testified that it was this Tenant's activities that created an unreasonable disturbance to them; the building manager complained of the odour when she vacuums that area, but this Tenant is away most of the day at work so it is unlikely that he is smoking when she is cleaning – although other residents may be smoking during that time who reside in that hallway. On a balance of probabilities, I am not satisfied that the Landlord has proven that this Tenant has unreasonably disturbed others or interfered with their use and enjoyment of the property, as a result of his smoking in the rental unit.

The Tenant is reminded that he has an ongoing responsibility to ensure that his smoking is not bothering others. Since this is an older building with poor ventilation, this requires extra care to ensure that the smoke is not remaining in the rental unit where it may permeate into the hallway. The use of fans to extract the smoke, air fresheners and something to block the base of the main door may minimize some of the odour. Smoking outdoors away from common areas is likely the best solution.

#### Conclusion

The One Month Notice to End Tenancy dated April 20, 2018 is hereby cancelled and of no force or effect. The tenancy shall continue until such time as it is terminated with proper notice by either party.

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: May 22, 2018

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Residential Tenancy Branch