



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Affordable Housing Non Profit Rent  
Association and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC, FFT

### Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause (the "One Month Notice"), pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord's agent (the "agent"), tenant N.M. and tenant N.M.'s advocate (the "advocate") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email address for service of this decision and order.

I note that section 55 of the *Act* requires that when a tenant submits an application for dispute resolution (the "application") seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the application is dismissed or the landlord's notice to end tenancy is upheld and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Both parties agree that the tenants served the landlord with the tenants' application for dispute resolution and evidence on September 1, 2021 via registered mail. The agent testified that the landlord received the tenants' evidence and application for dispute

resolution on September 2, 2021. I find that the above documents were served in accordance with section 88 and 89 of the *Act*.

Both parties agree that additional evidence was personally served on the landlord on December 13, 2021. I find that that this evidence was served in accordance with section 88 of the *Act*.

The agent testified that the tenants were served with the landlord's evidence via posting on December 7, 2021. Tenant N.M. testified that she received the landlord's evidence on December 8, 2021. I find that the landlord's evidence was served in accordance with section 88 of the *Act*.

#### Preliminary Issue- Amendment

The landlord's name listed on this application for dispute resolution differs from the landlord's name listed on the One Month Notice. The agent testified that the landlord's correct legal name is that list on the One Month Notice, not that listed on the tenant's application for dispute resolution. Both parties agreed to the amendment of the tenant's application for dispute resolution to state the landlord's name as listed on the One Month Notice. Pursuant to section 64 of the *Act* I so amend.

#### Issues to be Decided

1. Is the tenant entitled to cancellation of the One Month Notice, pursuant to section 47 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. If the tenant's application is dismissed or the landlord's One Month Notice is upheld, and the One Month Notice complies with the *Act*, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

#### Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced

here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on September 1, 2006 and is currently ongoing. Monthly rent in the amount of \$1,550.00 is payable on the first day of each month. A security deposit of \$550.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The agent testified that a One Month Notice was posted on the tenants' door on August 5, 2021. Tenant N.M. testified that she received the One Month Notice on August 5, 2021. The One Month Notice states that the tenants must vacate the subject rental property by September 30, 2021.

The One Month Notice states the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
  - 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;
- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Both parties agree that at the time the tenancy agreement was signed there wasn't a prohibition on smoking and that the tenancy agreement does not mention smoking. The agent testified that the building became a non-smoking building in 2014 or 2015 at which time all new tenancy agreements contained a non-smoking clause. The agent testified that the tenancies that pre-dated the switch of the building to a non-smoking building continue to be permitted to smoke in their units, as long as their smoking does not impact the quiet enjoyment of other tenants in the subject rental building. The agent testified that new tenants are not specifically told that some tenants are permitted to smoke because their tenancies pre-date the no smoking policy.

The agent testified that the landlord received numerous complaints about second-hand smoke from floors 18-22 likely arising from more than one unit over the course of several years. The agent testified that in response to these complaints the landlord posted column letters on each floor that all tenants were able to read, which reminded tenants that even those tenants whose smoking was "grandfathered" in were not permitted to disturb the quiet enjoyment of other tenants.

The agent entered into evidence column letters regarding smoking and the quiet enjoyment of others dated:

- May 1, 2019,
- July 28, 2020,
- August 10, 2020,
- February 10, 2021, and
- June 28, 2021.

The agent testified that after investigation and numerous complaints directed at the subject rental property, the landlord served warnings letters regarding smoking on the tenants dated:

- June 25, 2020,
- July 3, 2020,
- April 7, 2021, and
- July 22, 2021.

The tenant did not dispute receiving the above letters.

The June 25, 2020 letter states:

We have received complaints regarding second-hand tobacco coming from your unit window particularly during the early morning and afternoon hours and entered in the surrounding units. Particularly on the following dates and times: June 20, 2020 at :30 pm, June 23, 2020 at [left blank].

These actions contravene city bylaws that prohibits smoking near or around any doorways or windows.

Please be reminded that this a non-smoking building and there is no smoking on the premises. Those who are “grand fathered” must still not disturb the quiet enjoyment of any other resident.

