



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, FFT

### Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution, filed on October 31, 2020, wherein the Tenants requested an Order canceling a 1 Month Notice to End Tenancy for Cause issued on October 31, 2020 (the "Notice") and to recover the filing fee.

The hearing of the Tenants' Application was conducted by teleconference at 9:30 a.m. on January 21, 2021. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

At the outset of the hearing the Landlord confirmed that he did not receive all the Tenants' evidence which was filed online on November 5, 2020. The Tenant, C.P., confirmed that he provided a copy of the Notice as well as the residential tenancy agreement but did not provide his handwritten notes to the Landlord.

Hearings before the Residential Tenancy Branch are conducted in accordance with the *Residential Tenancy Branch Rules of Procedure* and the Principles of Natural Justice. *Rule 3.1* sets out the Applicant's responsibilities. As this is a Tenants' Application, they were obligated to comply with *Rule 3.1*.

### **3.1 Documents that must be served**

The applicant must, within 3 days of the hearing package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the application for dispute resolution;

- b) the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;
- c) the dispute resolution proceeding information package provided by the Residential Tenancy Branch;
- d) a detailed calculation of any monetary claim being made;
- e) a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and
- f) any other evidence, including evidence submitted to the Residential Tenancy Branch with the application for dispute resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an application for dispute resolution*].

The *Rules* relating to the exchange of documents prior to the hearing is a codification of one of the principles of natural justice which provides that that a party to a dispute has the right to receive and meaningfully respond to any and all evidence submitted by the other party. In this case the Tenants failed to provide their handwritten notes to the Landlord. I therefore decline to consider the Tenants' handwritten documents.

The parties agreed that all other evidence that each party provided had been exchanged. No other issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

#### Issues to be Decided

1. Should the Notice be cancelled?
2. Should the Tenants recover the filing fee?

#### Background and Evidence

*Residential Tenancy Branch Rules of Procedure—Rule 6.6* provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the

reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlord presented their evidence first.

The Landlord testified as follows. He confirmed that the tenancy began July 1, 2018. Monthly rent was originally \$1,300.00 and the Tenants paid a \$650.00 security deposit. Rent is currently \$1,325.00. A copy of the residential tenancy agreement was provided in evidence and which confirmed these details.

The Landlord issued the Notice on October 31, 2020. The Landlord confirmed that the address for the rental unit was his personal address and that he incorrectly noted the address on the Notice. The second page of the Notice also indicated that the Notice was served on November 30, 2020. The Landlord confirmed that this was another error as he in fact served the Tenants on October 31, 2020.

The reasons cited on the Notice are as follows:

- the Tenant or a person permitted on the residential property by the Tenant has
  - significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
  - seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
  - put the landlord's property at significant risk;

The Landlord provided the following additional details:

1. Complaint: Their chain smoking causing health issues to upstairs tenant. Smoking is a breach of an agreement (at the time of renting the basement suite, [C.] signed an application that they are non-smokers).
2. Arguments with upstairs tenants, reached to police involvement. After the police incident [C.], sent a text message that he will vacate the suite asap (as per [C.], his and his family's life in danger).
3. Complaint: Not sharing their portion of duties to clean up the Yard, Laundry Room, Garbage/Recycle disposal etc.
4. Complaint: Rude behaviour with neighbours.
5. Complaint: Keep feeding squirrels to tease neighbours.

[Reproduced as written]

During the hearing the Landlord was provided an opportunity to provide testimony in support of the Notice and his request to end this tenancy. The Landlord stated that the Tenants are arguing with the upstairs and further stated that after this incident the

Tenants stated that they were moving out. He submitted that the Tenants gave notice to end their tenancy. In support he referred to a text message sent by the Tenant C.P., wherein he wrote:

We will have to move out soon because y family is no longer safe here...I have the police file number for you.

[Reproduced as written]

When asked to provide details as to the alleged arguments and police involvement the Landlord responded that he believes the dispute between the upstairs and downstairs tenants was not his issue. He reiterated that he believed the Tenants were going to move out based on their text message.

