



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      MNDC; OLC; O

### **Introduction**

This is the Tenant's Application for Dispute Resolution, made March 15, 2017, seeking compensation for damage or loss under the Act, regulation or tenancy agreement; an Order that the Landlord comply with the Act, regulation or tenancy agreement; and other unspecified order(s).

The Landlord, EY, the Tenant and the Tenant's witness gave affirmed testimony at the Hearing.

It was established that the Tenant served the Landlord with the Notice of Hearing, a copy of her Application for Dispute Resolution and documentary evidence by registered mail sent on March 17, 2017. The Tenant also served the Landlord with electronic evidence, by registered mail, which the Landlord acknowledged receiving on April 3, 2017.

It was established that the Landlord's son EY served the Tenant with the Landlord's binder of documentary evidence which included 127 pages, by handing the documents to the Tenant at the rental unit on or about April 7, 2017.

At the outset of the Hearing, the Tenant sought an adjournment in order to rebut some of the Landlord's documentary evidence; however, she later withdrew her application for an adjournment. The Tenant was invited to provide her rebuttal by way of oral testimony and stated that she realized the evidentiary value was reduced.

### **Issue(s) to be Decided**

Is the Tenant entitled to compensation for loss of quiet enjoyment of the rental unit and loss of essential services?

Should the Landlord be ordered to comply with the Act, regulation or tenancy agreement?

### **Background and Evidence**

Both parties gave extensive evidence, in oral and documentary form, during this Hearing, which lasted 3 hours. In this Decision, I have recorded only the relevant evidence.

A copy of the tenancy agreement was provided in evidence. This tenancy began on March 1, 2016. Monthly rent is \$1,750.00, due on the first day of each month. In addition, the Tenant is responsible for 75% of the gas and electricity bill. Cable and internet are the Tenant's responsibility. The Tenant paid a security deposit in the amount of \$875.00 and a pet damage deposit in the amount of \$250.00. There is an addendum to the tenancy agreement which provides that the residential property is smoke-free as of March 1, 2016. The addendum also provides, "The Landlord cannot and does not warrant or promise that the residential property or the residential premises will be free of secondhand smoke."

The rental unit is the upper suite of a residence belonging to the Landlord. The Landlord's son EY lives in the lower suite of the residence.

### **The Tenant and her advocate gave the following testimony and submissions:**

The Tenant alleged that EY is the Landlord's agent. She stated that EY showed her the rental unit, installed a new fridge, and also arranged for a service man to inspect the rental property's heating system. The Tenant stated that she received a Notice to End Tenancy and that EY signed the Notice in place of the Landlord. A copy of the Notice to End Tenancy was provided in evidence. The Tenant stated that the parties have another hearing scheduled later in April, 2017, with respect to the Notice to End Tenancy.

The Tenant's Application made March 15, 2017, seeks compensation in the amount of \$6,300.00. On March 24, 2017, the Tenant amended her claim to increase her monetary claim to "\$8,100.00, 30% return of rent".

The Tenant identified 3 main issues with respect to this tenancy, for which she seeks compensation:

1. The Tenant is suffering migraines and discomfort due to marijuana smoke in the rental property, which comes from the lower suite where EY resides.

The Tenant stated that she is an occasional cigarette smoker, and smokes outside of the rental unit. She testified that EY smokes marijuana in his suite “every day” and that the smoke comes up to her suite through the central air vents, causing her headaches. She stated that she cannot use the exercise room or her spare room, which are located on the lower level of the rental property. The Tenant testified that EY and his guests turn the rental property into a “hot box” and that she cannot have co-workers, guests or family over because of the smell.

The Tenant stated that she and EY have had “multiple conversations” about this, but EY will not stop smoking marijuana in the lower suite. She stated that when she talked to the Landlord about it, he “always told me to go to [EY]”.

The Tenant testified that she suffered depression and anxiety as a result of a medical issue. She acknowledged that she had asked EY for some marijuana in August, 2016, but stated that she has been “clean for months”.

