



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding LACERTE MANAGEMENT  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNC FF

### Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenant on January 4, 2017. The Tenant filed seeking an order to cancel a 1 Month Notice to end tenancy for cause and to recover the cost of the filing fee.

The hearing was conducted via teleconference and was attended by the Landlord; the Tenant; and the Landlord's witness (the Witness). Each person gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

Each person acknowledged receipt of the evidence submitted by the other and no issues regarding service or receipt of those documents were raised. As such, I accepted the relevant submissions from both parties as evidence for these proceedings.

Each person was provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

### Issue(s) to be Decided

1. Should the 1 Month Notice issued December 31, 2016 be upheld or cancelled?

### Background and Evidence

The parties entered into a written month to month tenancy agreement which commenced on February 1, 2016. Rent began at \$2,000.00 payable on the first of each month and was increased to \$2,074.00 effective February 1, 2017. On January 31, 2016 the Tenant paid \$950.00 as the security deposit.

The rental unit was described as originally being a 3 level single detached home built in approximately 1945. The Landlord completed two renovations on the property to bring it

up to code to be an upper / lower duplex. The Landlord stated those renovations included sound proofing between the floors which was required by code. The Tenant resided in the upper level which had three bedrooms. The lower duplex was two levels with 7 bedrooms and was rented by a different tenant who housed students.

This Tenant used to live in the house next door in a unit directly above the Landlord. When that house sold the Landlord offered the Tenant the vacant upper level of the current rental unit. I heard the Landlord state that he discussed this with the lower tenant to seek her approval to have a family with three small children move directly above her rental unit, to which she agreed.

The Landlord received complaints about noise from the lower tenant on February 14, 2016; March 2, 2016; July 21, 2016; and December 15, 2016. The Landlord discussed the complaints with the Tenant and then on March 3, 2016 he served the Tenant with a written warning.

The Landlord stated that he attempted to find a solution to resolve the problem and when he did not see the situation improving, he personally served the Tenant with a notice to end tenancy on December 31, 2016.

The 1 Month Notice was issued pursuant to Section 47(1) of the Act listing an effective date of January 31, 2017 for the following reasons:

- Tenant or a person permitted on the property by the tenant has:
  - Significantly interfered with or unreasonably disturbed another occupant or the landlord
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

The Landlord testified the first reason listed on the Notice related to the noise complaints he had been receiving from the lower tenant, as supported by the written complaint submitted into evidence. He said the second reason related to a term in the tenancy agreement which stipulated the Tenant was required to maintain quiet between 9:00 p.m. and 9:00 a.m. and was not to disturb other occupants.

The Tenant testified she occupied the rental unit with her three children aged 8, 5, and 3. She disputed the Witness' written complaint arguing that her children are not home every day all day long so the noise could not be happening as described in that document. The Tenant stated her 5 and 8 year old are in school and her 3 year old goes to preschool.

The Tenant submitted her children are in bed between 7:30 p.m. - 8:00 p.m. and are up early by 7:30 a.m. so they can get to school on time. On the weekends they usually sleep in until 8:00 a.m. and then she has them watch a show for about an hour. She

argued they are outside a lot of the time; are at the beach in the summer; and when the weather is good they play outside or at their friend's homes.

The Tenant noted the month's when the lower tenant complained was shortly after they moved in and went through a family separation during the spring; during the summer time; and again at Christmas. She noted that all of those times were holiday times when the children would be around more often because school and pre-school would be closed.

The Tenant asserted the Landlord is trying to evict her to make it easier for him to sell his house, since he listed it for sale last summer. Also, she noted that the downstairs tenant is mostly concerned about students that she is getting money to house and that they too have to learn to live with other people.

The Tenant argued she does not allow her children to run and jump continuously throughout the house. She has purchased rugs for them to play on and they are respectful that there are other people living in the same house.

The Witness was called in to the hearing and testified that most of the time the noise is "unbearable". She stated that one morning the children were jumping so hard at 8:00 a.m. the stipple fell off of the ceiling in one of the bedrooms.

The Witness stated she is home every day and she has heard the kids ride their "ride on" toys inside the house. After being questioned by the Tenant the Witness confirmed she had not been keeping a list of the dates, times, and type of noises she had been hearing.

The Witness argued the children are causing noise that is disrespectful of the lower occupants and can be heard two floors below them. She noted there were hardwood floors which could be part of the cause of the noise.

The Tenant disputed these submissions and argued her children could not be heard two floors down. She confirmed that her child fell out of bed one night and was crying in the middle of that night because he banged his head. She also confirmed that her three year old does run from time to time; however, when her children do begin to run or throw tantrums she deals with it immediately and does not let it carry on indefinitely. She argued that is how children behave from time to time.

