



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Pacific Cove Properties  
and [tenant name suppressed to protect privacy]

## **DECISION**

### **Introduction**

This hearing was convened in response to an application by the Tenants pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order cancelling a notice to end tenancy - Section 47; and
2. An Order for the Landlord’s compliance - Section 62.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions. The Tenants confirm receipt of the Landlord’s evidence provided by the Landlord on September 27, 2022. The Landlord confirms receipt of the Tenants’ evidence.

### **Preliminary Matter**

The Tenant states that they are seeking an order for the Landlord to have a complaint process.

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure provides that claims made in an application must be related to each other and unrelated claims may be dismissed with or without leave to reapply. As the order for compliance being sought is not related to the matter of whether the tenancy will end, I dismiss the claim with leave to reapply.

### **Issue(s) to be Decided**

Are the Tenants entitled to a cancellation of the notice to end tenancy?

### Background and Evidence

The following are agreed facts: the tenancy under written agreement started on July 1, 2020. Rent of \$1,538.00 is payable on the first day of the month. At the outset of the tenancy the Landlord collected \$775.00 as a security deposit and \$775.00 as a pet deposit. The tenancy agreement includes the following provision: "No vaping or smoking of any combustible material is permitted on the residential property, including within the rental unit." The Tenants were given a notice to end tenancy for cause dated June 17, 2022 (the "Notice"). The reasons set out on the Notice are 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 breach of a material term that was not corrected within a reasonable time after written notice to do so.

The Landlord confirms that the Landlord provides designated smoking areas on the residential property. The Landlord states that about a year ago they had a "lot of people" asking for smoking spots and that the Landlord subsequently designated areas on either end of the property for these tenants to smoke.

The Tenant states that they did not understand the reasons on the Notice. The Tenant states that they had no idea why the Notice was given until some time later. The Tenant states that while smoking in one of the designated areas the Landlord had told the Tenant that there were complaints about smoking but that the Landlord offered no details. The Tenant states that they assumed the Notice was about the Tenant smoking outside. The Landlord confirms that no details were provided on the Notice in relation to the first reason: significant interference or unreasonable disturbance.

The Landlord states that the Tenants were given caution letters about their smoking on the balcony from about a year ago and that these letters were based on 5 complaints from one tenant prior to the Notice being served. The dates of those complaints were June 28, August 30 and November 2021 and on February 21 and June 12, 2022. The Landlord states that the complaints about the use of the balcony were infrequent. The

Landlord states that since serving the Notice there have not been any complaints. The Landlord also states that they also received a complaint on June 24, 2022 after the Notice was served. The Landlord confirms that they have no evidence of the Tenants smoking inside their unit.

The Landlord states that the complaining tenant with children informed the Landlord that smoke was rising up from the Tenants' unit below and interfering with the tenant's quiet enjoyment of their deck and by having to close their balcony door to avoid the smell of second-hand smoke. The Landlord argues that although they have no supporting evidence of harm to the tenant or their children, it is common sense that second hand smoke is harmful to children. The Landlord states that another tenant who resides in the unit beside the Tenants also reported to the Landlord on one occasion that they could see smoke coming from the Tenants' balcony door. The Landlord states that this tenant did not indicate any disturbance from the smoke. The Landlord provides a photo taken July 2021 by another resident from the parking lot showing the Tenant smoking on the deck. The Landlord states that they have received smoking complaints for at least 6 other units located in the back of the building. The Tenants' unit is at the front of the building. The Landlord states that another tenant recently ended their tenancy due to a different tenant smoking on the deck below.

The Tenant states that they are not smoking on the deck and that they only smoked on the deck for about 5 or 6 days in the summer of 2021 when there was a heat wave. The Tenant argues that if the disturbance was significant or unreasonable the Landlord should have acted a year ago and that by waiting for this long it cannot be seen as unreasonable or significant. The Tenant states that there are two other units on their side that have tenants who smoke. The Tenant states that the Landlord is now accusing them of smoking in the unit however the Landlord has not inspected the unit for smoke although the Tenant told the Landlord that they could come unannounced for such an inspection and the Tenant would give them entry for the inspection. The Tenant states that they smoke in front and to the side of the building on the sidewalk

and at a distance from the building further than restricted by any bylaw. The Tenant states that between June 11 and 30, 2022, during which the last two complaints were made, another tenant was moving out of a nearby unit (one level up and one unit over) and was smoking frequently on the deck. The Tenant states that this tenant was very apologetic when informed of the Tenants' eviction notice.

The Landlord states that they did not seek to end the tenancy earlier as they had hoped to otherwise resolve the situation. The Landlord argues that the Tenants were given several opportunities to stop but ignored the caution letters.

### Analysis

Section 47(1)(h) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. Policy Guideline #8 provides 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. Given the Landlord's evidence of having created smoking areas on the residential property and as the term in the tenancy agreement restricts smoking on any part of the residential property, I find that the term in the tenancy agreement is not a material term. For this reason, I find that the Notice is not valid for breach of a material term.

Section 47(1)(d)(i) of the Act provides 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. Section 52 of the Act provides that in order to be effective, a notice to end a tenancy must be in writing and must, when given by a landlord, be in the approved form. The approved form includes a section for details to be included for the reasons in a notice to end tenancy for cause. The Landlord did not provide any details in the Notice for anything other than the breach of a

material term. Given the Tenant's evidence that they did not know why they were given the Notice and thought that it was about smoking outside the building and considering there were no details on the Notice about anything other than the material term I consider that the Notice is not effective for any other reason than the material term.

Even if the Notice were effective, given the Landlord's evidence that there were 3 complaints in 2021 and then one more in February 2022 after which the Landlord did not act to end the tenancy, I consider that there was nothing significant or unreasonable about the episodic smell of second-hand smoke until more recently when they had two complaints in June 2022. The Tenants however give persuasive evidence of the nearby tenant smoking on the deck during June 2022 and I consider this proximity, along with numerous other smokers residing in the building, to cast significant doubt on the source of the smoke being complained about. The Landlord's evidence is that there have been no complaints since June 2022. For these reasons and given the Tenants' denial of smoking on their deck since the summer of 2021 I find on a balance of probabilities that the Landlord has not substantiated that the Tenants have caused a significant interference or unreasonable disturbance that requires the end of the tenancy. The Tenants are therefore entitled to a cancellation of the Notice and the tenancy continues.

### Conclusion

The Notice is cancelled, and the tenancy continues.

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: November 16, 2022

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Residential Tenancy Branch