The Tenant testified that EY was growing marijuana at the rental property and she had seen a marijuana plant outside on the rental property.

2. EY plays loud music, has parties, and his guests are loud. This disturbs the Tenant’s sleep and takes away from her quiet enjoyment of the rental unit.

The Tenant stated that in September, 2016, she spoke to EY about loud music he was playing. She stated that in “October/November it got 10 times worse”. She stated that she spoke to EY every “2 months or so”, but became frustrated because nothing changed. The Tenant testified that the “music rattles the walls” and that by January 2017, EY and his friends were “partying every night”.

The Tenant stated that she also spoke to the Landlord on the following occasions about the loud music and smoke:

December 1, 2016: The Tenant spoke to Landlord about the music and smoke and asked him to “do something”. The Tenant stated that EY took out the sound system, but put it back in within 2 weeks.

February 23, 2017: The Landlord wanted to raise the rent. The Tenant complained about the music and smoke. The Landlord told the Tenant to talk to EY about it.

March 10, 2017: The Tenant stated that when she contacted the Landlord on March 10, 2017, the Landlord told her stop talking to him and to see EY if she was having trouble.

The Tenant stated that the neighbours behind the rental property witnessed EY's party guest screaming outside on one occasion. The Tenant stated that she was out for dinner on April 7, 2017, and the same neighbour texted her advising that she heard loud noise and wanted to call the bylaw officers but "didn't want them to think it was me". The Tenant stated that she has had to buy ear plugs and take sleeping pills in order to sleep at night. The Tenant said that she wanted to share videos she took when EY was having parties and making noise, but the Landlord didn't want to see them and told her to talk to EY. The Tenant stated that "for the last few weeks, EY's guest "Nick" comes over every day, screams "non-stop", and that she "can't even watch a movie or read a book because of the noise. The Tenant provided electronic copies of text messages sent to EY about the noise, dated September 26 and November 23, 2016 and January 7 and 21, 2017. She stated that in January, 2017, EY and his guests were partying every night. The Tenant also provided videos time stamped July 10, 2016, and January 17, February 4, and March 29, 2017.

The Tenant stated that on March 10, 2017, after she spoke to EY about the noise, EY said she had to take her dogs and leave.

3. The thermostat in the upper suite does not function properly.

The Tenant stated that she has no control of the temperature within her suite. She stated that it was always freezing cold or uncomfortably hot in her suite. For example, in the winter, the Tenant had her thermostat set to 20 degrees, but it was 32 degrees in her house during the day. At other times, the Tenant stated that it was very cold in her house, even if her thermostat was set to 24 degrees. The Tenant provided a video of her trying to set the thermostat to heat or to cool, which appeared to have no effect. The Tenant testified that the Landlord sent "Ted", who is a family friend of the Landlord's, to have a look at the thermostat. She stated that Ted came back several times, but always said there was nothing wrong with the thermostat. The Tenant submitted that Ted installed an "over-ride system" in September, 2016, so she could not control the heat above or below a certain amount, and that therefore she believes that

the lower suite controls the heat in the rental property. The Tenant testified that Ted did not come back to the house after March 11, 2017.

The Tenant testified that she sent texts to the Landlord on 16 different days because the temperature in the rental unit was either too hot or too cold. For example, she stated that in the winter months it was 32 degrees in the house, when her thermostat was set at 20 degrees.

The Tenant stated that she hired a professional third party "Nick" to come to look at her thermostat. She stated that Nick found that a wire leading to her thermostat was not connected. The Tenant stated that 4 hours later Ted came back and "fixed it". The Tenant read from Nick's invoice, which she stated she just got a few days ago, and which notes, "no heat, loose wire, downstairs working OK".

The Tenant stated that she didn't think it was fair that she should have to pay 75% of the bill to heat a 6 bedroom house to 30 degrees when she cannot control the temperature.

The Tenant stated that at the beginning of April, 2017, she called the Residential Tenancy Branch and asked for an "intervention". She testified that the Landlord e-mailed her on April 9, 2017, and asked her why she called the RTB for an intervention.

