



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Prospero International Realty  
Inc. and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC, OPC

### Introduction

This hearing was scheduled to deal with cross applications. The tenants applied for cancellation of a One Month Notice to End Tenancy for Cause ("1 Month Notice"). The landlord applied for an Order of Possession based upon the 1 Month Notice.

Both the landlord's agent and one of the named tenants appeared for the hearing. The parties were affirmed and the parties were ordered to not make an unofficial audio recording of the proceeding.

I confirmed the parties exchanged their respective hearing materials and evidence upon each other and I admitted the materials for consideration in making this decision.

Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

### Issue(s) to be Decided

1. Should the 1 Month Notice be upheld or cancelled?
2. Is the landlord entitled to an Order of Possession? If so, when should it take effect?

### Background and Evidence

Pursuant to a written tenancy agreement, the tenancy started on March 15, 2016. The tenants' current rent obligation is currently \$1245.00 payable on the first day of every month. The tenancy agreement does not expressly permit or prohibit the tenants from smoking in the rental unit or the balcony.

The rental unit is described as an apartment style unit, with a balcony, in an apartment building managed by the landlord.

The subject 1 Month Notice was sent to the tenants via registered aml on June 30, 2021 and has a stated effective date of July 31, 2021. The tenant indicated the 1 Month Notice was received on July 6, 2021 and I am satisfied the tenant filed to dispute the 1 Month Notice within the time limit for doing so.

The landlord indicated the reason(s) for ending the tenancy, as provided on the 1 Month Notice, as follows:

- ☒ Tenant or a person permitted on the property by the tenant has (check all boxes that apply):
- ☒ significantly interfered with or unreasonably disturbed another occupant or the landlord.
  - ☒ seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

In the Details of Cause on the 1 Month Notice, the landlord wrote:

Details of Causes(s): Describe what, where and who caused the issue and include dates/times, names etc. This information is required. An arbitrator may cancel the notice if details are not provided.

Details of the Event(s):

We have been receiving multiple complaints from the unit below about the smell of tobacco and marijuana smoke coming from your unit. Tenants below are unable to open their windows and balcony door even in this hot weather. Their bathroom also smells of smoke.

As the Landlord, we did what we could by issuing you warning letters and posting building notices about not smoking inside your unit and balcony. You have responded that you will not stop smoking no matter what. To protect other tenants in the building and ensure their health and safety, the Landlord now has no other option but to issue an eviction notice at this time.

### Landlord's position

The landlord submitted that complaints were written by another tenant on May 25, 2020 and June 27, 2020 and given to the building manager. The building manager forwarded them to the landlord's agent on August 6, 2020. The complaint letters describe their neighbours smoking cigarettes and marijuana "everyday constantly non-stop". The complaint letters do not identify the person making the complaint or the unit the complaint is directed; however, the building manager identified the complainant based on the unit number provided on the envelope containing the complaint letters and a phone call received from the complainant. In an email from the building manager to the landlord's agent, the complainant was identified and the complaint was directed toward

the tenant of the rental unit. The landlord acknowledged that this information was anonymized in the tenant's copy of the evidence. The landlord's agent stated that the complainant provided a written complaint but did not want to be identified and did not identify themselves or the offending tenant or unit for fear of retaliation based on a phone call the complainant made to the landlord. The landlord issued a warning letter to the tenant on August 26, 2020 based on these complaints. Upon receiving the written warning letter, the tenant telephoned the landlord and, among some profanity, asserted it was his right to smoke on the balcony. After that, the landlord waited to see if the tenant would comply with their request to stop smoking on the balcony. The complaints stopped coming in, which the landlord attributed to the arrival of the colder months and people leaving their windows and doors closed.

On June 2, 2021 the landlord received another complaint written about the tenant's "constant use of cannabis throughout the day all day, every day" on the balcony. The complainant described feeling nauseated and getting headaches from the smell and that the complainant cannot open their windows due to the smell. The landlord issued a second and final warning to the tenant on June 7, 2021.

The warning letters describe complaints from other tenants concerning the tenant smoking and this is severely disrupting the quiet and peaceful enjoyment for the other tenants". The warning letters also state that further complaints will result in an issuance of a 1 Month Notice.

After issuing the second and final warning letter of June 7, 2021, further complaints were received about the tenant's smoking on the balcony, on June 17, 18 and 30, 2021. The complainant who wrote to the landlord on June 18, 2021 is a different tenant from the first complainant described above. On June 18, 2021 the complainant described the tenant smoking on the balcony continuously after he gets home from work until night; and, on weekends he smokes from the morning till late night; and, on a long weekend he smoked continuously on the balcony for three days. On June 30, 2021 the complainant complained that nothing has improved with respect to the tenant frequently smoking on the balcony and the complainant cannot open their windows or door or even go on their balcony due to the constant smoke.

