



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding BAY STREET PROPERTIES  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes: CNC OPC

### **Introduction:**

Both parties attended the hearing and gave sworn testimony. I find that the Notice to End a Residential Tenancy dated September 4, 2017 to be effective October 31, 2017 was served by leaving it in the tenant's mailbox. The landlord admitted service of the application for dispute resolution in their office mailbox. I find the documents were sufficiently served pursuant to section 71(2) (b) and (c) for the purposes of this hearing.

The tenant applies to cancel a Notice to End the Tenancy for cause pursuant to section 47 of the *Residential Tenancy Act* (the Act) and to recover the filing fee.

**Issues:** Is the tenant entitled to any relief?

### **Background and Evidence:**

Both parties attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. The tenancy began on October 1, 2011, the current rent is \$1020 and the tenant paid a security deposit of \$500. The landlord served the Notice to End Tenancy pursuant to section 47 for the following reasons:

- a) The tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.

This is the second hearing on this matter. In June, 2017, an arbitrator considered the complaints of noise from the downstairs tenants and found the noise transference might be the result of thin carpeting and kitchen flooring. The arbitrator set aside the Notice to End Tenancy at that time and ordered the landlord to install new carpet and kitchen vinyl flooring. The landlord provided receipts and evidence to prove that they had complied with the order and even used more expensive underlay over the concrete flooring to try to address the noise issue. However, the tenants living underneath this tenant's suite continued to find the noise unreasonable.

The male tenant witness testified that the new flooring lightly muffled the noise from the suite above but there are still loud banging, sounds of multiple people and objects being moved after 10 p.m. and often until 3 or 4 a.m. on many nights. He and his co-tenant have suffered significant sleep deprivation which has impacted their performance at work. They have been forced to end their tenancy. Counsel for the applicant tenant questioned where they were

moving to and where they had lived prior to renting in this building. The witness declined to answer as they considered this a privacy issue.

The downstairs female tenant also declined to disclose her past or future plans for residence as she said it is not relevant to this issue. She said the noise from the upper suite has not stopped, she cannot function at work and it did not help when they moved their bedroom or slept in the living room. She said it has been an ongoing problem for 10 months and has become unbearable so they felt they had to end their tenancy to escape the situation. Counsel for the applicant pointed out that she had made a mistake in accusing the tenant upstairs when the noise was from a lower suite. She said she acknowledged that in the last hearing but it was a one time mistake. She is angry about the situation because she is not sleeping. A letter in evidence explains their decision to move due to constant noise and sleep disruption for over 9 months. They say they are no longer optimistic this matter can be resolved after lack of success in the previous hearing. Despite the new carpeting and the tenant's agreement to not have guests after 10 p.m., he continues to have guests throughout the night on a regular basis. The building and location suits their needs but they feel they have to move and incur the expenses associated with that.

The manager for the landlord pointed out that in the last hearing the tenant committed to having no guests or noise in the suite after 10 p.m. but the tenant's videos in evidence show that he continues to have other people in his unit after 10 p.m. He said that counsel for the tenant has contended to him that the previous arbitrator made a mistake in recording that commitment. However, he argues that if there was a mistake (which he says is not true), then the tenant could have appealed the arbitrator's decision but now is out of time to do that. The manager said he has managed this building since December 28, 2016 and there are no other complaints on his files related to this tenant but he has not consulted files prior to his management engagement. He regrets the downstairs tenants feel compelled to move and lose their ocean view. He is trying to re rent the unit but feels he must disclose the issue of the complaints of noise to prospects. He pointed out that the tenancy agreement, clause 17, which the tenant signed forbids loud conversation or noise to disturb other occupants anytime but particularly between the hours of 10p.m and 9 a.m.

The manager offered the applicant tenant a different suite which had most of its rooms over the lobby. The tenant refused it as it did not suit him. He described his present unit as a 3<sup>rd</sup> floor corner unit with an ocean view, 2 bedrooms and bathroom near the front entrance and kitchen, living and dining room near the patio. He said he lives alone and submitted videos to illustrate he is not making unusual noise but lives a quiet lifestyle. He said he did not commit to not having guests after 10 p.m., he does not drop things on the floor consistently, nor drag things over the floor. He said he takes his shoes off and his guests do also and he only has people over every 9 or 10 days. When I queried him about a part of the video, he said he was walking around with his laptop which he uses to chat with people.

The manager pointed out the tenant had sandals on in the video. The tenant agreed but said he was in bare feet most of the time. The manager also pointed out the limited view of the video of the security cam. He said most of the living room, hallway and kitchen can't be seen nor is there a view of the two bedrooms. The tenant said that he set it up to take shots every minute for 10 seconds but the first one was set up to take shots every 10 minutes. He wanted to capture what he did to show he was not doing activities or otherwise causing unreasonable noise. He said he can hear the people above him but does not complain and has had no complaints against him in the 7 years he has lived there. The landlord requested, if the tenant is unsuccessful, an Order of Possession effective October 31, 2017 which is the effective date of the Notice to End Tenancy.

In evidence is the tenancy agreement, the Notice to End Tenancy, caution notices with noise complaints, flooring approval and receipts for installation, the previous decision, the Notice to End Tenancy of the downstairs tenants and a letter explaining the reasons for their decision to move.

**Analysis:**

The Notice to End a Residential Tenancy is based on cause pursuant to section 47 of the Act. The *Residential Tenancy Act* permits a tenant to apply to have the Notice set aside where the tenant disputes it. I find the weight of the evidence is that the behaviour of the tenant and/or his guests have significantly interfered with or unreasonably disturbed other occupants. I find the evidence of the landlord and his witnesses most credible and prefer it to the evidence of the tenant. I find the credibility of the landlord and witnesses is supported by the complaints and cautions sent to the tenant over a significant period of time and their consistent testimony on the kind and nature of the noises. I find also that the video evidence provided by the tenant shows at least one female and male visitor after 10:30 p.m. which contravenes his agreement in the last hearing. Although the tenant allegedly disputed the idea that he would agree to no visitors after 10 p.m., he did not appeal that decision so I accept the arbitrator's record of that. I also find his lease agreement also provides for quiet hours between 10p.m. and 9 a.m. Although the video had no sound, I find that the visitors appear to be talking and using the kitchen after 10 p.m. which may cause loud conversation and banging noises as alleged.

Furthermore, I find the tenant's statements inconsistent with his video evidence. He was wearing shoes or sandals at some points in the video. I also find the times recorded on the video feed showed him walking constantly around his unit and talking on his laptop until at least 3 a.m. on one occasion. Although the view is limited, I find the tenant is using the kitchen at about midnight on some occasions also. As the landlord pointed out, there may be guests also in the bedrooms or in the part of the living room that is not visible. I find this is consistent with the guests, female and male walking into the view from time to time from some other location in the unit. I find it most probable that his constant pacing, talking on his laptop in the middle of the night and he and others using his kitchen after 10 p.m. is significantly interfering with and unreasonably disturbing the tenants below him.

Based on the weight of the evidence, I therefore dismiss his application to cancel the Notice to End the Tenancy. I find his tenancy is ended on October 31, 2017 as provided in the Notice to End Tenancy. Section 55(1) (a) provides that the arbitrator must grant an order of possession of the rental unit where an arbitrator has dismissed the tenant's application and has upheld the Notice. As a result I grant the landlord an Order for Possession.

**Conclusion:**

I grant the landlord an Order for Possession effective October 31, 2017. I dismiss the tenant's application without recovery of the 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: October 10, 2017

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Residential Tenancy Branch