



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, PSF

### Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant May 09, 2022 (the “Application”). The Tenant applied as follows:

- To dispute a One Month Notice to End Tenancy for Cause dated April 25, 2022 (the “Notice”)
- For an order that the Landlord provide services or facilities required by the tenancy agreement or law

The Tenant appeared at the hearing. The Agent for the Landlord (the “Agent”) appeared at the hearing and called the Witness at the hearing. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties and Witness provided affirmed testimony.

Pursuant to rule 2.3 of the Rules, I told the Tenant at the outset of the hearing that I would consider the dispute of the Notice and dismiss the request for an order that the Landlord provide services or facilities required by the tenancy agreement or law because this is not sufficiently related to the dispute of the Notice. The request for an order that the Landlord provide services or facilities required by the tenancy agreement or law is dismissed with leave to re-apply. This decision does not extend any time limits set out in the *Residential Tenancy Act* (the “Act”).

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence. The Agent testified that the Landlord did not receive the hearing package from the Tenant but did receive the Tenant’s evidence. The Agent said the Landlord learned of the hearing through the RTB. The Agent confirmed they were fine with proceeding on the day of the hearing and therefore I did not go into this

issue further. The Tenant confirmed receipt of the Landlord's evidence. Although the Tenant raised issues with service of the evidence, the Tenant did not point to a breach of the Rules by the Landlord in relation to service of the evidence.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered all evidence provided. In this decision, I will only refer to the evidence I find relevant to the issues before me.

### 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. The Landlord is not named as the landlord on the tenancy agreement. The Agent advised that the Landlord purchased the rental unit building in 2019 and this tenancy carried over from the prior landlord. The Tenant confirmed the tenancy agreement submitted is the only tenancy agreement they have in relation to the rental unit. The tenancy started October 08, 2006. Rent is due on the first day of each month. The parties agreed rent is currently \$520.70.

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

- ☐ 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.
  - ☒ put the landlord's property at significant risk
- ☐ Tenant's rental unit/site is provided by the employer to the employee to occupy during the term of employment and employment has ended.
- ☒ Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to damage the landlord's property
- ☒ Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the landlord.
- ☐ Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely jeopardize a lawful right or interest of another occupant or the landlord.
- ☒ Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.

The Details of Cause section of the Notice outlines issues regarding the Tenant smoking in the rental unit which causes damage and disturbs others.

The Agent acknowledged there is no term in the tenancy agreement about the Tenant not smoking in the rental unit. The Agent relied on terms 7, 12 and 16 of the agreement and term 10 of the addendum to support the grounds for the Notice.

The Agent testified that the Notice was sent to the Tenant by registered mail April 25, 2022. The Tenant testified that they received the Notice by regular mail May 05, 2022.

The Agent testified that the Tenant smokes in the rental unit and submitted that this is illegal activity.

The Agent testified that the Tenant smoking in the rental unit disturbs neighbours and that they have received many complaints from other tenants about this. The Agent testified that the Tenant smoking in the unit also disturbs the Agent when they come to the building because they can smell the smoke and it gives them a headache. The Agent testified that the Tenant has been told to stop smoking in the rental unit and has been issued warnings about this. The Agent submitted that second-hand smoke is dangerous to others' health and damages the property. The Agent submitted that smoke ruins the unit such that everything in the unit will have to be ripped out to address the damage. The Agent also submitted that smoking in the unit is a fire hazard. The Agent submitted that the Tenant smoking in the unit is affecting the quiet enjoyment of other tenants in the building. The Agent testified that potential renters do not want to rent in the building because it smells like smoke and people are leaving comments about this online which causes financial loss.

The Agent called the Witness during the hearing. The Agent advised that the Witness does plumbing and maintenance work in the building. The Witness testified that the Tenant smokes in the rental unit which has caused the ceiling and walls to yellow. The Witness testified that the building smells like smoke.

The Tenant acknowledged smoking in the rental unit and stated they have been doing so for 16 years. The Tenant testified that the unit was damaged from smoke when they moved into it. The Tenant submitted that their smoking does not disturb other tenants and that the Landlord's agents are lying. The Tenant pointed out that the Landlord's evidence from other tenants of the building does not show names or further information. The Tenant denied that their smoking bothers others or filters through vents in the building as alleged.

In reply, the Agent testified that they crossed out other tenants' information for privacy reasons. The Agent submitted that there is no evidence about there being smoke damage in the rental unit at the start of the tenancy. The Agent testified that they have put up signs in the rental unit building about not smoking inside the building.

The Landlord submitted complaint emails; however, the authors and unit number of the authors have been removed. In some instances, the year of the complaint has been removed. The only complaints that show the author are complaints from agents of the Landlord. The Landlord submitted photos of the rental unit.

### Analysis

The Notice was issued pursuant to section 47(1) of the *Act*.

