



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

A matter regarding AWM Alliance Real Estate Group  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC, OLC, FFT  
                             OPC, FFL

### Introduction

This hearing dealt with an application filed by both the tenant and the landlord pursuant to the Residential Tenancy Act (the “Act”):

The landlord applied for:

- an order of possession for cause pursuant to sections 47 and 55; and,
- authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- an order for the landlord to comply with the Act, the Residential Tenancy Regulation and/or tenancy agreement, pursuant to section 62;
- cancellation of the One Month Notice to End Tenancy for Cause (the “Notice”) pursuant to section 47;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

AD appeared at the hearing as agent for the landlord. BA (the “tenant”) appeared at the hearing. AG appeared as counsel for the tenant, SM appeared as the tenant’s translator and MK appeared as the tenant’s witness.

AG testified that he served the notice of dispute resolution on behalf of the tenant on the landlord by email on November 21, 2022, as was agreed upon at an expedited hearing in this matter. AD confirmed receipt of the same.

AD testified that the tenant was served with the notice of dispute resolution package and evidence on December 1, 2022, by posting it to the door of the rental unit. AD

submitted a proof of service document which details the same. The tenant testified that they did not receive the notice of dispute resolution package or evidence.

AD advised that the evidence contained with the notice of dispute resolution that was posted to the rental unit's door on December 1<sup>st</sup>, is the same evidence that was provided to the tenant for the November 21, 2022, emergency hearing in this matter. The parties agreed to proceed with the hearing.

I find that all parties have been sufficiently served with the required documents in accordance with section 71(2)(b) of the Act.

### Preliminary Matter

The tenant applied for an order for the landlord to comply with the Act, the Residential Tenancy Regulation and/or tenancy agreement, in addition to cancellation of the One Month Notice. The hearing focussed on the substantive matters and no testimony or evidence was put forward by the tenant or AG regarding this application. As a result, I have severed the tenant's application for the landlord to comply with the Act, the Residential Tenancy Regulation and/or tenancy agreement pursuant to Rule 2.3 of the RTB Rules of Procedure. The tenant has leave to reapply on this issue.

### Issues to be Decided

Should the landlord's Notice be cancelled?  
If not, is the landlord entitled to an Order of Possession?  
Are either party entitled to recover the filing fee?

### Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting June 1, 2014. Monthly rent is \$821.89 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$395.00, which the landlord continues to hold in trust for the tenant.

The landlord issued the Notice dated September 28, 2022, indicating the following reasons to end the tenancy:

- tenant has allowed and unreasonable number of occupants in the unit;
- tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
- tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord'
- tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk;
- breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

A copy of the Notice was submitted into evidence.

The tenant confirmed receipt of the Notice and filed their application for dispute resolution on October 3, 2022.

AD testified the landlord's concerns started about a year ago. He alleged there is constant smoking in the unit and stated this is disrupting the other tenants of the building. Further, he argued there is smoke coming from the unit with a number of people coming and going from the unit at all hours.

AD testified that on February 15, 2022, the tenant was issued an "official notice" regarding smoking in the unit and disrupting the enjoyment of the neighbouring residents in the building and an "official notice" regarding unauthorized occupants residing in the unit. AD testified that the issues were not resolved. Copies of the "official notices" dated February 15, 2022, were submitted into evidence.

AD testified that on September 9, 2022, the tenant was issued another "official notice" for smoking in the unit and disrupting the enjoyment of the neighbouring residents in the building. A copy of the "official notice" dated September 9<sup>th</sup>, 2022, was submitted into evidence.

AD went on to note he has submitted letters from neighbours who are disrupted by the smoking. AD testified there is a young child living next door and the parents are concerned for the child's safety.

AD testified that there was an incident on September 12, 2022, when a man entered the building with a knife and was reported to the caretaker as a possible intruder. When

questioned by the caretaker he stated he was the tenant's brother and that he was staying there for a couple of days. The male did not have keys to the suite and proceeded to use a knife to try and pry the door open. AD drew my attention to a photograph of a damaged door that is submitted into evidence. When questioned by AG, AD testified that the incident was not reported to police.

AD testified that he received two more complaints about the rental unit last week; however, he noted it was too late per the RTB Rules of Procedure to submit them into evidence.

AD testified that the Landlord served the one month notice to end tenancy for cause based on the breach of the lease. Item number 43 of the lease states that no smoking of any combustible material is permitted on the residential property, including within the rental unit.

When questioned by AG as to the alleged unreasonable number of occupants in the unit, AD testified that anywhere from four to six individuals were living in the unit. AD testified that he had not spoken to the individuals, but the building manager had. AD testified that he does not know the names of the individuals, descriptions, or the dates they were alleged to have been present in the unit. AD testified that he has not performed a recent inspection, but he believed the building manager had been in the unit a couple of weeks ago for a fire inspection. When questioned by AG, AD testified that he was unsure if there were any indications during the fire inspection that anyone other than the tenant was living in the rental unit.

