



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Ardent Properties  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on December 04, 2020 (the "Application"). The Tenant applied to dispute a One Month Notice to End Tenancy for Cause dated November 26, 2020 (the "Notice").

The Tenant appeared at the hearing with L.C. and T.C. to assist. The Tenant also appeared with the Witness; however, the Tenant did not call the Witness during the hearing. The Agent for the Landlord appeared at the hearing.

The Agent provided the full name of the Landlord which is reflected in the style of cause.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Agent confirmed receipt of the hearing package December 21, 2020 and took issue with the timing of service. The Agent confirmed receipt of the Tenant's evidence and did not take issue with the timing of service.

In relation to the hearing package, the Agent submitted that the hearing package had to be served within three days of the RTB making it available; however, the Landlord did not receive it until 11 days after it was made available by the RTB. The Agent took the position that the Application should be dismissed. The Agent confirmed the Landlord had a chance to prepare for the hearing. I asked the Agent what unfairness or prejudice

had occurred given the late service. The Agent said he thought the parties had to follow the rules. The Agent acknowledged there was no unfairness or prejudice caused and then said it is unfair if everyone does not follow the rules.

L.C. confirmed the hearing package was served on the Landlord December 21, 2020 and provided reasons for this.

Rule 3.1 of the Rules of Procedure (the “Rules”) states:

The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
- b) the Respondent Instructions for Dispute Resolution;
- c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
- d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

The purpose of rule 3.1 of the Rules is to ensure respondents are made aware of the proceedings in sufficient time for them to prepare for the hearing and attend the hearing.

I declined to dismiss the Application for the following reasons. The Landlord received the hearing package one month and two weeks prior to the hearing which I found to be more than enough time for the Landlord to prepare for the hearing and arrange to attend the hearing. It was clear the Landlord did have time to prepare for the hearing as the Landlord submitted 78 pages of evidence including written submissions for the hearing. The issue raised in the Application is straightforward. The Tenant’s evidence is not voluminous. I did not find that the Agent pointed to any unfairness or prejudice caused by the late service.

L.C. and T.C. confirmed receipt of the Landlord's evidence. L.C. raised issues in relation to where and when the evidence was served; however, T.C. advised that the Tenant was not seeking a remedy in relation to this and wanted to proceed. Therefore, I did not go into this issue further.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence submitted and the oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession?

### Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started October 01, 2015.

The Agent testified that the Notice was sent to the Tenant by registered mail and provided Tracking Number 1. I looked Tracking Number 1 up on the Canada Post website which shows the package was delivered November 27, 2020. T.C. advised that this date sounds correct.

The Notice was submitted as evidence. The grounds for the Notice are:

1. Tenant or a person permitted on the property by the Tenant has:
  - a. Significantly interfered with or unreasonably disturbed another occupant or the Landlord;
  - b. Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord;
  - c. Put the Landlord's property at significant risk.
2. Breach of a material term.

The Details of Cause state the issues as smoking and cleanliness. The Agent said the Notice was also issued for noise. T.C. advised that the Tenant did not understand that the Notice was issued for noise. I had reviewed the Notice and did not understand that it was issued for noise as it does not state this in the Details of Cause. In the circumstances, I told the Agent I would only consider the smoking and cleanliness issues.

The Agent relied on the Details of Cause when asked about the grounds for the Notice. The Agent referred to letters sent to the Tenant outlining the issues, follow up inspections and complaints from other tenants. The Agent referred to the terms in the tenancy agreement and addendum about not smoking, not disturbing other tenants, not putting the property in jeopardy and waste management. The Agent testified that the Tenant has put the property at risk by putting cigarette butts out on the carpet which is a fire safety issue.

T.C. testified as follows. Once the Notice was brought to the attention of L.C. and T.C., they spoke to W.M. and the parties came to an agreement about addressing the issues which would result in the continuation of the tenancy. The parties agreed to terms to continue the tenancy and the Tenant, L.C. and T.C. met those terms. The non-smoking term in the tenancy agreement was not enforced in the building until recently. The Tenant has stopped smoking the rental unit. L.C. and T.C. got a cleaning team to clean the rental unit. The cleaning team missed cleaning under the bed. They have hired a cleaner to maintain the cleanliness of the rental unit. There were burn marks in the carpet of the rental unit from the start of the tenancy. The complaints to the Landlord have come from one tenant who is new to the building.

