



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OLC

### Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) that was filed by the Tenant under the *Residential Tenancy Act* (the “Act”), seeking:

- An order for the Landlord to comply with the Act, regulation or tenancy agreement.

The hearing was convened by telephone conference call and was attended by the Tenant, and an agent for the Landlord (the “Agent”), both of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The Agent acknowledged receipt of the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and Notice of Hearing, and both parties acknowledged receipt of each other’s documentary evidence. Neither party raised any concerns regarding the service or acceptance of the above noted documents.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; however, I refer only to the relevant facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided in the Application.

### Preliminary Matters

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the “Branch”) under Section 9.1(1) of the Act.

Issue(s) to be Decided

Is the Tenant entitled to an order for the Landlord to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the one year fixed term tenancy began on October 1, 2019, and is set to end on September 30, 2020, after which the tenancy will continue on a month to month basis. Rent is set at \$1,275.00 and is due on the first day of the month. The tenancy agreement also indicates that a \$637.50 security deposit was paid. In the hearing the parties agreed that these are the correct terms of the tenancy agreement. There was also agreement that the Tenant's rental unit is located in a multi-unit building owned and operated by the Landlord and that the other tenants of the property are also tenants of the Landlord.

The Tenant stated that their right to quiet enjoyment has been repeatedly breached by the tenant living above them and that the Landlord has repeatedly failed to act reasonably with regards to this tenant's behavior or the protection of their right to quiet enjoyment. As a result, the Tenant sought a decision from the Residential Tenancy Branch (the "Branch") stating that the Landlord has breached section 28 of the *Act* and an order from the Branch that the Landlord take action to protect their right to quiet enjoyment.

The Tenant stated that the tenant above them has a fish tank, which has caused two leaks in their rental unit, one in November of 2019 and one in January of 2020, and that these leaks damaged a couch and dining table. The Tenant stated that when the first leak occurred, they contacted the Landlord by phone, and although they were initially encouraged to send an email regarding the issue, they were persistent, and the Landlord ultimately sent a maintenance employee to inspect the leak. The Tenant stated that the maintenance employee found no evidence of an ongoing leak necessitating repairs, such as a burst pipe, but confirmed that a leak had occurred and stated that this was a long-standing issue as the upstairs tenant has a fish tank which has cause numerous leaks in the past. The Tenant stated that when the second leak occurred in January of 2020, a sprinkler repair professional was sent to their rental unit, as they were not sure if this might also be leaking, but that no sprinkler leak was found.

The Tenant stated that the tenant above them also empties water from the fish tank over their balcony daily, which drains onto the Tenant's own balcony, and that on one occasion in May of 2020, the upstairs tenant dumped out a large volume of water from the fish tank, drenching the Tenant who was sitting on their own balcony. The Tenant stated that when they alerted the upstairs tenant that they had been drenched with water, that tenant screamed at them and slammed their balcony door so violently that it shook possessions in the Tenants rental unit. The Tenant stated that this has left them unable to use the balcony, as it is constantly wet, soaked in dirty fish tank water, and covered in algae, and that they are also afraid to go out onto the balcony for fear that another large volume of water will be dumped on them or that the upstairs tenant will shout at them.

The Tenant stated that when they visited the office for the building to discuss the ongoing impact of the leaks and the draining of fish tank water onto their balcony they were told to simply deal with the leak and water issues and the damage to their possessions themselves or through their own insurance, and that the Landlord would not get involved as this was a dispute between tenants.

The Tenant stated that they do not have the funds to make a claim for the damage to their possessions, as each of the above noted incidents would be subject to a \$1,000.00 deductible, and that in any event, it is not their responsibility to pay for this damage, as the Landlord was aware of this issue before the start of their tenancy and despite their repeated requests for resolution, nothing of consequence has been done by the Landlord. The Tenant requested a refund of the rent paid to date under their tenancy agreement as they believe that the Landlord has failed to act diligently with regards to the protection of their right to quiet enjoyment and sought the replacement of their damaged possession as the Landlord knew the upstairs tenant's fish tank leaked prior to the start of the tenancy and failed to take proper action. The Tenant also sought an end to their tenancy for a breach of a material term of the tenancy agreement.

