



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      SS MNDC O FF

### Introduction

This hearing dealt with applications under the *Residential Tenancy Act* ("the *Act*") from the landlord and one of two tenants who are party to the residential tenancy agreement for this tenancy.

The landlord applied for an 'other' remedy or compensation under the *Act* outlining the details of his response to the tenant's claim. The landlord did not specify in his application or at the hearing what remedy he sought. He also applied to recover the filing fee for his application from the tenant pursuant to section 72.

Tenant JS applied for a monetary order for damage or loss pursuant to section as well as to recover his filing fee for this application from the landlord. Tenant JS also applied for an order allowing substituted service in his original application. Tenant JS withdrew this portion of his application, explaining that this order was not required.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. Both parties confirmed receipt of the other party's materials for this hearing. A second tenant (co-tenant JH) not named in either application was present for the entirety of this hearing.

### Issue(s) to be Decided

Is Tenant JS entitled to a monetary order for loss as a result of this tenancy?

Is Tenant JS entitled to recovery of his filing fee?

Is the landlord entitled to recovery of his filing fee for this application from Tenant JS?

### Background and Evidence

This tenancy began on January 1, 2015. Both parties testified that the rental amount of \$2395.00 is payable on the first of each month. A copy of the tenancy agreement was submitted by the landlord.

Tenant JS made an application for a \$1200.00 monetary order against the landlord. He testified that, as a result of construction work, his (and his co-tenant's) quiet enjoyment were disturbed on an ongoing and continuing basis. In his written application, Tenant JS stated, "we experienced inconvenience with commercial drilling". Tenant JS wrote that construction noise lasted throughout the day. In his documentary evidence, Tenant JS provided a copy of email correspondence with the landlords indicating that, starting February 2, 2015, he complained to the landlord of nearby construction (drilling) sounds and that his co-tenant was awoken almost daily at 7:30 a.m. as a result of the noise.

Both parties described the rental unit as an urban apartment-type condominium building that is located above commercial properties in a downtown area. The landlord testified, providing supporting documents that the building was a concrete building built in 2009. Other documents and testimony of all parties showed that this building was under renovation at the start of this tenancy. Tenant JS testified that, on renting the unit, he was not advised by the landlord of any scheduled construction in the building. Tenant JS also testified that, while the tenants were supposed to have access to a gym, work on that area of the premises had been ongoing and therefore not available during the majority of their tenancy. The landlord acknowledged this issue as legitimate.

Tenant JS testified that, as a result of construction activity (particularly drilling/coring), he and his co-tenant have not been able to sleep the hours they require, watch and hear the television or have guests over. He testified that, from February 2, 2015 and for at least the entire month of February 2015, there were disturbing and disruptive construction noises that have adversely affected his tenancy, his sleep, his employment, his social life and his quiet enjoyment of the rental unit.

Tenant JH (co-tenant) also testified that his sleep has been adversely affected by this drilling/coring and construction work. Tenant JH testified that the work and the associated noise began in early February 2015 and that it continues to the date of this hearing. He testified that he could hear construction during the course of this teleconference. He also testified that he and Tenant JS work evening shifts at a very demanding job and that it has been very difficult to deal with the construction sounds in the daytime when they are trying to sleep. Tenant JH testified that he and Tenant JS could not have guests over because of the constant noise and disruption. He testified that his productivity at work has been affected by this noise. In his testimony, Tenant JH stated that, for "at least one month, there was quite vigorous noise and activity".

The landlord submitted a copy of the tenant JH's initial email dated February 2, 2015 at 7:53 p.m. regarding this issue focussed around the lack of notice. He stated,

“This morning I was awoken by loud jack-hammering on what sounded like the floor above ... Not everyone works a 9AM to 5PM schedule... No notice was given....I later found out when walking past the elevators to discover a posted sign... This... has greatly affected my schedule... I realize work has to be done but those people in charge must do a better job of informing residents.”.”

