



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding ROWAN PROPERTY MGMT LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OLC

### Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking an order that the landlord comply with the *Act*, regulation or tenancy agreement.

The tenant and an agent for the landlord attended the hearing. The tenant and 2 witnesses of the landlord each gave affirmed testimony. The landlord's agent was given the opportunity to question the tenant and the witnesses, and the tenant was given the opportunity to question the landlord's witnesses. The parties were also given the opportunity to give submissions.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

### Issue(s) to be Decided

Has the tenant established that the landlord should be ordered to comply with the tenancy agreement with respect to smoking tobacco products on the balcony of the rental unit?

### Background and Evidence

**The tenant** testified that this month-to-month tenancy began on October 1, 2014 and the tenant still resides in the rental unit. Rent in the amount of \$600.00 per month was originally payable under the tenancy agreement on the 1<sup>st</sup> day of each month, which has been increased and is currently \$655.00 per month, and there are there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the

tenant in the amount of \$300.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is an apartment in a complex containing 4 stories and about 12 units per storey. The tenant resides on the ground floor.

The tenant further testified that the tenancy agreement specifies that smoking is permitted only on the balcony, where the tenant has been smoking since the beginning of the tenancy, and that was one of the reasons the tenant rented the apartment. A copy has been provided as evidence for this hearing which states: "Smoking of tobacco products only is limited to the area described as: balcony of #102." However 2 neighbouring tenants made complaints to the landlord about the tenant's cigarette smoke going into their units. One of those tenants lives on the 4<sup>th</sup> floor directly above the tenant, and the other lives on the 2<sup>nd</sup> floor kitty-corner to the tenant's unit. The tenant on the 4<sup>th</sup> floor was a friend of the tenant and moved into the complex prior to this tenancy. They visited back and forth and that neighbouring tenant even permitted the tenant to smoke on her balcony. The other neighbouring tenant moved to the 2<sup>nd</sup> floor around the late fall of 2016.

From the time the tenant moved in, at one time there were at least 10 tenants who smoked on balconies, however some have moved out.

The landlord's evidentiary material states that the landlord continued to receive complaints after several verbal requests to the tenant to not smoke on the balcony, however, the tenant testified that isn't true. One of the landlord's agents spoke to the tenant at the beginning of July, 2017 saying that a complaint was received but the agent did not know by whom, and told the tenant she was not permitted to smoke on her balcony anymore. The tenant complied, but retrieved a copy of the tenancy agreement which permits smoking on the balcony, and received a reply to that inquiry from the Residential Tenancy Branch. A copy has been provided as evidence for this hearing, which states that a landlord can only amend the agreement with the tenant's consent and initials on the form, and that if the tenancy agreement doesn't say no smoking, the tenant can continue to smoke on the balcony until the tenant moves out or the parties come to an agreement. Once that email response was received, the tenant began smoking on the balcony again.

**The landlord's first witness** (KS) testified that on July 13, 2017 the landlord received a complaint from a tenant on the 2<sup>nd</sup> floor about not being able to open windows due to cigarette smoke. The witness believes another agent of the landlord gave a verbal warning to the tenant to stop smoking on the balcony, and in following-up with the

neighbouring tenant on the 2<sup>nd</sup> floor, the landlord learned that it was better and smoke was down to a minimal. Another complaint was received in January, 2018 and a written letter was provided to the tenant, a copy of which has been provided as evidence for this hearing. Only tenants who were complained of received a letter.

Another complaint was made by a neighbouring tenant on the 4<sup>th</sup> floor in February, 2018, who actually made 3 complaints, and then another from the tenant on the 2<sup>nd</sup> floor in April, 2018.

The landlord issued a One Month Notice to End Tenancy for Cause on April 24, 2018, and the same day, the landlord received another complaint about the tenant smoking on the balcony.

**The landlord's second witness** (MW) is the general manager of the rental complex and testified that she gave the tenant the One Month Notice to End Tenancy for Cause, and the tenant asked the witness to rescind it if the tenant stopped smoking on the balcony, and the witness rescinded it.

The landlord has also provided an excerpt from an unknown source about the *Tobacco Act* and the *Residential Tenancy Act*, which states that a tenant does not have unfettered right to smoke if it bothers other tenants. The landlord's agent submitted that new tenancy agreements do not permit smoking except in designated areas since about 2 years ago. However, in 2008 tenants who were "grandfathered in" were verbally told not to smoke on balconies but only if complaints were received.

One of the landlord's witnesses submitted that one of the tenants who complained has COPD, a pulmonary disease, and the landlord's evidentiary material contains a statement that the neighbouring tenant has Chronic Obstructive Pulmonary Disease and is seriously affected by second-hand smoke.

### Analysis

The parties agree that the tenancy agreement specifies: "Smoking of tobacco products only is limited to the area described as: balcony of #102." Both parties must comply with the terms of any tenancy agreement, and the parties also agree that there is no other written agreement changing that term.

I have reviewed all of the evidentiary material, and I agree with the landlord's agent that the landlord has an obligation to provide each tenant with their right to quiet enjoyment of their rental units. However, the tenant testified that smoking on the balcony was one

of the main reasons for entering into the tenancy agreement, and the parties also agree that the tenant has been doing so for the last 4 years. The letters of complaint from other tenants provided for this hearing by the landlord indicate that the neighbouring tenants are bothered by cigarette smoke, and one has even permitted the tenant to smoke on her balcony. I also note that smoking on balconies was permitted at the beginning of the tenancy of at least one of the complainants. One of the landlord's witnesses submitted that one of the complaining neighbouring tenants has COPD, a pulmonary disease. The landlord submitted that some tenants have been grandfathered with respect to smoking, and I find that the landlord ought to have notified new tenants of that when entering into new tenancy agreements, rather than attempting to amend an existing tenancy agreement with another tenant in the absence of that tenant's consent.

I also note that the written letter sent to the tenant by the landlord asks that the tenant ensure that she refrains from smoking at least 3 meters away from any doors, windows or vents while on the property. The only 2 complainants who reside on the 4<sup>th</sup> floor and the 2<sup>nd</sup> floor in a kitty-corner unit surely have more than 3 meters from their doors and windows from the tenant's balcony.

In the circumstances, I am satisfied that smoking on the balcony, which has been done by the tenant since 2014, is a material term of the tenancy agreement, meaning that it is likely that the tenant would not have agreed to rent the apartment had that term not been a part of the agreement. A landlord may not remove a material term without the tenant's consent. Therefore, I order the landlord to comply with the tenancy agreement and permit the tenant to smoke tobacco products on the balcony of the tenant's rental unit.

Since the tenant has been successful with the application, the tenant is also entitled to recovery of the \$100.00 filing fee, and I order that the tenant be permitted to reduce rent for a future month by that amount or may otherwise recover it.

### Conclusion

For the reasons set out above, I hereby order the landlord to comply with the tenancy agreement by permitting the tenant to smoke tobacco products on the balcony of the rental unit.

I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00 as recovery of

the filing fee, and I order that the tenant be permitted to reduce rent for a future month by that amount or may otherwise recover it.

This order is final and binding and may be enforced.

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: June 26, 2018

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Residential Tenancy Branch