I heard the Landlord state that he had listed the house for sale and there were no current offers on the house. He submitted that he had not conducted an investigation and had not been at the rental unit during any period when there was noise. He stated that he had asked the Witness to call him when the noise was happening; however, there was no opportunity for him to be there during the noise because he was told the noise stops quickly and can be inconsistent.

## Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Upon review of the 1 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the *Act* and I find that it was served upon the Tenant in a manner that complies with section 89 of the *Act*.

Where a Notice to End Tenancy comes under dispute, the Landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice. Where more than one reason is indicated on the Notice the Landlord need only prove one of the reasons.

When tenants occupy a multi-unit wood framed building with hardwood floors there are normal sounds or noises that are generated from day to day living which can be heard throughout the building at all hours of the day or night; which all tenants have to deal with. There is also an expectation that tenants compromise when other tenants have family and or friend celebration(s) occasionally, around birthdays, or holidays.

The *Act* stipulates a tenant, meaning all tenants, are entitled to freedom from unreasonable disturbance. Neither the *Act*, nor the Regulations, nor the Residential Tenancy Policy Guideline 6: *Right to Quite Enjoyment*, define the terms “unreasonable disturbance”.

Without a formal test for determining an unreasonable disturbance I have turned to a reasonable persons test in determining that noises generated from the normal day to day living such as walking on floors; opening and closing of doors; alarms used to wake occupants; music or televisions at reasonable volume levels during reasonable hours of the day and evening; children playing; and voices at normal volumes when guests are visiting; are defined as being reasonable disturbances.

Regarding the first reason listed on the Notice, I find the Landlord submitted insufficient evidence to prove the Tenant or her children have significantly interfered with or unreasonably disturbed another occupant or the landlord. I make this finding in part as the Landlord confirmed the noise, when it does happen, stops quickly and can be inconsistent. The aforementioned supports the Tenant’s submissions that when her children do begin to run or throw tantrums she deals with it immediately and does not let it carry on indefinitely.

The evidence also supports that the noise, when it does happen, occurs during the day time hours, between 7:30 a.m. and 8:00 p.m., and occurs more often during vacation periods when the children are not at school or pre-school, based on the timing of the

complaints. I accept the Tenant's submissions that the Witness's description of the noises happening "all day long" to be inaccurate. Rather, I accept that the evidence supports the children are absent from the home, during the day, while attending school and preschool. The type or amount of noise, based on the evidence before me, is not considered to be unreasonable when considering there are three children aged 3, 5, and 8 living in the suit. Furthermore, there was no evidence submitted as to the reason why the rental unit had been vacated prior to this Tenant moving in. Accordingly, the Notice must fail on this ground.

I favored the Tenant's submissions over the Landlord's regarding the issue relating to a breach of a material term of the tenancy agreement. 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. Case law has determined that the mere presence of a term in an agreement does not make it a material term.

In addition, when considering that the Landlord has had this property listed for sale for several months without a confirmed offer, I find it presumptuously suspicious that the Landlord requested the Witness submit the written complaint, which was dated December 15, 2016. This lends to the credibility of the Tenant's argument that it would be easier for the Landlord to sell the house if she vacated.

In absence of a copy of the written tenancy agreement before me, and after finding the amount of noise was not unreasonable, I find there was insufficient evidence to prove the Tenant was in breach of a material term of the tenancy. While I accept there was evidence that the children wake at 7:30 a.m. to prepare to leave for school and pre-school, there was insufficient evidence to prove the children were making excessive or unreasonable noise every morning or after 9:00 p.m. As such the Notice must fail on this ground as well.

Based on the above, I find in favor of the Tenant's application and I order the 1 Month Notice issued December 31, 2016 to be cancelled. This tenancy will continue until such time as it is ended in accordance with the Act.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenant has succeeded with their application; therefore, I award recovery of the filing fee in the amount of **\$100.00**, pursuant to section 72(1) of the Act.

The parties are reminded of the provisions of section 72(2)(a) of the Act, which authorizes a tenant to reduce their rent payments by any amount the director orders a landlord to pay to a tenant, which in these circumstances is \$100.00.

Conclusion

The Tenant was successful with her application and the 1 Month Notice issued December 31, 2016 was cancelled. The Tenant was awarded recovery of her filing fee and may deduct the \$100.00 off of her next rent payment.

This decision is final, legally binding, and 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 09, 2017

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Residential Tenancy Branch