The landlord submitted documentary materials as evidence for this hearing. He provided documents from the strata corporation and property management confirming that signs were posted to notify tenants of the drilling/coring work the same day that management were notified of the work by the construction group, February 2, 2015. That correspondence from the construction company to the property management stated that the coring/drilling would occur on February 3, 2015 and February 4, 2014.

The landlord also submitted correspondence with the strata council that there were some “minor issues” while construction was occurring but that “the drilling noises were short-lived and signs were put up letting tenants know that this was a temporary issue.” The landlord testified that he is a member of strata council and that he attended the meetings regularly. He testified that he raised the issue of drilling noise with the strata as soon as it was brought to his attention by the tenants. He also testified that, at the strata meetings, there was no mention of other tenant complaints. He provided copies of the strata meeting minutes from March 18, 2015. He testified that this was the first meeting after the drilling began. There were no tenant complaints noted on this issue while other tenant complaints were recorded in the minutes.

The landlord submitted email correspondence from the construction company representative to the strata corporation dated February 2, 2015 advising that drilling would occur the following day. In a separate email, that representative of the construction company also wrote directly to the landlord in response to his inquiries that the coring occurred over February 3 and February 4, 2015.

The landlord testified, supported by email correspondence from members of the property management team and strata council, that the commercial units are on the lower/bottom floors of the building and that drilling took place in the parkade area. The landlord testified, confirmed by the tenants, that the tenants reside on the seventh floor of this building.

The landlord testified that the current tenants have created a variety of problems affecting the other occupants and the strata and property management as a result of their actions within the residential premises. He provided testimony and evidence showing that the landlord incurred a strata bylaw fine of \$200.00 after the tenants used

the common room and left damage after an organized gathering. The landlord provided evidence that the tenants have been repeatedly cautioned by the strata for improper use of their parking stall as storage. The landlord provided an email from the property management and strata council. That email responded to the landlord's inquiries about the drilling noise at the residence and the tenants' concerns. The writer of that email implored the landlord to encourage the tenants to treat the residential premises with respect.

The landlord also claims that any evidence that is provided by the tenants has been altered and modified. He points to the digital evidence supplied by the tenants – recordings that were submitted for evidence at this hearing. He notes that the digital display on the recording submitted show “modifications” in April 2015, well after the time when the tenants claimed they suffered the effects of the construction noise. The landlord submits that the tenants have exaggerated their claim in order to offset other bad acts by the tenants over the course of this tenancy. The landlord provided some evidence to show a lack of veracity of statements made by Tenant JS at the outset of the tenancy.

### Analysis

Tenant JS relies on section 28(b) of the *Act*: a tenant's right to quiet enjoyment.

**28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Tenant JS submitted that the landlord is ultimately responsible for his lack of quiet enjoyment. Residential Tenancy Policy Guideline No. 6 explains “quiet enjoyment”,

At common law, the covenant of quiet enjoyment “promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of

quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy. **(emphasis added)**

Examples of an interference with quiet enjoyment are given within Policy Guideline No. 6. They include but are not limited to unreasonable and ongoing noise; persecution and intimidation; and allowing the property to fall into disrepair so the tenant cannot safely continue to live there". **When actions or inactions of the landlord result in temporary discomfort or inconvenience, this does not constitute a breach of the tenant's right to quiet enjoyment.**

If the landlord failed to take reasonable steps that lead to a significant or substantial interference of the tenants, this would constitute a breach of the tenant's right to quiet enjoyment. The standard would be whether the interference was significant enough to warrant an end to the tenancy, regardless of whether the tenants chose to vacate the rental unit. However, a landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of the interference and failed to act reasonably.

The tenant's right is a right to freedom from serious interference with his tenancy. In relation to this characterization, I note the language used by both tenants in describing the interference experienced as a result of construction noise:

- Tenant JS stated in his application for dispute resolution that, "we experienced inconvenience with commercial drilling..."; and
- Tenant JH testified at the hearing that the noise was "quite vigorous".

