



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      **CNC, OLC**

### Introduction

The hearing was convened as a result of the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- cancellation of a One Month Notice to End Tenancy for Cause dated June 11, 2021 pursuant to section 47 of the Act; and
- an Order that the Landlord comply with the Act, *Residential Tenancy Regulations* ("Regulations") and/or tenancy agreement pursuant to section 62 of the Act.

The tenant and an advocate for the Tenant (collectively the "Tenant") and the landlord's agent and assistant agent (collectively the "Landlord") attended the participatory hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The Tenant testified the Notice of Dispute Resolution Proceeding and the Tenant's evidence ("NOH Package") were served on the Landlord by email on September 13, 2021. The Landlord confirmed receipt of the NOH Package and Tenant's evidence. I find that the NOH Package was served on the Landlord in accordance with sections 88 and 89 of the Act.

The Landlord testified its evidence was served on the Tenant by registered mail and submitted a registered mail receipt dated October 1, 2021 to corroborate its testimony regarding service. The Tenant acknowledged receipt of the Landlord's evidence. I find the Landlord's evidence was served on the Tenant in accordance with section 88 of the Act.

### Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- If the Tenant fails in his application to cancel the 1 Month Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to an order that the Landlord comply with the Act, Regulations and/or tenancy agreement?

### Background and Evidence

The tenancy commenced on April 15, 2006 on a month-to-month basis with rent of \$530.00 payable on the 1<sup>st</sup> day of each month. The Tenant paid a security deposit of \$265.00. The Landlord confirmed it was still holding the security deposit and that the Tenant has paid the rent until October 31, 2021.

The Landlord testified the 1 Month Notice was served on the Tenant's door on June 11, 2021. The Tenant acknowledged receiving the 1 Month Notice on June 11, 2021. The 1 Month Notice stated that the reasons for the 1 Month Notice were that the Tenant or a person permitted on the property by the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord; and
- seriously jeopardized the health, or safety or lawful right of another occupant or the landlord.

The details stated on the 1 Month Notice are:

[Street address of residential premises] is a non smoking building. Despite numerous written and verbal warning, this tenant is still smoking inside the building which causes excessive smoking smell near building entry. It is a health hazard to other tenants and also makes it difficult for us to locate new tenants.

The Landlord submitted into evidence a letter sent by the Landlord to the Tenant on February 25, 2015 that stated, among other things, the Tenant was required to "cease smoking within the Premises, in the common areas of the building or within the property lines of lands". That letter also stated the Tenant "must take [his] smoking to the public street no closer than 6 metres from the nearest opening of the building".

The Landlord submitted into evidence a second letter sent by the Landlord to the Tenant on July 7, 2020 that stated:

Some of your neighbours complain about your smoking within the Premises is causing cigarette odours to linger in the common lobby, hallways and laundry room adjacent to the Premises. .... Accordingly, we required that you cease smoking within the Premises, in the common areas of the building or within the property lines of lands...

The Landlord stated the Tenant had stopped smoking in the rental unit for several years. The Landlord submitted 2 photos of an ashtray that were taken during recent inspections of the Tenant's rental unit as evidence that the Tenant was now smoking in the rental unit. The Landlord submitted that, as the Tenant had stopped smoking in the residential premises for several years, the Tenant had accepted the prohibition against smoking as a term to his tenancy.

The Landlord testified that, one tenant who had a baby, had vacated a rental unit in the residential premises and that the tenant with the baby had told him they vacated because of the Tenant's smoking in the building. The Landlord testified there were persons who had come to view vacant rental units in the building, but they had decided not to rent because of the odour of smoke in the common areas of the residential premises.

The Landlord submitted a photo of a dirty ashtray that was taken by the building manager during a recent inspection of the Tenant's rental unit as evidence that the Tenant was smoking in the rental unit. The Landlord did not submit any evidence or call any witnesses to testify the Tenant was smoking in the common areas of the residential premises. The Landlord acknowledged that the tenancy agreement with the Tenant did not contain a term that prohibited the Tenant from smoking in the rental unit. The Landlord stated the building was about 60 years old and that it was not possible to prevent smoke from escaping from the rental unit to other areas of the building.

The Tenant testified that, when he signed the tenancy agreement in 2006, there was no term in it that prohibited him from smoking in the rental unit. The Tenant stated he has not agreed with the Landlord to amend his tenancy agreement for the inclusion of a prohibition of smoking in the rental unit. The Tenant stated he smokes tobacco cigarettes only and has never smoked in the common areas of the residential premises.