The July 3, 2020 decision states:

Since our last letter sent to you on June 25, 2020, we have again received multiple complaints regarding second-hand tobacco smoke coming from your unit window particularly in the last seven days during the afternoon and evenings and entering the surrounding units.

We therefore ask you to stop smoking **immediately** inside your apartment, as the second-hand tobacco smoke is affecting other apartments around you. Also, these actions contravene city bylaws which prohibits smoking near or around any doorways or windows.

Please be reminded that this a non-smoking building and there is not smoking on the premises. Those who are “grand fathered” must still not disturb the quiet enjoyment of any other resident.

Accordingly, we advise that any further incidents may constitute cause for termination of your Tenancy Agreement.

The April 7, 2021 letter states:

Please be advised that we have continued to receive smoking complains emanating from your suite.

Please be advised that we are a non-smoking building and that your smoking has caused your neighbours some distress especially during these pandemic times.

Please stop smoking immediately. If you do need to smoke, please feel free to go outside.

Thank you very much for your immediately attention to this letter.

The July 22, 2021 letter states:

Please be advised that we have continued to receive smoking complaints emanating from your suite. Your smoking is causing all the neighbours around you serious health problems especially during a pandemic which attacks the respiratory system i.e. lungs.

We have in the past requested that you stop smoking in your unit as you are causing many of your neighbours loss of use of quiet enjoyment of their suite.

Therefore, we have enclosed a Breach Notice to you for such and any further complaints received from other tenants will result in a Notice to End Tenancy.

Thank you for your immediate attention to this. Please govern yourself accordingly.

The Breach Notice is dated July 22, 2021 and states:

[The landlord] is with this letter giving you WRITTEN NOTIFICATION that CONDUCT is considered to be a material term of the tenancy agreement we have with you. Any further smoking issues on [the subject rental building] by your or your guests, will result in a one (1) month notice of Termination being served on you pursuant to Section 47(1)(d),(h) of the Residential Tenancy Act, SBC 2002.

The agent testified that after serving the tenants with the above breach letter, the tenants continued to smoke in the subject rental property and the agent submitted that the landlord received complaints regarding the tenants' smoking on:

- July 24, 25, 27 and 29, 2021,
- August 7, 2021 and,
- September 4,5, 2021

The agent testified that the one of the tenants' neighbour's has asthma and due to the pandemic works from home. The agent testified that the tenants' smoking has significantly impacted the neighbour and the second-hand smoke has weakened the neighbour's lungs. The agent testified that the complaints have stated that the smoke can be seen escaping into the hallway under the tenants' door.

The agent testified that in the most recent inspection of the subject rental property the furniture smelled strongly of smoke and nicotine could be seen on the walls and ceiling. Tenant N.M. testified that she smoked more before the inspection because she smokes when she is stressed.

The agent testified that the landlord has had previous issues with the tenants' smoking between 2017 and 2019. The agent testified that another tenant who lived above the subject rental property had to be moved to another unit due to the tenants' smoking.

Tenant N.M. testified that she has smoked in the subject rental property occasionally throughout the tenancy but stopped smoking on July 22, 2021 when she received the breach letter. Tenant N.M. testified that other people in the subject rental property smoke, not just her. Tenant N.M. testified that prior to receiving the breach letter she smoked 1-2 times per day but that her windows and balcony door were always closed.

Tenant N.M. testified that there were inaccuracies in some of the warning letters served on her by the landlord such as dates of complaints occurring when she was out of the country. The agent testified that the tenant never contacted the landlord to dispute any of the warning letters. The tenants did not submit any documentary evidence of disputation.

The advocate submitted that the One Month Notice should be dismissed because the landlord has not established cause. The advocate submitted that the warnings were directed at a large swatch of people, not just the tenants, and that the smoking could have come from someone else. The advocate submitted that it is unreasonable to hold the tenant responsible for other people's smoking.

The advocate submitted that in forcing the tenant to stop smoking in the subject rental property the landlord is making a material change to the tenancy agreement without the permission of the tenants, contrary to section 14(2) of the *Act*.

The advocate submitted that while the landlord has submitted all the warning letters into evidence, the landlord has not submitted all of the complaints levied against the tenants. The advocate submitted that I should make an adverse inference from their absence. The agent testified that he is more than willing to provide the many emails into evidence and did not initially do so because they contain the names of the tenants' neighbours who do not wish to be personally involved.