The Agent stated that although they were not employed by the Landlord at the time either of the tenancies commenced, they are aware that the upstairs tenant is permitted a fish tank under their own tenancy agreement as this was permitted by the previous owner. The Agent denied personally knowing anything about a history of leaks originating in the upstairs rental unit at the time the Tenant's tenancy agreement was entered into, but acknowledged that a maintenance employee attended the rental unit in November of 2019 and found a leak. The Agent stated that no action was required as it was no longer actively leaking and that no further action was taken with regards to the Tenant's rental unit until the second leak was reported in January 2020, and a sprinkler

repair professional attended the rental unit. The Agent stated that a sprinkler repair professional was only sent as the Tenant specifically stated that they thought the sprinkler might be the cause of the most recent leak, and that no sprinkler leak was found.

The Agent denied that the Landlord has failed to take reasonable action with regards to protecting the Tenant's right to quiet enjoyment and stated that they have addressed the leak issue with the Tenant as requested and have spoken with the upstairs tenant numerous times. The Agent stated that after being first notified by the Tenant of the leak in November 2019, they personally spoke with the upstairs tenant and asked them what they planned to do about the situation. The Agent stated that the upstairs tenant advised them that they would either remove the fish tank or prevent any further leaks. When asked, the Agent acknowledged that no timeline was given and no consequences were discussed, should the tenant fail to take action.

The Agent stated that when the second leak occurred in January of 2020, they spoke with the upstairs tenant again, who assured them that they would fix the issue. The Agent acknowledged that again no timelines or consequences were discussed. The Agent stated that they followed up with the upstairs tenant by phone in approximately the second week of March 2020, and were advised by the tenant that they would be getting rid of the fish tank within a week. The Agent stated that they then served a notice to enter the rental unit, a copy of which was not submitted for my review, in order to confirm that the fish tank had been removed but were ultimately unable to enter the rental unit due to the pandemic and temporary changes to a landlord's right to enter a rental unit.

The Agent stated that in May of 2020, the upstairs tenant was sent a written "final warning" regarding the excessive water damage caused by their fish tank and advising them that the water leaks were damaging the possessions of the tenant below them. Although a copy of this letter was not provided for my review, the Agent acknowledged that it did not contain any timelines or warn of the potential consequences for failing to take action. However, the Agent stated that they personally advised the upstairs tenant that they would "move further with the process" if they did not take action. The Agent stated that they have done what they could under the circumstances and that even if they had wanted to end the upstairs tenant's tenancy as a result of these issues, they could not have as there is currently a prohibition on issuing Notice's to End Tenancy as a result of the state of emergency.

The Agent argued that as the Landlord has acted reasonably with regards to the leaks and the Tenant's complaints, there has been no breached section 28 of the *Act* on the part of the Landlord.

The Tenant also alleged that the Landlord or their agents never responded to an email they sent regarding these issues on May 4, 2020. The Agent responded by stating that the Tenant used the incorrect email address and as a result, the email was sent to the operations department in another province. When I inquired with the Agent as to whether this email was subsequently redirected to the appropriate department, they acknowledged that it was, and although they could not confirm an exact date, they stated that this likely occurred within a few days. The Agent acknowledged that they are not aware of any written response to the Tenant's email but are "pretty sure" that their co-worker spoke with the Tenant about it. The Tenant denied that any agent or employee of the Landlord has spoken to them about the email. The Agent also confirmed that it is the Landlord's general position not to get involved with disputes between tenants and that it would be a tenants responsibility to cover the cost of damaged items through their own insurance.

Throughout the hearing the parties referred to the relevant documentary evidence before me for consideration, including the tenancy agreement, a copy of the upstairs tenant's tenancy agreement, photographic and video evidence submitted by the Tenant, excerpts from Residential Tenancy Policy Guideline (the "Policy Guideline") 6 and proof of acquisition of the building by the Landlord in or prior to 2018.