The tenant testified that he is a smoker, but he does not smoke in the building. He stated that he smokes close to Tim Hortons on 15<sup>th</sup> Street. The tenant submitted that he does not have anyone else living in his rental unit and that his colleagues attend his residence daily after work to discuss the next day's work.

The tenant testified that on one occasion, he received a call from the caretaker indicating that someone was at his residence and wanted to be let in. He attended his residence and let the person in. The tenant testified that his brother does not reside in Canada. The tenant testified that on one occasion, his cousin stayed with him for a week.

MK testified that he regularly visits the tenant's rental unit. MK submitted that the tenant lives alone in the unit. MK testified that he has not witnessed the tenant or anyone else smoking in the unit.

AG argued that the burden of proof in this review is on the landlord to prove the reasons for issuing the notice. AG submitted that while some evidence has been provided, the tenant has not had the opportunity to cross examine the witnesses in order to test the veracity, credibility and reliability of their statements. On the other hand, AG submitted that the tenant and his witness have given oral evidence under oath.

Ultimately, AG argued that the landlord has not proven the elements of their claim on a balance of probabilities, and, on that basis, the Notice should be cancelled, and the tenant is entitled to recover the filing fee.

### Analysis

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities which, simply put, means what is more likely than not. In most circumstances the onus to prove their case is on the person making the claim. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

In this case, the landlord must prove on a balance of probabilities that the tenancy should be ended for the reasons identified on the Notice and pursuant to section 47 of the Act.

The parties agreed the landlord served the tenants with the landlord's notice; however, the tenant was unclear as to the date it was received by them. Despite this confusion, the tenant confirmed receipt of the notice and is found to have been served in accordance with the Act. I have corrected the effective date of the notice in accordance with section 53(2) of the Act to be November 30, 2022.

The landlord submits that the Notice was served for five reasons. However, after a consideration of the totality of the evidence before me, for the reasons as set out below I find that the landlord has not met the onus which is on them to prove their claims on a balance of probabilities.

AD testified that anywhere from four to six individuals were occupying the rental unit; however, I find his evidence vague and unconvincing on this point. AD was unable to provide names or descriptions of the individuals nor was he able to provide the dates

during which time these individuals were alleged to have been occupying the unit. Furthermore, AD testified that the building manager could speak to the allegations; however, the building manager was not present at the hearing. AD was unable to confirm if a recent fire inspection indicated anyone other than the tenant was occupying the unit, nor has the fire inspection report been submitted into evidence. Ultimately, I find the landlord has provided insufficient evidence to establish that the tenant has allowed an unreasonable number of occupants in the unit.

Furthermore, I acknowledge the allegations of smoking in the unit and documentary evidence provided in support of the same, and I accept that the landlord provided official notice to the tenant with regard to smoking. However, there is no evidence before me to indicate that any investigation took place prior to issuing the official notices nor has an inspection report been submitted into evidence to support the claim of smoking within the rental unit. Moreover, I find it significant that the building manager was not present at the hearing to speak to their written evidence or face cross examination by the tenant. I find the written allegations of the building manager and other residents alone are insufficient when weighed against the sworn testimony of the tenant and MK indicating that there is no smoking in the unit. Ultimately, I find there is insufficient evidence before me to cause me to conclude on a balance of probabilities that the tenant smokes in their unit or that by doing so, they have significantly interfered with or unreasonably disturbed another occupant or the landlord or jeopardized the health or safety or lawful right of another occupant of the landlord.

Given that I find there is insufficient evidence before me that the tenant smokes in their unit, I am not satisfied that by doing so, the tenant has put the property at significant risk. Furthermore, while I acknowledge the incident of September 12<sup>th</sup>, 2022. I find that there is nothing before me to support that there is an ongoing risk to the landlord's property based on this single incident.

Finally, I acknowledge that smoking in the unit is a breach of a material term of the tenancy agreement. However, as previously stated, I am not satisfied that the landlord has provided sufficient evidence for me to conclude that the tenant smokes in their unit. Ultimately, while I caution the tenant that smoking in the unit is a breach of a material term that could lead to termination of the tenancy, I am not satisfied in this instance that the landlord has proven on a balance of probabilities that the tenant has breached this material term of the tenancy.

Ultimately, I conclude the landlord has not met the evidentiary burden which is upon them to prove on a balance of probabilities the reasons indicated on the Notice to end the tenancy. Accordingly, the Notice is cancelled and of no force or effect.

As the tenant was successful in this application, pursuant to section 72(2)(a) the tenants are authorized to deduct \$100.00 from a future rent payment on one occasion to recover their filing fee.

### Conclusion

The Notice dated September 28, 2022, is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

I order the tenant to withhold \$100.00 from a future rent on **ONE** occasion.

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: February 16, 2023

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Residential Tenancy Branch