The Tenant provided electronic evidence with respect to her claim, including photographs, text messages and video.

The Tenant's witness gave the following testimony:

The witness is the Tenant's mother. She testified that she used to visit the Tenant 2 or 3 times a week and that first everything was OK. She stated that lately there is "always a smell of marijuana that permeates upstairs".

The witness testified that, when she visits the Tenant, it is always very hot or very cold in the rental unit. She said she has not tried to adjust the thermostat.

The witness testified that she and her other daughter came to the rental unit to spend the night on December 23, 2016. She stated that there was loud music and screaming coming from the lower suite and that it was very unpleasant because it was very hot. The witness stated that they had to open the windows because of the heat and the smell of marijuana. The witness called the Landlord, who "never made a comment except any issues should be resolved between the Tenant and [EY]".

The Landlord and EY gave the following testimony:

The Landlord disputed that EY is the Landlord's agent and stated that he is only an occupant who lives in the basement suite at the rental property. The Landlord acknowledged that EY showed the rental unit to the Tenant and advised the Landlord that she was a "good fit", but stated that the decision with respect to whether or not the Tenant would be accepted as a tenant remained with the Landlord alone. The Landlord testified that rent was paid to the Landlord and not to EY. He stated that EY is not a professional property manager and was helping the Landlord out because he is the Landlord's son and the Landlord lives in a different city.

The Landlord submitted that the rental unit is "25 to 30 years old" and is not well insulated for sound. He testified that he and his wife lived in the rental property for 13 years and often heard the occupant who lived in the downstairs suite.

The Landlord stated that EY and the Tenant had a great relationship in the beginning of the tenancy and that he thought it was best that they communicate with each other with respect to issues. He stated that he was unaware of any serious issues until after December 1, 2016, when the Tenant called the Landlord to complain. The Landlord phoned EY immediately and addressed the Tenant's concerns. The Landlord submitted that EY "made adjustments". The Landlord testified that he doesn't recall hearing anything after that. The Landlord stated that he believes that EY feels "unjustly accused".

The Landlord acknowledged that Ted is a family friend, but stated that he is also a certified mechanic.

EY stated that Ted gave the Landlord a letter which states that the Tenant was turning the thermostat controls off completely. EY testified that the Landlord decided to put in a "secondary system", but that it was not an "over-ride system". He stated that the Tenant agreed on a set program, but the Tenant kept changing the settings. A copy of Ted's letter was provided in evidence.

EY submitted that a third party checked the furnace "less than a week ago" and found a loose ground wire, which effected EY's controls, too. EY stated that the third party said there was "nothing wrong on the Tenant's panel", but that he found a loose wire and that the 30 year old furnace should be checked more often.

EY testified that he arranged for a technician to go to the rental unit on March 8, 2017, within 3 hours of being advised by the Tenant that her thermostat was not working. He stated that the Tenant told him it wasn't important and that it could be looked at "within the next few days". On March 9, 2017, Ted went to the rental unit and found that everything, including the sensors, was "working fine". EY stated that if the air conditioning was on, the Tenant could have turned it off. EY submitted that the Tenant's testimony was contradictory. He submitted that the Tenant did not provide documentary evidence that she was paying higher electric bills.

EY stated that he never used the word "eviction" during the confrontation with the Tenant on March 10, 2017. He stated that he simply told the Tenant that if she didn't like it there, she could leave. EY stated that he and the Tenant were "good friends" until December, when the Tenant "broke down" due to noise and heating issues. EY stated that he was not noisy late at night. He stated that "my friends work... no listening to music until 3 a.m. on a work night". EY submitted that the Tenant has exaggerated the issues. EY submitted that the Tenant's videos did not show any noise at night, only during the day, and that he was allowed to make noise during the day. EY stated that the Tenant was not at home when he turned his bass up.

EY testified that on December 23, 2016, he left the rental property and went to Vancouver for a few days. He stated that there were no parties and no marijuana smoke on December 23, 2016.

