



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOMES  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNE-MT, FFT

### Introduction

On October 12, 2022, the Tenant filed an Application for Dispute Resolution under the *Residential Tenancy Act* ("the Act") to cancel a One-Month to End Tenancy for Cause, (the "Notice") issued on September 26, 2022, to request more time to file to dispute the Notice, and to recover the filing fee for this application. The matter was set for a conference call.

The Landlord's Agent (the "Landlord") as well as the Tenant and their Advocate (the "Tenant") attended the hearing and were each affirmed to be truthful in their testimony. The Landlord and Tenant were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this decision.

### Issues to be Decided

- Is the Tenant entitled to more time to file to dispute the Notice?
- Should the Notice issued on September 26, be cancelled?
- If not, is the Landlord entitled to an order of possession?
- Is the Tenant entitled to the recovery of the filing fee of their application?

### Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The parties testified that the tenancy began on May 1, 2016, with the Tenant currently paying rent in the amount of \$1,124.00. The parties also agreed that at the outset of the tenancy, the Tenants paid a \$497.50 security deposit. The Landlord provided a copy of the tenancy agreement into documentary evidence.

The parties agreed that the Notice to end tenancy was served to the Tenant on September 26, 2022, by posting the Notice to the front door of the rental unit. The Tenant and the Landlord provided a copy of the Notice into documentary evidence.

The reason checked off within the Notice is as follows:

- 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*
  - *Put the Landlord's property at significant risk*
- *Breached a material term of the tenancy agreement that was not corrected within a reasonable after written notice to do so.*

The Notice states that the Tenant must move out of the rental unit by November 1, 2022. The Notice informed the Tenant of the right to dispute the Notice within 10 days after receiving it. The Notice also informed the Tenant that if an application to dispute the Notice is not filed within 10 days, the Tenant is presumed to accept the Notice and must move out of the rental unit on the date set out on page one of the Notice.

The Landlord testified that they have received six complaints about the Tenant smoking in their rental unit from other residents of the rental property. They Landlord provided copies of the six written complaints from other residents dated between April 2019 to June 2021, into documentary evidence.

The Landlord testified that section 43 of the tenancy agreement is a material term prohibiting smoking in the rental unit, a term which the Tenant has accepted by initialling on the document.

Section 43 of the tenancy agreement states the following:

**“Smoking.** The tenant agrees to the following material term regarding smoking: and the use of vapor products.

- No smoking of any combustible material or use of vapor products is permitted on the residential property, including within the rental unit.”

The Landlord testified that they spoke to the Tenant several times regarding the smoking complaints in an attempt to gain compliance but that when the complaints continued, they issued a written warning on 7 June 2021 advising the Tenant that if the breach continued it would result in a notice to end tenancy. The Landlord testified that they did try to work with the Tenant for several months as they understood that the Tenant’s health condition made it difficult for them to go outside to smoke, but that the Tenant needed to respect the other residents and the conditions of their tenancy.

The Landlord testified that the smoking complaints stopped for a while but that on September 12, 2022, they received another smoking complaint and were forced to issue the Notice to end the tenancy.

Additionally, the Landlord testified that they have received three additional smoking complaints in December 2022 and that they attended the rental unit on January 4, 2023, to deliver documents to the Tenant, and personally saw the Tenant smoking inside the rental unit. The Landlord submitted three additional written dated December 21, 22 and 23 2022, into documentary evidence. The Landlord requested an order of possession to enforce their Notice to end the tenancy.

The Tenant testified that they agreed with the Landlord’s testimony and that they had been smoking in their rental unit, and they had been given a written warning to stop but that they did not think it should bother other residents. The Tenant asked if the Landlord would reconsider and give them another chance.

The Landlord declined to withdraw the Notice to end tenancy and requested again that their Notice be enforced.

During these proceedings, the Tenant asked for a move-out date of January 31, 2023. The Landlord agreed to the January 31, 2023, end of tenancy date as per the Tenant's request.

### Analysis

Based on the above, testimony and evidence, and on a balance of probabilities, I find as follows:

I accept the agreed-upon testimony of these parties that the Landlord served the Notice to End Tenancy on September 26, 2022, by attaching it to the door of the Tenant's rental unit, which is an approved method of service provided for under section 88 of the *Act*. Section 90 of the *Act* states that unless it is shown otherwise, a document served in this manner is deemed to have been received three days after the day in which the notice was posted.

#### ***When documents are considered to have been received***

**90** *A document given or served in accordance with section 88 [how to give or serve documents generally] or 89 [special rules for certain documents], unless earlier received, is deemed to be received as follows:*

- (a) if given or served by mail, on the 5th day after it is mailed;*
- (b) if given or served by fax, on the 3rd day after it is faxed;*
- (c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;*
- (d) if given or served by leaving a copy of the document in a mailbox or mail slot, on the 3rd day after it is left.*

Without evidence to the contrary, I find that the Tenant was deemed to have received the Notice on September 29, 2022.

When a tenant receives a 10-Day Notice to end tenancy the *Act* provides ten days in which the tenant may apply to dispute the Notice.

#### ***Landlord's notice: cause***

**47 (4)** *A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.*

Accordingly, I find that the Tenant had until October 10, 2022, the first business day following the expiry of the deadline, to file an application for dispute resolution to dispute the Notice. I have reviewed the Tenant's application and noted that they filed to dispute the Notice on October 12, 2022, which is 2 days after the expiry of the deadline to file to dispute the Notice.

The Tenant application includes a request for additional time to file to dispute the Notice, pursuant to section 66 of the *Act*. I have reviewed the Tenant's request and I find that their request for a two-day extension to file an application is reasonable given the Tenant's health concerns. Additionally, during the hearing, the Landlord did not object to the Tenant's request for a two-day extension to file their dispute. Therefore, I grant the Tenant's request to extend the deadline to file their application to dispute this Notice pursuant to section 66 of the *Act*.

As for the validity of the Notice, I have reviewed all of the documentary evidence and testimony before me, and I find there is sufficient evidence to prove to my satisfaction that the Tenant has breached the non-smoking material term of their tenancy agreement and that they have continued to breach this term after being given a written notice of their breach.

Specifically, I accept the Tenant's own testimony that they have repeatedly smoked in their rental unit in breach of their tenancy agreement. Therefore, I find that the Tenant has breached a material term of their tenancy agreement and has continued to breach this material term after being given a written warning of the breach. Consequently, I dismiss the Tenant's application to cancel the Notice issued on September 26, 2022.

Section 55(1) of the Act states the following:

***Order of possession for the landlord***

***55(1)*** *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 have reviewed the Notice to end tenancy, and I find the Notice complies with section 52 of the *Act*. As I have dismissed the Tenant's application, I must grant the Landlord an order of possession to the rental unit.

Therefore, I find that the Landlord is entitled to an order of possession, pursuant to section 55 of the *Act*, effective not later than 1:00 p.m. on January 31, 2023, the agreed-upon date. This order may be filed in the Supreme Court and enforced as an order of that Court. The Tenant is cautioned that costs of such enforcement are recoverable from the Tenant.

Section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Tenant has not been successful in their claim, I find that the Tenant is not entitled to the recovery of their filing fee for this application.

### Conclusion

The Tenant's application to cancel the Notice, issued September 26, 2022, is dismissed. I find the Notice is valid and complies with the *Act*.

I grant an **Order of Possession** to the Landlord effective not later than 1:00 p.m. on January 31, 2023. The Tenant must be served with this Order. Should the Tenant 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: January 12, 2023

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Residential Tenancy Branch