The landlord proceeded to issue the 1 Month Notice on June 30, 2021. The landlord stated that after the issuance of the 1 Month notice, two more complaints were received about smoking by the tenant, on July 11, 2021 and just last week. The landlord provided a copy of the complaint written on July 11, 2021. It was written by a different tenant located near the rental unit. In the complaint, the complainant describes the

tenant's frequency of smoking as increasing after cannabis was legalized and the tenant smokes on the balcony "around the clock" including early morning hours such as 2 a.m., 3 a.m. and 5:00 a.m. The complainant described how they must leave their windows closed but that still does not stop all of the smoke from entering as the smoke is so thick. The complainant describes the other occupant living in his/her unit as have breathing difficulties due to COPD.

The landlord argued that the tenant's smoking on the balcony has disturbed multiple tenants and the landlord has an obligation to provide all of its tenants with quiet enjoyment, including a healthy environment. The landlord has issued warning letters to the tenant but he has not changed his behaviour. As such, the landlord is of the position the landlord has no other choice but to evict the tenant to protect the other tenant's rights to a safe and healthy environment. The landlord's agent stated that if the tenancy is not ended, the landlord will lose other good tenants who will not tolerate the on-going smoking by the tenant.

Documentary evidence provided by the landlord included the tenancy agreement; complaint letters received from other tenants in 2020 and in June and July 2021; the warning letters issued to the tenant on August 26, 2020 and June 7, 2021; the 1 Month Notice; and proof of service of the 1 Month Notice.

I noted that the landlord's warning letters indicates the tenant must comply with the municipal by-laws and building rules. I asked the landlord which by-law(s) the landlord was referring to. The landlord responded that there is a by-law requiring smokers to stay at least 7.5 meters away from a building's windows and doors. The landlord's agent acknowledged the by-law was not provided as evidence by the landlord. The landlord also acknowledged that a copy of the "building rules" or the notices posted in the building, as referenced in the Details of Cause of the 1 Month Notice, were not submitted as evidence either.

### **Tenant's position**

The tenant admits he smokes on the balcony, both tobacco and marijuana cigarettes. The tenant claims that several other tenants smoke in the building as well.

The tenant stated that during his first year of tenancy he smoked in the parking lot at the request of the building manager but a tenant complained about that so he started smoking tobacco cigarettes on his balcony in 2017. The tenant stated that when

cannabis became legal to smoke, he began smoking marijuana cigarettes on his balcony too, in approximately 2019.

The tenant stated there is nothing in his tenancy agreement that prohibits him from smoking in his unit or on his balcony but he chooses not to smoke inside the rental unit he has a child inside.

The tenant submitted that the building manager has been aware of his smoking since the tenancy began and the building manager had brought the complaints of another tenant to his attention years ago but the manager also told him there was nothing she could do to stop the tenant from smoking.

The tenant attributes the landlord's efforts to evict him now as being the result of complaints being made to the landlord's head office instead of the building manager, and the landlord likely wishes to re-rent his unit for more money.

The tenant acknowledged that the second-hand smoke is likely bothersome to his neighbours, including a couple with a baby living nearby his unit. As a result, the tenant stated he put a fan on his balcony to aid in blowing the smoke in a different direction.

The tenant indicated there has always been one tenant living in the unit above him who complained of his smoking since early on in his tenancy but now there are more complaints because new tenants have moved in. Despite the complaints of other tenants, the tenant is of the view that it is incumbent upon new tenants to do their due diligence before renting a unit to determine if there are any smokers nearby, and it is up to the landlord to disclose that to prospective tenants.

The tenant maintains that smoking in his rental unit or on its balcony is a legal activity and that the municipal by-laws exempt residential residences from the smoking ban. The tenant claimed that his conduct has not changed in the five years of his tenancy so he should not be evicted now for doing what he has always done.

Documentary evidence provided by the tenant included a copy of the 1 Month Notice; and, a copy of the City by-law concerning smoking, and the warning letter of June 7, 2021.

During the hearing, I informed the tenant that a tenancy may be ended where a tenant is unreasonably disturbing other tenants, even if the activity creating the disturbance is legal, but the tenant rejected that information as being accurate. I asked the tenant if he

would be willing to change the location where he smokes in recognition the second-hand smoke is bothersome to other tenants and with a view to preserving his tenancy to which the tenant responded he would not change.

As the hearing neared an end, I asked the parties if the tenant had presented payment of rent to the landlord for November 2021. The tenant stated he had. The landlord's agent stated she had not yet confirmed the rent payments received for the month. I stated that if the 1 Month Notice was upheld, I would consider issuing an Order of Possession to be effective on November 30, 2021 having heard the tenant state he presented payment for November 2021. The landlord did not object.

### Analysis

Where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenant was served with a valid notice to end tenancy and the tenancy should end for the reason(s) indicated on the notice.

Upon review of the subject 1 Month Notice, I find it is in the approved form and is duly completed. Considering the 1 Month Notice was mailed to the tenants on June 30, 2021 but the tenant received it on July 6, 2021, I find the effective date should read August 31, 2021. In inaccurate effective date does not invalidate a Notice to End Tenancy; rather, it automatically changes to comply pursuant to section 53 of the Act.