EY acknowledged that he had grown a "small marijuana plant" outside, but that he brought it inside. EY stated that the plant was approximately 3 feet by 1 foot in size. He submitted that there was no evidence of multiple plants and no proof that the Tenant suffered illness because of marijuana. He stated that he has smoked marijuana with the Tenant in the rental unit and that she used to "come down to smoke with us".

The Landlord submitted that EY had a guest "Trevor" in the downstairs suite on March 10, 2017, but that there were no others, although the Tenant stated there were 5 to 7 people in the downstairs suite.

The Landlord provided a binder of documents, including 127 pages of written materials and photographs.

## **Analysis**

Is EY the Landlord's Agent?

The Act defines “landlord” as follows, in part:

**"landlord"**, in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
  - (i) permits occupation of the rental unit under a tenancy agreement, or
  - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

It is not necessary for an agent to be a professional property manager in order to qualify as a landlord’s “agent”. I find that EY exercised powers and performed duties under the tenancy agreement on behalf of the Landlord. Furthermore, the Landlord acknowledged that he told the Tenant to communicate with EY with respect to any “issues”. Therefore, I find that EY is the Landlord’s agent.

Regarding the Tenant’s monetary claim for loss of peaceful enjoyment of the rental unit

This is the Tenant’s Application and therefore the onus is on the Tenant to provide sufficient evidence to prove her claim, on the balance of probability.

Sections 7, 28, 32(1) and 67 of the Act provide:

**Liability for not complying with this Act or a tenancy agreement**

- 7** (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
- (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

**Protection of 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.

### **Landlord and tenant obligations to repair and maintain**

**32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

### **Director's orders: compensation for damage or loss**

**67** Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

[Reproduced as written.]

The Tenant gave differing dates and time frames in her oral testimony than those that were provided in her documentary evidence. However, I find that the dates/time frames were not significantly different and am not persuaded that these mistakes impeded her credibility.

I find that there was insufficient evidence that marijuana smoke caused the Tenant migraines. There were no doctor's letters provided, and the Tenant acknowledged that she had been a marijuana smoker at the beginning of the tenancy. However, I accept that the tenancy agreement provided that the rental property is "non-smoking", and that the Tenant had contacted the Landlord, and his agent EY, requesting that EY comply with the tenancy agreement and stop smoking marijuana in the rental property. I also accept the Tenant's witness's testimony that the rental unit smelled of marijuana; that it

was uncomfortable for the Tenant's guests to be in that environment; and that this negatively impacted the Tenant's right to quiet enjoyment of the rental unit.

Based on the oral testimony of both parties, I find that the Landlord did not sufficiently investigate the Tenant's complaints with respect to the noise and the heating issues. I further find that the Landlord's agent EY did little to address the Tenant's complaints. I accept that it is true that a certain amount of noise during the day is to be expected in a living accommodation; however, the Tenant's videos show that EY, or his guests, were noisy beyond what could be considered "normal living" noises.

The Tenant provided videos of various dates and times, showing her thermostat at the rental unit. These videos show the Tenant trying to set the thermostat to heat or to cool, which appeared to have no effect. In addition, the temperature in the rental unit was displayed. Several different time frames were taken, showing the temperature alternating between 19 and 33.5 degrees. These videos span the dates between December 4, 2016, and March 19, 2017.

The Landlord provided a letter from Ted (the certified mechanic who is the Landlord's friend). The letter is dated March 31, 2017, and provides more details with respect to the heating/cooling system at the rental property. A portion of the letter is reproduced, as follows:

