



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **CNC, FFT**

### Introduction

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

1. Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Sections 47 and 62 of the Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord, AK, and three Witnesses, RB, DP and CE, DH, attended the hearing at the appointed date and time. The Tenant, JJ, Advocate, KC, and Witness, SM, attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, to question the other party, and make submissions.

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

AK testified that he personally served JJ with the One Month Notice which is dated October 22, 2021. JJ said she was not at home when the One Month Notice was served on her, she said it was slipped under her door. The Landlord's evidence was later served on the Tenant via email for which she confirmed receipt. Personal service means actually handing a copy of the document to the person being served. Service by posting means attaching a copy to a door or other conspicuous place at the address at which the tenant resides. A conspicuous place is one that is clearly visible and likely to attract notice or attention. Placing a copy of the document under the door is not

recognized by the Legislation. Normally, I would not find service perfected by sliding a notice under a person's door. As the Tenant confirmed receipt of the notice and as the Tenant wanted to have this matter heard and concluded, I find there is no prejudice to the Tenant. I find that the Tenant was sufficiently served with the notice and all the Landlord's evidence pursuant to Section 71(2)(c) of the Act.

JJ served the Notice of Dispute Resolution Proceeding package for this hearing to the Landlord via Canada Post registered mail on November 1, 2021 (the "NoDRP package"). KC referred me to the Canada Post registered mail tracking number as proof of service. I have noted the registered mail tracking number on the cover sheet of this decision. The Landlord confirmed receipt of the NoDRP package. I find that the Landlord was deemed served with the documents for this hearing five days after mailing them, on November 6, 2021, in accordance with Sections 89(1)(c) and 90(a) of the Act.

KC testified that JJ's evidence was later served on the Landlord via email. The Landlord confirmed receipt of the Tenant's evidence. I note that the Tenant's evidence was uploaded on the RTB website on November 22, 2021. I find that the evidence served on the Landlord was done in accordance with Section 43(1) of the Residential Tenancy Regulation and was received on November 22, 2021.

### Preliminary Matter

I was alerted to a possible appearance of bias or a conflict of interest. I recognized one name associated with the Tenant with which I had a past professional relationship. I told the parties that I have no reasonable apprehension of bias in this matter and can be objective to decide this application. None of the parties objected to me hearing this application.

### Issues to be Decided

1. Is the Tenant entitled to cancellation of the Landlord's One Month Notice?
2. Is the Tenant entitled to recovery of the application filing fee?
3. If the Tenant's application fails, is the Landlord entitled to an Order or Possession?

### Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

This periodic tenancy began in February 2011. A tenancy addendum was signed by JJ on February 4, 2019. This addendum specifies that the Tenant agrees only to smoke on the balcony with the bedroom sliding door closed and the living room door closed. She is not to smoke in the rental unit. Monthly rent is \$820.00 payable on the first day of each month. A security deposit of \$350.00 was collected at the start of the tenancy and is still held by the Landlord.

The reason stated in the Landlord's One Month Notice is that the Tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. The details of cause in the One Month Notice say: *Smoking in the unit. Failure to stop smoking in the unit after multiple warnings. Complaints from multiple neighboring [sic] tenants.*

The Landlord purchased the residential property in 2013 and submitted that a number of people who reside in the building smoke. The Landlord testified that a number of other tenants complained about smoke in the hallway near the Tenant's unit. Some of these complaints are from tenants who no longer live in the residential property, while others are from current tenants but dated after the One Month Notice was issued.

KC testified that JJ has never received a written notice that there was a problem with cigarette smoke coming from her unit. JJ also stated that she quit smoking in September 2021.

### Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 47 of the Act is the relevant part of the legislation in this application. It states:

47 (1) *A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*

...

(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;*

...

Much of the Landlord's submitted documentary evidence is dated after the One Month Notice was given and is not relevant to the reason of cause. The Landlord must establish cause, prior to the date on the One Month Notice which is October 22, 2021, to be the reason why the tenancy must end.

The Landlord claims that the Tenant has breached a material term of her tenancy agreement. I find the situation of smoking in her unit to be a serious matter, if she has done so, as the Landlord made efforts to incorporate the additional no smoking terms into her tenancy agreement. Residential Tenancy Policy Guideline #8 deals with Unconscionable and Material Terms. The RTB provides these public policy guidelines to assist landlords and tenants, and decision makers with delegated authority under the Act to understand the policy intent of the legislation.

Policy Guideline #8 specifies that a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. I must focus on the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. To end a tenancy agreement for breach of a material term, the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and,
- that if the problem is not fixed by the deadline, the party will end the tenancy.

The Tenant's Advocate said that the Tenant did not receive written notice that she had breached a material term of her tenancy agreement; hence, there was no deadline set for the Tenant to fix the problem. The Tenant submits that she has quit smoking and being that smoking is permitted in the building raises the issue of the source of the cigarette smoke. I find that the Landlord has not sufficiently notified the Tenant that there was a breach of a material term of her tenancy agreement, and subsequently, has not proven cause pursuant to Section 47(1)(h) of the Act.

I find that on a balance of probabilities the Landlord has failed to establish that the Tenant is the source of cigarette smoke in the building and that there is no cause established to end the tenancy. Accordingly, I cannot uphold the Landlord's One Month Notice to end this tenancy. JJ's application to dismiss the One Month Notice is granted. The tenancy shall continue until it is ended in accordance with the Act.

As the Tenant is successful in her claim, she is entitled to recovery of the application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold \$100.00 from one month's rent due to the Landlord.

### Conclusion

The Tenant's application to dismiss the Landlord's One Month Notice is granted.

The Tenant may withhold \$100.00 from one month's rent to recover her application filing 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 Act.

Dated: December 14, 2021

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Residential Tenancy Branch