The Tenant had 10 days from receipt of the Notice to dispute it pursuant to section 47(4) of the *Act*. The parties disagreed about service. However, accepting the Agent's earlier date of service of the Notice, the Tenant would be deemed to have received the Notice April 30, 2022, pursuant to section 90(a) of the *Act*. The Tenant had until May 10, 2022, to dispute the Notice. The Application was filed May 09, 2022, within time.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts are as claimed.

There is no issue the Tenant is smoking in the rental unit, the Tenant admits this. I understood the Agent to acknowledge there is no term in the tenancy agreement prohibiting the Tenant from smoking in the rental unit. Given this, the Landlord must prove that the Tenant smoking in the rental unit meets one of the grounds for the Notice.

The Agent relied on terms 7, 12 and 16 of the agreement, and term 10 of the addendum, to support the grounds for the Notice. None of these terms address smoking in the rental unit and therefore, again, the issue is whether smoking in the rental unit meets one of the grounds for the Notice.

Two of the grounds for the Notice relate to illegal activity. RTB Policy Guideline 32 explains the term "illegal activity" as follows:

The term "illegal activity" would include a serious violation of federal, provincial or

municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

The Landlord has not provided evidence that the Tenant smoking in the rental unit violates a federal, provincial or municipal law, or any statute or bylaw. There is no basis for these two grounds in the Notice.

In relation to extraordinary damage, this is a very high bar to meet. I do not accept that smoking in the rental unit, when doing so is not prohibited by the tenancy agreement, is grounds to end a tenancy based on extraordinary damage. The Tenant testified that they have been smoking in the rental unit for 16 years, since the start of the tenancy. Smoking in the rental unit was obviously permitted at the start of the tenancy otherwise the tenancy agreement would prohibit this. In my view, any damage to the rental unit caused by the Tenant smoking in it has already been done, the Tenant is not now causing extraordinary damage to the rental unit because smoking in it is less acceptable than it was 16 years ago. Smoke damage to the rental unit is the natural and expected result of allowing the Tenant to smoke in the rental unit, which the tenancy agreement does. I decline to uphold the Notice based on extraordinary damage.

In relation to the Tenant significantly interfering with or unreasonably disturbing other occupants or the Landlord, I am not satisfied the Landlord has provided sufficient evidence of this. Again, this ground is a high bar to meet given the words "significant" and "unreasonable". I place very little weight on the email complaints submitted because the Landlord has removed the names and unit numbers of the authors. In my view, the Tenant has a right to know who is making complaints against them so that they can adequately address the complaints. Further, it is difficult for me to determine the weight to give the complaints when I do not know details such as whether they are from one other tenant or multiple other tenants or from a next-door neighbour of the Tenant or someone who lives on the opposite side of the building from the Tenant. In the absence of compelling evidence from other tenants of the building, I am not satisfied the Tenant is interfering with or disturbing other tenants.

The Landlord submitted statements from agents of the Landlord. Further, both the Agent and Witness testified about the effect of the Tenant smoking in the rental unit on them. However, I do not accept that the Tenant smoking in the rental unit amounts to a *significant* interference or *unreasonable* disturbance of agents for the Landlord because these individuals do not live in the building, and I do not find the stated effects to be serious enough when the agents are only intermittently at the building for work purposes. I decline to uphold the Notice based on significant interference or unreasonable disturbance.

In relation to smoking seriously jeopardizing the health or safety or lawful right of another occupant or the Landlord, I find this is an issue the Landlord would need to submit some evidence, beyond their own testimony, about. The subjective opinion of the Agent about the health and safety affects of smoking on others is not sufficient. Given there is no compelling evidence about the health or safety affects of the Tenant smoking in the rental unit on others, I am not satisfied the Landlord has provided sufficient evidence of this ground and I decline to uphold the Notice based on it.

In relation to the grounds about safety and putting the Landlord's property at significant risk, I understood the Agent to submit that smoking in the rental unit is a fire hazard. It is not clear how smoking in a rental unit is any more dangerous than having open flames, such as candles, in the rental unit. Further, the Tenant has been smoking in the rental unit without incident for 16 years. I do not accept that the Tenant now poses a greater risk than they did at the start of the tenancy when smoking was not prohibited in the tenancy agreement. If statistics or evidence shows that there is now a greater understanding of the risk posed by smoking in a rental unit, the Landlord should have provided this to me. The Landlord has not submitted such evidence. I decline to uphold the Notice based on this ground.

I acknowledge that smoking in a rental unit is viewed differently today than it was 16 years ago. This decision is not meant to condone the Tenant smoking in the rental unit. However, if the Landlord wants to end this tenancy over the Tenant smoking in the rental unit, which is not prohibited by the tenancy agreement, then the Landlord needs to submit compelling evidence of the issues the smoking causes. It is not sufficient for the Agent to appear and make general statements about the Tenant smoking in the rental unit being a hazard or having adverse health effects on others in the building without providing some reliable and credible evidence to support this.

Given the above, I am not satisfied the Landlord has proven the grounds for the Notice. The Notice is cancelled. The tenancy will continue until otherwise ended in accordance with the *Act*.

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: September 21, 2022

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Residential Tenancy Branch