The Landlord also stated that the “main issue” was the smoking. He noted that when they applied to rent the unit, they informed the Landlord that they were non-smokers. The Landlord provided in evidence a copy of the Rental Application wherein the Tenant wrote that they were non-smokers. He confirmed that he did not provide a smoking clause in the written residential tenancy agreement because the Tenants informed him that they were non-smokers. The Landlord stated that the Tenants lied on their application as they in fact chain smoke.

The Landlord stated that all the conflict is due to the smoking. The Landlord claimed that in the winter the upstairs tenants did not notice the Tenants smoking because their windows are closed. When the spring came and the Tenants were outside smoking, the upstairs tenants informed the Landlord that the downstairs tenants were smoking. He initially did not believe them and told the upstairs tenants that they were non-smokers as that is what they had told them.

The Landlord confirmed that he does not want smokers in the rental property and never would have rented the unit to them had they been honest and told them that they smoke. The Landlord also stated that due to restrictions created as a result of the COVID-19 pandemic in 2020 he was not able to end the tenancy.

In response to the Landlord’s claims the Tenant, C.P. testified as follows. The Tenant stated that he was a smoker, and informed the Landlord of this when they first saw the unit. He testified that he and the Landlord agreed it was okay, provided that he only smoked outside. The Tenant confirmed that they ticked the “non-smoking” on the rental application because they would never smoke in the rental unit.

The Tenant stated that shortly after they moved in, they received a call from the Landlord and they spoke about a number of matters including smoking. The Tenant stated that once again he promised the Landlord that he would only smoke outside, and once again the Landlord assured them that they could smoke outside.

The Tenant testified that the tenants upstairs were fine with their smoking as they smoke as well. He noted that they simply asked that he smoke away from the windows. He referred to text communication between the upstairs and downstairs tenants which was provided in evidence before me and which confirmed the tenants spoke amongst themselves.

In terms of the conflict with the upstairs tenant, the Tenant stated that the Landlord doesn't know what is going on and doesn't want to get involved. He further stated that the Landlord doesn't see the upstairs tenants yelling and screaming and although they have tried to have the Landlord assist, as noted in his text messages to the Landlord, the Landlord doesn't think he has to do anything. The Tenant also stated that the upstairs tenants act as though it is their house as they have been there for 10 years.

In reply the Landlord stated that the upstairs tenant does not smoke. The Landlord further stated that the Tenants did not tell him that they smoke and their testimony in this respect was a complete lie.

In terms of why he waited to issue the Notice, the Landlord stated that he first found out the Tenants smoked in April 2019. He stated that he first didn't believe the upstairs tenants, then there was an issue about parking, then it was winter again and then it was COVID-19.

### Analysis

A Landlord may end a tenancy provided they do so in accordance with the *Residential Tenancy Act*. Section 47 of the *Act* allows a Landlord to end a tenancy for cause and reads 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:

(a)the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement;

(b)the tenant is repeatedly late paying rent;

- (c) there are an unreasonable number of occupants in a rental unit;
- (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,
  - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
  - (iii) put the landlord's property at significant risk;
- (e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
  - (i) has caused or is likely to cause damage to the landlord's property,
  - (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
  - (iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;
- (f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;
- (g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) *[obligations to repair and maintain]*, within a reasonable time;
- (h) 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) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;
- (j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property;
- (k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional or municipal government authority;

(l)the tenant has not complied with an order of the director within 30 days of the later of the following dates:

(i)the date the tenant receives the order;

(ii)the date specified in the order for the tenant to comply with the order.

(2)A notice under this section must end the tenancy effective on a date that is

(a)not earlier than one month after the date the notice is received, and

(b)the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3)A notice under this section must comply with section 52 [*form and content of notice to end tenancy*].

(4)A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5)If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

(a)is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b)must vacate the rental unit by that date.

In this case the Landlord issued the Notice pursuant to section 47(1)(d). This subsection allows a Landlord to end the tenancy in the event the Tenant has *significantly* interfered with another occupant or the Landlord, *seriously* jeopardized the health or safety or lawful right of the landlord or another occupant, or put the landlord's property at *significant* risk. The use of the italicized words is purposeful and indicates the severity of the circumstances giving rise to a request to end a tenancy on this basis.

