



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      CNC OPR

### Introduction

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* (“the Act”) for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause (“1 Month Notice”) pursuant to section 47 *Act*.

An application by the landlord pursuant to section 46 of the *Act* was heard in conjunction with the above noted matter. This application by the landlord sought:

- an Order of Possession for non-payment of rent.

Both the landlord and the tenant attended the hearing. The landlord was represented at the hearing by building manager, R.H. (the “landlord”). All parties present were given a full opportunity to be heard, to present their sworn testimony and to make submissions under oath.

The landlord stated that a 1 Month Notice to End Tenancy for Cause (“1 Month Notice”) was posted on the tenant’s door on March 31, 2017. The tenant confirmed receipt of this 1 Month Notice and the landlord’s evidentiary package. Pursuant to section 88 of the *Act* the tenant is found to have been served with the landlord’s 1 Month Notice and evidentiary package.

The landlord provided further testimony that a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (“10 Day Notice”) was posted on the tenant’s door on April 5, 2017. The tenant acknowledged receipt of this notice. Pursuant to section 88 of the *Act* the tenant is found to have been served with the landlord’s 10 Day Notice.

The landlord confirmed receipt of the Tenant’s Application for Dispute Resolution package (“Tenant’s Application”) disputing the 1 Month Notice. In accordance with

section 89 of the *Act*, I find that the landlord was duly served with the tenant's Application.

I discovered a Monetary Order for \$5,000.00 included with the tenant's application. The tenant appeared to have requested this Monetary Order on April 24, 2017. This application does not include the name of the applicant or agent and is therefore incomplete. No evidence was produced during the course of the hearing as to whether or not this was served on the landlord in accordance with the *Act*. In addition, no testimony was presented by either side concerning this matter. This matter will therefore not be considered as part of the issues properly before me at this hearing.

#### Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?

#### Background and Evidence

Testimony was provided by the landlord that this tenancy began on June 1, 1993. Rent is \$1,005.00 per month and a security deposit of \$345.00 continues to be held by the landlord.

On March 31, 2017 a 1 Month Notice was placed on the tenant's door. The landlord explained that a 1 Month Notice was issued to the tenant for two reasons:

*The tenant has:*

- i) significantly interfered with or unreasonably disturbed another occupant or the landlord; and
- ii) significantly jeopardized the health or safety or lawful right or another occupant or the landlord.

The landlord explained that on February 24, 2017, the parties appeared at a hearing before the *Residential Tenancy Branch*. At this hearing, the parties reached a settlement agreement whereby the landlord agreed to withdraw a 1 Month Notice issued on January 24, 2017 and the tenant agreed to "continue to make every reasonable effort to not unreasonably disturb the tenant(s) in unit #XYZ which is directly below his rental unit or any other occupant or the landlord."

On March 27, 2017, the landlord wrote a letter to the tenant advising him of the terms of the settlement agreement. This letter also explained that the landlord had received

noise complaints on February 25, 26, March 2, 25 & 26, 2017 for “noise [you had] created [through] loud banging and thumping in the early morning hours.” This letter continued by stating, “I called you on March 23<sup>rd</sup> and talk (sic) with you on the phone regarding this noise issue and although you stated it was not you it continues.”

On March 29, 2017, the tenant responded to this letter explaining that the noise in question did not originate in his apartment and that on the night of March 25, 2017 he in fact, slept on the couch. This letter continued by noting that he had a friend staying with him on the night of March 26, 2017 and that this friend did not recall hearing any noise being caused by the tenant. A letter from this friend was submitted to the hearing as part of the tenant’s evidentiary package confirming this account of events.

In his March 29, 2017 email to the landlord, the tenant described himself hearing loud noises on the evenings of March 17 and 26, 2017. He wrote, “Just to let you know that noise is not coming from my apartment...I told J [M] that at about 12:30 am, the pipes in the outside wall in my bedroom made such a huge cracking sound that I thought the window below blew out. Then, at approximately 3 – 3:30am, I heard a big cracking sound coming from in between my bedroom floor and the floor below me.” This email continued to describe the noise from March 26, 2017 noting, “I also heard noises that night...I also heard a sliding glass door opening and closing along with what sounded like a chair or something being dragged back and forth on the outside deck, and remember this was in the early morning 2 – 3:30am.”