"During the summer of 2016..... I went to check out the situation.... The tenant upstairs (KB) was turning off the mechanical system by turning the old mechanical thermostat off by increasing the temperature so that the cooling would not come on until she got home to turn it back down. I saw this as a risk to the (Landlord's) family home and in fear of that, I taught them about the benefits of an electronic thermostat. Not only can a schedule be set to save money on heating and cooling costs but the thermostat also acts as a safety to the house. The main issue I saw with having 1 thermostat was the fact that (KB) could turn her thermostat off, which would result in the same issue. My resolution was to install a secondary thermostat for the (Landlord's) family for their own piece of mind as well as (EY's) comfort downstairs. After the installation I set the secondary thermostat to never go below 18 degrees Celsius and never above 24 degrees Celsius..... I also installed a new thermostat upstairs in place of the old mechanical style so that (KB) could set herself a schedule and save money on HVAC costs. After the initial installation I was called back about the cooling and heating either staying on or turning off for long periods of time. The reason this was happening was the original thermostat I installed was faulty which I replaced under warranty within 2 weeks. It didn't take long and I was called back again for the same issues several times within a few months. (KB) was not informed of the

safety thermostat which I saw no reason to advise her of at the time since this was the decision that I presented to the home owner and it was for the protection of the home. Also since she had full control of her thermostat within the limits I had set, there shouldn't have been anymore issues.

..... In the visits I made to the house I was constantly trying to teach (KB) on how to set up the new thermostat. After I would set it properly I would get a call from the home owner again asking me to make another visit which I would find the settings improperly set again. This happened several times and it was starting to become frustrating for me as well. The last few times I visited, (KB) always seemed very upset with the last visit being the worse as she broke out in tears and told me she has all kinds of health complications and the HVAC system has only been making them worse.

In frustrations of trying to solve the issue in a more professional way, I informed (KB) about this "safety" installed downstairs and there is absolutely nothing wrong with the HVAC system which was absolutely correct. This resulted in her becoming even more emotionally upset and unstable while I was there...."

[Portions reproduced as written.]

I find that the letter referred to above is not particularly helpful. There are no dates provided in the letter with respect to when the thermostat was inspected or when the faulty electronic thermostat was replaced. I find that it is not clear what the function(s) of the "safety thermostat" or "secondary thermostat" were.

The Tenant's videos show that the temperature in the rental unit was above 24 degrees on December 4, 2016 (29 degrees, "equipment idle"), December 18, 2016 (33.5 degrees), February 18, 2017 (25.5 degrees), and March 7, 2017 (25.5 degrees).

The rental unit was also chilly on some occasions. On March 17, 2017, at 3:05 a.m., the Tenant attempted to turn up the heat in the rental unit by setting the controls to 27 degrees, and the thermostat indicates "heat on"; however, the thermostat indicates that the temperature in the rental unit did not rise above 19 degrees.

The Landlord provided no evidence that the Tenant was provided with written instructions for use of the electronic thermostat.

For the reasons provided above, I find that the Landlord did not comply with Sections 28(b) and 32(1)(a) of the Act, and that the Tenant is entitled to compensation for the Landlord's breach of the Act.

The Tenant seeks compensation in the equivalent of 30% of her rent commencing March 1, 2016. Based on the evidence of both parties, I find that 30% of rent paid is reasonable compensation; however, I find that she did not provide sufficient evidence that her quiet enjoyment of the rental unit was significantly impacted, or that she had notified the Landlord of her lack of quiet enjoyment, until December, 2016. Likewise, I find that there is insufficient evidence that the Tenant's heating/cooling system was not properly working prior to December, 2016.

I award the Tenant compensation, calculated as follows:

Total rent paid for December, 2016, to April, 2017 (5 months) = \$8,750.00

$\$8,750.00 \times 30\% = \mathbf{\$2,625.00}$

I searched the Residential Tenancy Branch's electronic filing system. At the time of writing this Decision, the hearing with respect to the 2 Month Notice to End Tenancy for Landlord's Use had taken place and an Order of Possession was granted to the Landlord. Therefore, as the tenancy has ended, the Tenant's application for an Order that the Landlord comply with the Act is dismissed.

### **Conclusion**

I hereby provide the Tenant with a Monetary Order for service upon the Landlord in the amount of **\$2,650.00**. This Order may be filed in the Provincial Court of British Columbia and enforced as an Order of that Court.

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 11, 2017

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Residential Tenancy Branch