The Tenant JS made an application and a claim that the landlord both by failing to notify him of the upcoming construction and by failing to act reasonably in addressing the tenant's issue, has caused him (and his co-tenant) loss of quiet enjoyment. As this is the tenant's application, it is his burden to show that loss through evidence submitted to the arbitrator. There is no evidence that the landlord was involved in or even of aware of the construction work (particularly drilling/coring by a third, outside party) prior to its start. There is evidence that, when advised by his tenants of the construction work, particularly the complaints regarding drilling, the landlord acted as soon as practicable and investigated thoroughly.

The tenants both testified that the noise affected their sleep and that they were particularly vulnerable due to their work hours. However, in their testimony and correspondence with regarding this issue, Tenant JS acknowledges that their sleep hours are general work/labour hours. Neither tenant provided proof with respect impact

on their work or health. There is also no corroborating evidence provided by the tenants to support their testimony and claim that their social life was impacted.

Tenant JS relied mainly on his own testimony and the testimony of his co-tenant, Tenant JH. The tenants submitted some digital evidence. I do not find that there is sufficient evidence to prove the timeframe and veracity of the digital evidence, particularly given the submissions by the landlord regarding the digital evidence and markings referring to modification. Tenant JS has not provided any further evidence in the form of corroboration of the significant and interfering construction noise from other neighbours. The landlord provided testimony, with some corroboration from his documentary evidence, that there were no (or at worst, very minimal) other complaints regarding the drilling.

Given the conflicting testimony regarding the substantial issue regarding the length of the construction drilling/coring, an initial determination regarding this impetus for any loss of quiet enjoyment hinges on a determination of credibility. In addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other evidence provided.

The landlord's demeanor during the hearing has convinced me of his credibility. He answered all questions asked of him in a calm and candid manner, and never wavered in his version of events. The landlord provided undisputed testimony and corroborating evidence with respect to other areas of this tenancy, including the fact that tenants had violated strata bylaws on more than one occasion. The landlord also made some important admissions, including the fact that there is a lack of provision of some common amenities to the tenants at this time.

Unlike the evidence of the landlord, the tenant's evidence lacked documentary and corroborating support. I have considered the credibility of both party's testimony as well as the corroborating evidence provided to support their testimony. The burden of proof falls to the tenant to show that he has suffered a serious loss of quiet enjoyment. I accept the landlord's testimony regarding his lack of foreknowledge of the construction and the steps he took to address it when he became aware. I also accept his evidence regarding the temporary and fleeting nature of this inconvenience to the tenants and the notice that they were provided within the residential premises. I note that the landlord provided documentary evidence sufficient to rebut the tenant's claim that they suffered a loss of quiet enjoyment in a significant way as a result of the constructions sounds over 6 floors below. I give the landlord's rebutting evidence strong weight and note that some of the submissions at this hearing affected the credibility of Tenant JS.

I find that the tenant has provided insufficient evidence to establish on a balance of probabilities that his quiet enjoyment was significantly or substantially affected. I find that the tenant has provided insufficient evidence to determine the particulars of any loss beyond temporary annoyance or inconvenience. The tenants reside in an urban area, under recent construction when they rented with commercial units incomplete below them. I dismiss the tenant's application for a monetary award.

As the tenant has been unsuccessful in his claim, I do not find he is entitled to recover his filing fee.

I note that the landlord sought to recover his filing fee for his own application. However, I also note that his filed application only responded, successfully rebutting the tenant's application and that the landlord sought no remedy of his own. Therefore, I do not find that he is entitled to recover his filing fee for this application.

### Conclusion

Tenant JS sought to withdraw the portion of his application relating to substituted service. That portion of his application is withdrawn.

I dismiss the tenant's application for a monetary award in its entirety without leave to reapply, including the recovery of any filling fee.

I dismiss the landlord's application in its entirety without leave to reapply including the recovery of his 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 *Residential Tenancy Act*.

Dated: September 22, 2015

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Residential Tenancy Branch