The Tenant submitted into evidence six letters from other occupants living in the residential premises. The authors of several of those letters state that the occupants have never seen the Tenant smoking in the common areas the residential premises. In another letter, from the tenant living across the hall from the Tenant, the tenant states they have “no issue with [Tenant’s] smoking”. In another one of the six letters, the tenant living directly above the Tenant’s rental unit states “I have no smoking issues with him”.

The Tenant testified the smell of cigarette smoke in the entrance area of the residential premises was from other tenants and their guests who smoke outside in front of the entrance doors to the building. In one of the six letters referred to above, a tenant states “There are many other smokers in the Units here who are usually smoking quite close to the front entrance which could be causing the lingering smoke smell”.

The Tenant testified it was his understanding that the emphasis of the Landlord had been on smoke originating from the consumption of marijuana in other rental units located in the residential premises. The Tenant submitted a Memorandum to residents of the residential premises dated August 12, 2021 which read in part:

**RE: Inspection – Smoking Not Allowed**

It is noticed there is a heavy weed smell in the building. Please be advised that smoking of any substances such as weed or vapes are not allowed in the building common areas or inside unit.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause, the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

Rule 6.6 of the *Residential Tenancy Branch Rules of Procedure* 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 he is the Applicant, the Landlord presents its testimony first.

The Landlord testified the Tenant had stopped smoking in the rental unit for several

years and submitted that the Tenant had accepted the new non-smoking policy as a term to his tenancy. Although the Tenant would not admit he had stopped smoking in the rental unit for any duration of time, he stated he had not agreed to any amendment to the tenancy agreement that would prohibit him from smoking in the rental unit. Section 14 of the Act reads:

- 14** (1) A tenancy agreement may not be amended to change or remove a standard term.
- (2) *A tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.*
- (3) The requirement for agreement under subsection (2) does not apply to any of the following:
- (a) a rent increase in accordance with Part 3 of this Act;
  - (b) a withdrawal of, or a restriction on, a service or facility in accordance with section 27 *[terminating or restricting services or facilities]*;
  - (c) a term in respect of which a landlord or tenant has obtained an order of the director that the agreement of the other is not required.

[italics added]

Regardless of whether the Tenant had stopped smoking in the rental unit for a period of time, I do not find this constitutes, under section 14(2) of the Act, the Tenant's agreement or consent, express or implied, to add a term to the tenancy agreement that prohibits the Tenant from smoking in the rental unit.

Based on the evidence and testimony before me I find that the current tenancy agreement does not prohibit smoking in the rental unit. I find also the Landlord has not provided any testimony or evidence to show the Tenant has smoked in any of the common areas of the residential premises.

The Landlord chose not to call any of the tenants or other occupants of the building who are allegedly being significantly affected by the Tenant's smoking as witnesses. The Landlord has not provided written statements from current or past tenants or

submitted any documentary evidence of their complaints to the Landlord regarding the Tenant's smoking in the rental unit. As a result, I am unable to ascertain how often and for what duration and how severely the occupants of the residential property may be adversely affected.

Based on these deficiencies, I find cause has not been made out by the Landlord under subsections 47(1)(d)(i) or 47(1)(d)(ii) of the Act. The burden of proof is on the Landlord in these circumstances and there is insufficient evidence before me to find in favour of the Landlord. Both the Landlord and Tenant testified that the tenancy agreement does not contain a term prohibiting smoking in the rental unit. I find the Tenant is not in breach of the tenancy agreement.

I find the landlord has not met their evidentiary burden of showing on a balance of probabilities that this tenancy should end based on the reasons indicated on the 1 Month Notice.

Therefore, I allow the Tenant's application and cancel the 1 Month Notice. This tenancy continues until ended in accordance with the *Act*.

As the 1 Month Notice is cancelled on the basis the Landlord has failed to demonstrate that the tenancy should be ended pursuant to the causes set out in the 1 Month Notice and, as I have found there is no prohibition against smoking in the tenancy agreement, I find the Tenant's claim for an order that the Landlord comply with the Act, Regulations or tenancy agreement are unnecessary and I dismiss this claim by the Tenant.

Conclusion:

I allow the Tenant's application to cancel the 1 Month Notice dated June 11, 2021. The 1 Month Notice is of no force or effect. The tenancy continues until ended in accordance with the Act.

The Tenant's claim for an order that the Landlord comply with the Act, Regulations or tenancy agreement is dismissed without leave to reapply.

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: October 24, 2021

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Residential Tenancy Branch