In reply, the Agent testified that he is not persuaded that the Tenant has stopped smoking in the rental unit because there was smoke in the halls after the Notice was issued and he saw evidence of smoking in the rental unit such as cigarette butts under the bed and lighters. The Agent testified that three other tenants have complained about the Tenant.

The documentary evidence submitted includes correspondence between the parties, photos, inspection reports and complaints from other tenants.

### Analysis

The Notice was issued pursuant to section 47 of the *Residential Tenancy Act* (the “*Act*”) and the following subsections:

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,
- (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...

(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...

The Tenant had 10 days from receiving the Notice to dispute it pursuant to section 47(4) of the *Act*. I am satisfied based on the Canada Post website information that the Tenant received the Notice November 27, 2020. The Application was filed December 04, 2020, within time.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules.

I decline to uphold the Notice for the following reasons.

Policy Guideline 11 addresses waiver of notices to end tenancy and states:

#### **D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY**

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
- the conduct of the parties.

I am satisfied based on the evidence provided that the conduct of the parties, and in particular the Agent and Landlord, amounted to an implied waiver of the Notice for the following reasons.

I am satisfied the parties came to an agreement that the tenancy would continue if the Tenant addressed the smoking and cleanliness issues and there was significant improvement in relation to these issues based on the following evidence. The testimony of T.C. The December 01, 2020 email between L.C. and W.M. The December 01, 2020 email from W.M. to L.C. and T.C. The December 02, 2020 email from W.M. to L.C. and T.C.

I am satisfied based on the testimony of T.C. and emails from L.C. and T.C. to W.M. that the Tenant, L.C. and T.C. took steps immediately to address the smoking and cleanliness issues.

Based on the evidence before me, I am satisfied there was significant improvement in relation to the smoking and cleanliness issues by January 12, 2021 when a further inspection was conducted. I accept the submission of T.C. that the Tenant, L.C. and T.C. met the terms of the agreement between the parties made December 01, 2020. I find this for the following reasons.

The only documentary evidence showing that there were further issues relating to smoking or cleanliness after the December 01, 2020 agreement is the following:

- A January 02, 2021 email complaint about the Tenant throwing garbage out the kitchen window with a photo attached;
- A January 06, 2021 email complaint about the Tenant throwing garbage out the kitchen window;
- A January 12, 2021 inspection report;
- Photos from the January 12, 2021 inspection; and
- A January 13, 2021 email from W.M. about the January 12, 2021 inspection.

I note that there are further complaints about odour coming from the rental unit; however, it appears from the January 06, 2021 email that the odour was not related to smoke or smoking.

The Landlord only received two further complaints about the Tenant, neither of which relate to smoke or smoking. Based on the photos in evidence, the debris out the kitchen window appears to be a minor issue.

The photos from the January 12, 2021 inspection show the rental unit was clean except for one window and under the bed. The Agent acknowledged in the January 13, 2021 email that access to the outside of the kitchen window is problematic. T.C. testified that the debris under the bed was due to the cleaners missing this and I accept this as it does not make sense that the Tenant caused further mess but only under the bed. The photos from the January 12, 2021 inspection show there was significant improvement in relation to the cleanliness of the rental unit.

Based on the January 13, 2021 email from the Agent, I am satisfied the rental unit was not smoky during the January 12, 2021 inspection. T.C. testified that the Tenant

stopped smoking in the rental unit, and this is supported by the Agent's comments in the January 13, 2021 email. The evidence the Agent relies on for the position that the Tenant has not stopped smoking in the rental unit is not compelling evidence.

I note that the Agent raises issues in the January 13, 2021 email that do not form part of the basis for the Notice and were not discussed in the December 01, 2021 agreement between the parties.

Based on the evidence before me and noted above, I am satisfied the parties came to agreement about what the Tenant, L.C. and T.C. would do to continue the tenancy and that they met those terms. I am satisfied there was an implied waiver of the Notice by the parties agreeing to terms to continue the tenancy and the Tenant, L.C. and T.C. meeting those terms. I therefore decline to uphold the Notice.

The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

I note that if there are further issues in relation to smoking or cleanliness, the Landlord is at liberty to serve the Tenant with a new One Month Notice if there is a basis under section 47 for doing so.

### Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: February 12, 2021

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Residential Tenancy Branch