Testimony was presented by, T.G., the person living below the tenant, that despite this settlement agreement, he continued to suffer the effects of loud noise emanating from the tenant’s apartment above. T.G. testified that this noise was not of a nature which would be heard by the other occupants of the building, saying, “This isn’t noise neighbours would hear.” T.G. explained that the noise did not originate from speaking/yelling, a loud television or from music, but rather was the result of dead weight being moved around above him. T.G. described the noise as “living below an elephant” and said, “It sounds like dumbbells are being dropped.” T.G. confirmed that this building was older in nature and was built with a wood frame.

When asked about the frequency of this noise, T.G. stated that it would occur throughout the day, on weekends, and often early in the morning around approximately 5:00 A.M. T.G. described reaching a “breaking point” after three occasions. The first of these events occurred towards the end of November or early December when a light fixture fell from his ceiling as a result of a loud noise. The second incident occurred in January when constant noise could be heard through the night. The third incident occurred shortly after the settlement was reached when the tenant and T.G. got into an

altercation following T.G. complaining to the Resident Caretaker J.M. This final incident was acknowledged by both parties to have taken place on the night of the Super Bowl, February 5, 2017.

T.G. reported having suffered greatly from this noise as a result of lost sleep. T.G. stated that he missed work on one occasion because of the noise and accompanying lack of sleep.

The tenant denies making any noise described by T.G. The tenant acknowledged that an incident as described above occurred on one occasion when he did direct his frustrations towards T.G. As part of the tenant's evidentiary package, the advocate provided letters of support from the tenant's neighbours directly across the hall from him and next to him. A third letter was produced by a person living on the same floor as the tenant, and a fourth letter was written by a person who had spent an evening in the apartment with the tenant. All of these letters speak to the quiet nature of the tenant. Included with these letters of support was a DVD demonstrating the nature of the noise emanating from the tenant's bed. The video demonstrated the tenant making significant efforts to create noise while he occupied his bed. This video did not demonstrate any noise similar to that described by T.G.

Resident Caretaker, J.M. argued that the nature of the noise was such that the tenant's surrounding neighbours would not be disturbed. She argued that because the noise was originating from a unit above, it was reasonable to conclude that only the person below would be affected by these disturbances.

In addition to this 1 Month Notice, a further Notice to End Tenancy was issued to the tenant in April 2017. The landlord stated that he issued a 10 Day Notice to the tenant because the tenant had failed to pay rent for the month of April 2017. The landlord continued explaining that on April 18, 2017 rent was paid in its entirety and a receipt was given for "payment on account."

#### Analysis – 10 Day Notice

The landlord testified that he sought an Order of Possession for unpaid rent for the month of April 2017. The landlord explained that the tenant paid this rent in full on April 18, 2017 when it was received as rent and the tenant was issued a receipt stating, "receipt given for payment on account." In accepting these outstanding funds as rent, the question to be determined is whether the landlord has waived his right to enforce the 10 Day Notice and has continued the tenancy.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

*A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.*

*If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:*

- whether the receipt shows the money was received for use and occupation only*
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- the conduct of the parties.*

*There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.*

It was undisputed that the tenant failed to pay the outstanding rent due on April 1, 2017, within five days of receiving the 10 Day Notice. The tenant was deemed to have received the 10 Day Notice on April 8, 2017, and he made a rent payment for April 2017 on April 18, 2017. I find that the landlord's accepting full rent payment for the month of April 2017 to be a waiver of the 10 Day Notice. The landlord failed to provide any evidence that the landlord specifically informed the tenant that the April 2017 rent payments were being accepted for "use and occupancy only."

I find that the tenant relied on the landlord's accepting the April 2017 rent payment without issuing any receipts or verbal notifications that the rent was being accepted for "use and occupancy only" as a continuation of the tenancy.

For the above reasons, and given the conduct of the parties, I find that the landlord waived his rights to pursue an Order of Possession based on the 10 Day Notice. I find that the landlord reinstated this tenancy by accepting full rent payment from the tenant after the effective date of the 10 Day Notice of April 15, 2017.