The Landlord bears the burden of proving the reasons for ending the tenancy. Those reasons have been reproduced earlier in this my decision.

The Landlord failed to provide any evidence or submissions with respect to the allegation that the Tenants were not sharing in their portion of duties to clean the yard, laundry room or deal with garbage and recycling.

The Landlord also alleged conflict between the Tenants and the neighbours as a reason to end this tenancy. This is not grounds to end a tenancy pursuant to section 47 of the *Act*.

The Landlord stated that his main concern was the Tenants smoking. I find the Landlord has failed to meet the burden of proving this tenancy should end for this reason. The Landlord testified that he first became aware the Tenants smoked in April of 2019, yet he did not issue the Notice until October 2020. While a landlord was limited in terms of their ability to end a tenancy from during the Provincial State of Emergency in 2020, there was no such prohibitions in 2019. The Landlord failed to give any credible reason for why he did not seek to end the tenancy in 2019, had smoking been as concerning as he alleged during the hearing before me. Further, had the Tenants' smoking been as problematic as the Landlord alleges, he could have issued a notice to end this tenancy for cause at any time between August 17 and October 30, 2020. I find the Landlord's failure to act promptly following his claimed discovery that the Tenants smoked in April 2019, to be indicative of the lack of severity of this situation.

I accept the Tenant's testimony that the upstairs tenants also smoke. This is confirmed in the email communication between the two units wherein the tenants discuss the upstairs roommate and family member smoking.

Although the Tenants indicated on their rental application that they were non-smokers, there is no smoking prohibition in the tenancy agreement. Further, although the Tenants informed the Landlord on the rental application that they did not smoke at the time of filling in the application form, there was nothing in the agreement to prevent them from taking up smoking or otherwise preventing their guests or other occupants from smoking. Had smoking been a serious concern of the Landlord, he should have included a clear smoking prohibition in the written tenancy agreement.

I also accept the Tenant's testimony that they do not smoke inside the rental unit and that they only smoke outside. The Landlord failed to submit any evidence to support a finding that the Tenants have put the landlord's property at *significant* risk.

The text communication between the upstairs and downstairs units confirm there is conflict. Much of this conflict appears to have started over a parking issue and then over smoke entering the unit above. While it is unfortunate these two parties do not seem to be able to get along with one another, it appears as though both tenants are equally responsible for the conflict between them. I find the Landlord has not met the burden of proving the downstairs Tenants, who are party to the dispute before me, have *significantly* interfered with the upstairs occupants or *seriously* jeopardized the health or safety or lawful right of the upstairs occupants to such an extent as to warrant ending their tenancy.



**In all the circumstances, I find the Landlord has not met the burden of proving the reasons cited on the Notice. As such, I grant the Tenant's request to cancel the Notice. The tenancy shall continue until ended in accordance with the Act.**

Many municipalities have enacted smoking bylaws which include a smoke free buffer zone around doorways and open windows. This is to reduce the amount of second hand smoke which enters buildings. The Tenants and their guests are directed to smoke at least three metres away from the rental building, and further away should airflow result in smoke entering the building. Should the Tenants continue to smoke near the doorway and windows of the rental building the Landlord may serve another notice to end tenancy for cause.

As noted, this hearing occurred due to a Tenants' Application to cancel the Notice. The Landlord did not file a separate Application. That said, I wish to address his submissions regarding his belief that the Tenants gave notice to end their tenancy.

A tenant may end a tenancy provided that the notice complies with sections 45 and 52 of the *Act*, which provide as follows:

**Tenant's notice**

**45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and

(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

**Form and content of notice to end tenancy**

**52** In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and
- (e) when given by a landlord, be in the approved form.

The text upon which the Landlord wishes to rely does not comply with section 45 or 52. I find the text provided by the Tenant to be an expression of his frustration, and not a formal notice to end the tenancy.

Conclusion

The Tenants request to cancel the Notice is granted.

As the Tenants have been successful, they are entitled to recover the filling fee. Pursuant to section 72 of the *Act* I authorize the Tenants to reduce their next month's rent by \$100.00 as recovery of this fee.

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: January 27, 2021

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Residential Tenancy Branch