The advocate submitted that the warning letters mention the breach of City bylaws but the bylaws in question are not provided or specified.

The advocate submitted that if the landlord is successful in this application the tenants require more than two days notice to move out given their poor health, the holidays and the global pandemic.

The agent testified that the tenants' second-hand smoke is negatively affecting the tenants' neighbours and the tenants have not stopped smoking after many warnings and so must move out. The agent testified that the landlord is willing to allow the tenants to stay until the end of January or February 2022 but is not willing to cancel the One Month Notice.

### Analysis

Based on the testimony of both parties I find that the landlord posted the One Month Notice on the tenants' door on August 5, 2021, in accordance with section 88 of the *Act*. Upon review of the One Month Notice I find that it meets the form and content requirements of section 52 of the *Act*.

Section 47(1)(d)(i) states that a landlord may end a tenancy by giving notice to end the tenancy if 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.

It is uncontested that the tenant smoked daily in the subject rental property for the majority of this tenancy and that the tenant was permitted to smoke in her unit. The advocate submitted that in asking the tenant to stop smoking in the subject rental property the landlord is unilaterally altering a material term of the tenancy agreement. I do not agree with the advocate's above submission. The tenants were permitted to smoke as long as that smoke did not unreasonably disturb the other occupants of the building or the landlord. I find that the allowance of the tenants' to smoke in their unit, does not trump other occupants right to live free from significant interference and unreasonable disturbance. I accept the agent's testimony that the warning letters addressed to the tenant were drafted in response to complaints against the smoke emanating from the subject rental property and not emanating from other units.

I find that while other units may have also smoked, the landlord has proved, on a balance of probabilities, that the smoke emanating from the subject rental property has unreasonably disturbed other tenants and in particular the neighbour with asthma. I find that it is common knowledge that second-hand smoke is a carcinogen and that the smoke does not always remain inside the unit in which it originates.

Based on the testimony of the agent and the warning letters entered into evidence, I find that other tenants in the subject rental property have repeatedly complained to the landlord about the second-hand smoke emanating from the subject rental property. I accept the agent's testimony that in response to the second-hand smoke complaints levied against the tenants, the tenants were sent warning letters on:

- June 25, 2020,
- July 3, 2020,
- April 7, 2021, and
- July 22, 2021.

The advocate submitted that I should place an adverse inference on the landlord's lack of complaints entered into evidence. I do not agree with the advocate's above submission. I find that the landlord's claim is adequately supported by the 19 pages of documentary evidence provided by the landlord which include the warning letters served on the tenants. I accept the agent's testimony that he was respecting the privacy concerns of the other tenants when deciding what documents to include in this dispute resolution proceeding.

I find that the tenants unreasonably disturbed other tenants in the building by smoking in the subject rental property because that smoke leaked into common spaces and other units. Had the smoke remained in the subject rental property and not infiltrated other spaces no breach of section 47 of the *Act* would have occurred.

The tenants were provided with numerous warnings about the impact their smoking was having on their neighbours and the smoking continued until at least July 22 of 2021. I find that regardless of when or if the tenants quit smoking, the tenants unreasonably disturbed their neighbours by exposing them to harmful second-hand smoke, contrary to section 47(1)(d)(i) of the *Act*. I therefore uphold the One Month Notice and dismiss the tenants' application to cancel the One Month Notice.

Section 55 of the *Act* states that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if:

- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I find that since the One Month Notice complies with section 52 of the *Act* and the One Month Notice was upheld, the landlord is entitled to an Order of Possession.

As the agent testified that the landlord is willing to provide extra time for the tenant to reside in the unit in order secure new housing, I award the landlord an Order of Possession effective February 28, 2022 at 1:00 p.m.

As I have ended this tenancy pursuant to section 47(1)(d) of the *Act*, I decline to consider if the landlord is entitled to an Order of Possession pursuant to any other subsection of section 47 of the *Act*.

As the tenants were not successful in this application for dispute resolution, I find that they are not entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

### Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective at **1:00 p.m. on February 28, 2022**, which should be served on the tenants. Should the tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: December 16, 2021

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Residential Tenancy Branch