I dismiss the landlord's application for an order of possession based on the landlord's 10 Day Notice, dated April 5, 2017. The landlord's 10 Day Notice, dated April 5, 2017, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

#### Analysis – 1 Month Notice

The tenant has applied to dispute a 1 Month Notice issued to him by the landlord for cause. Specifically, the landlord has alleged that the tenant has been creating a large amount of noise that has significantly interfered with another occupant of the building and has seriously jeopardized the health and safety of another occupant.

Section 47(d) of the *Act* states that a tenancy may be ended when the tenant...has significantly interfered with or unreasonably disturbed another occupant and seriously jeopardized the health or safety or a lawful right or interest of another occupant.

Based on the testimony presented at the hearing, it is evident that occupant T.G. has suffered from a disruption as a result of noises in the building. The tenant has denied having any part of this disruption and produced documentary evidence to support the quiet nature of his tenancy. In addition, the tenant himself explained in a letter submitted to the hearing as part of his evidentiary package that he too, has heard significant noises in the building.

The question is therefore whether or not these purported incidents can be classified as being of "significant" or "unreasonable" in nature, and whether they seriously jeopardized the health and safety of T.G. When a tenant applies to cancel a notice to end tenancy, the burden shifts to the landlord to justify the notice and the end of tenancy based on the grounds supplied. In this case, the landlord is relying on the testimony of a single occupant of the rental building. While a settlement agreement was reached between the parties in February 2017, this agreement notes "The tenant agrees to continue to make every reasonable effort to not unreasonably disturb the tenant...directly below his rental unit."

Testimony presented by occupant T.G. indicated that noise exists in the building. Little evidence was presented demonstrating that the tenant has not taken *every reasonable effort to not unreasonably disturb the tenant directly below his rental unit*. I found the DVD demonstrating the tenant attempting to, and failing to make noise on his bed to be very persuasive. In addition, the tenant has by all other accounts been very quiet and respectful of the other occupants in the building. A neighbour who shares a wall and a terrace with the tenant wrote a letter stating, "I have never once been disturbed by him or been made aware of neither his presence nor activities at home."

Finally, both the tenant and occupant T.G. acknowledge that the building in question is an older, wood framed building. It is inevitable that a building built in a different era would most likely have been constructed to a different standard. The tenant himself stated that he too has heard inexplicable noises seeming to originate from the walls and the window seals.

Turning my attention to the second reason cited by the landlord for an Order of Possession, I must examine whether the tenant has seriously jeopardized the health or safety or a lawful right or interest of another occupant.

During the hearing, occupant T.G. explained that he has felt harassed by the tenant after having complained numerous times to the landlord concerning these noises. T.G. stated that an incident occurred on February 5, 2017 where the tenant yelled off his balcony and made efforts to stomp on his floor to create a disturbance. In addition, T.G. testified that he has lost a large amount of sleep and some work because of the constant "elephant-like" noise originating above him.

While I am sympathetic to the living situation in which T.G. finds himself, little evidence was presented at the hearing other than his testimony, demonstrating that T.G. has faced a situation where his health and safety were seriously jeopardized. The tenant has never threatened T.G. and, apart from an incident that occurred on February 5, 2017, no evidence was presented that the tenant has made any overt attempts to disturb T.G. Finally, all of the factors cited by T.G. in his list of "breaking points" occurred prior to the Settlement Agreement reached on February 24, 2017 between the landlord and the tenant.

I find that the landlord has failed to demonstrate that the tenant has significantly interfered with or unreasonably disturbed another occupant in the building. Furthermore, the tenant's actions have not seriously jeopardized the health and safety of another occupant.

The tenant is reminded that this decision does not affect the outcome of the settlement agreement of February 24, 2017. He must continue to make every effort to not disturb any persons in the rental building.

### Conclusion

The landlord's application for an Order of Possession for unpaid rent is dismissed.

The tenant's application to cancel the 1 Month Notice is allowed. The Notice is of no continuing force or effect. This tenancy continues until ended in accordance with the *Act*.

As noted above, there was no monetary aspect to the tenant's application properly before me, so I have not considered that matter as part of this hearing.

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: May 16, 2017

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Residential Tenancy Branch