At issue is whether the landlord has cause to end the tenancy. It is agreed that the tenancy agreement is silent with respect to smoking in the rental unit or on its balcony and the tenancy agreement does not expressly prohibit smoking in the rental unit or the balcony. It is also undisputed that the tenant has been smoking on the balcony of the rental unit for years; the landlord received complaints about the tenant's smoking on the balcony from its other tenants in 2020 and 2021; and, the landlord has put the tenant on notice that his smoking is "...severely disrupting the quiet and peaceful enjoyment for the other tenants..." by way of two written warnings and notice that further complaints will result in the issuance of a 1 Month Notice. It is also undisputed that after receiving the warning letters the tenant did not cease or reduce his consumption of tobacco and marijuana cigarettes on the balcony of his rental unit.

The landlord was of the view that smoking within 7.5 meters of a building's windows or door violates the city by-laws; however, the tenant provided evidence that residential residences are exempt from the by-law. Based on the by-law provided to me by the

tenant, I accept that the by-law does not prohibit the tenant from smoking in the rental unit or on its balcony.

The landlord's warning letters referenced "building rules" but I was not provided a copy of building rules. The 1 Month Notice referenced building notices but those were not provided as evidence. As such, I find the landlord has not established that there is a basis to end the tenancy due to a violation of "building rules" or the notices posted in the building.

During the hearing, and by way of the warning letters and on the 1 Month Notice, the landlord pointed to its obligation to protect its other tenant's right to peace and quiet enjoyment of their units and the health and safety of its other tenants as a basis for ending the tenancy and I proceed to consider that basis further.

The landlord submitted that multiple other tenants have complained of not being able to open their windows or enjoy their balcony due to the smoke coming from the tenant's balcony; of smoke infiltrating their units even with their windows open; and, concern over the health effects of the smoke.

During the hearing, the tenant appeared to acknowledge that it is not healthy to be exposed to second-hand smoke as the tenant protects his own son from the second-hand by smoking on the balcony and not inside his unit. The tenant also acknowledged that the smoke he creates while smoking on the balcony is likely bothersome to nearby tenants as evidenced by his effort to place a fan on the balcony in an attempt to blow the smoke in a different. Further, the tenant acknowledged receipt of the landlord's written notification that his smoking activity on the balcony is severely disturbing other tenants. Yet, the tenant takes the position that despite the disturbance to other tenants he has a legal right to smoke and the consequences of exposure to his smoke rest with the other tenant's failure to do their due diligence in selecting a rental unit near a smoker and/or the landlord not disclosing the tenant's smoking habits to them.

While smoking in one's own home may be legal, I reject the tenant's defence that a legal activity equates to permission to unreasonably disturb other tenants. Many daily activities may be disturbing to other tenants from time to time, such as slamming of a door, walking loudly, playing loud music, running on a treadmill and the like. Sounds, sights, smells of ordinary living activity are expected from time to time especially in a multiple unit building. As such, a tenancy cannot be ended for a mere disturbance. However, a tenancy may be ended where there is "**unreasonable** disturbance" of other

tenants, as provided under section 47(1)(d)(i) of the Act, which provides that a tenancy may be ended where:

- (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,

[My emphasis underlined]

This is one of the two reasons appearing on the subject 1 month Notice.

All of the landlord's tenants are entitled to the right to quiet enjoyment, as provided under section 28 of the Act. Section 28 provides that the right to quiet enjoyment which includes "freedom from unreasonable disturbance".

Since the landlord has an obligation to protect its tenants' right to quiet enjoyment, it follows that a tenancy may be ended where one tenant is unreasonably disturbing another tenant. This is also described in Residential Tenancy Policy Guideline 6: *Entitlement to Quiet Enjoyment*. Policy guideline 6 provides, in part:

## **B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT**

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

[My emphasis underlined]

From the tenant's own admission, he acknowledges the second-hand smoke is likely disturbing some of the landlord's other tenants. I proceed to consider whether the tenant is creating an "unreasonable disturbance" to the other tenants.

Upon review of the complaint letters the landlord received, I note that there are multiple different tenants from more than one unit complaining about the tenant's smoking. Further, the complainants state that the tenant smokes so frequently they describe it as "continuously" for days at a time and "around the clock" that results in thick smoke. The complainants state that they cannot open their windows or patio door and the smoke smell even permeates into their units. The tenant did not deny that he smokes on the balcony frequently.

Given the quantity of smoke created by the tenant's frequent or continuous smoking on the balcony, I find the tenant is unreasonably disturbing other tenants of the building and the other nearby tenants are suffering from a breach of their right to quiet enjoyment. As such, I find the landlord is in a position to end the tenancy for such, as indicated on the subject 1 Month Notice. Therefore, I uphold the 1 Month Notice.

Having upheld the 1 Month Notice, I dismiss the tenant's application and I grant the landlord's request for an Order of Possession. I accept the tenant likely paid for use and occupancy for the month of November 2021 and I provide the landlord with an Order of Possession with an effective date of November 30, 2021.

### Conclusion

The 1 Month Notice is upheld and the tenant's application for cancellation of the 1 Month Notice is dismissed.

The landlord is provided an Order of Possession effective at 1:00 pm. On November 30, 2021.

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: November 10, 2021

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Residential Tenancy Branch