### Analysis

Although the Tenant sought a refund of the rent paid to date for loss of quiet enjoyment in the hearing, as the Tenant did not file a claim seeking monetary compensation, I am unable to consider this claim. As a result, I have made no findings of fact or law in relation to whether the Tenant is entitled to a refund of rent paid or any other monetary compensation in relation to their loss of quiet enjoyment to-date. The Tenant remains entitled to file an Application for Dispute Resolution with the Branch seeking monetary compensation for loss of quiet enjoyment, loss of use, and/or compensation for monetary loss or other money owed, should they wish to do so.

Section 28 of the *Act* states that 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.

Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected and defines a breach of the entitlement to quiet enjoyment as substantial interference with the ordinary and lawful enjoyment of the premises. The Policy Guideline states that this includes situations in which the landlord has directly caused the interference, as well as situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

There was no dispute between the parties that several leaks occurred in the Tenant's rental unit as a result of a fish tank owned by the upstairs tenant, who also has a separate tenancy agreement with the Landlord, or that the upstairs tenant is permitted under their tenancy agreement to have the fish tank. However, the parties disputed whether the Landlord took reasonable steps to protect the Tenant's right to quiet enjoyment with regards to the upstairs tenant and the issues caused by their possession of the fish tank.

The Tenant submitted several photographs which clearly show water damage to a dining table and couch, 6 ceiling patches, a drainage hose hanging over the upstairs tenant's balcony, and the state of their own balcony, which I would describe as being covered with a green algae like substance. The Tenant also submitted a video showing water pouring onto their balcony from the above rental unit and a copy of an email sent to the Landlord regarding their complaints. Based on the above, and the testimony of the parties in the hearing, I am satisfied that the upstairs tenant has unreasonably disturbed the Tenant on numerous occasions by either discharging dirty water from their fish tank onto the Tenant's balcony or allowing their fish tank to leak, causing water ingress in the Tenant's rental unit and damage to their possessions.

I acknowledge that the Agent present for the Landlord in the hearing may not have personally been aware of previous leaks in the rental unit, as they stated that they began working for the Landlord in the summer of 2019, shortly before this tenancy began. However, given the number of patches to the Tenant's ceiling as shown in the documentary evidence, and the testimony of the Tenant in the hearing that they were advised by a maintenance employee for the Landlord in November 2019 that this was a

long-standing issue with the upstairs tenant, I am satisfied on a balance of probabilities that the Landlord therefore knew or ought to have known about the history of leaks caused by upstairs tenant's possession of a fish tank prior to the start of this tenancy.

Further to this, I disagree with the Agent's position that the Landlord has acted reasonably in response to the leaks, the Tenant's complaints, or the Tenant's right to quiet enjoyment of the rental unit. Although the Agent provided testimony that several conversations were had and a final warning was given to the upstairs tenant in relation to their fish tank between November 2019 – May 2020, the Agent acknowledged that no timelines were ever given to the upstairs tenant for either fixing any leaks in the fish tank or removing it from the rental unit, nor were any consequences outlined or discussed, should the upstairs tenant fail to fix or remove the fish tank. Further to this, I do not accept the Agents position that the Landlord was effectively prevented from taking further appropriate action, such as entering the upstairs rental unit or ending the upstairs tenant's tenancy due to the state of emergency, as the state of emergency was not declared until March 2020. As I have already found above that the Landlord was aware or ought to have reasonably been aware of the leaky fish tank issue prior to the start of the Tenant's tenancy and was alerted to ongoing issues by the Tenant as early as November 2019, I find that the Landlord's inability to take further action as a result of the state of emergency was a direct result of their negligence, their lack of due diligence, and their failure to act reasonably and expediently with regards to this issue.

Finally, I am not satisfied that either the Landlord or an agent for the Landlord ever responded to the email sent by the Tenant on May 4, 2020, with regards to these issues as the Agent acknowledged that no written response was made and that they themselves did not speak with the Tenant about it. Although the Agent stated that they were "pretty sure" that a co-worker had spoken to the tenant about it, that co-worker did not appear to provide any evidence or testimony for my consideration, no documentary evidence was submitted by the Landlord or the Agent in support of this testimony, and the Tenant denied that this occurred.

Based on the above, and pursuant to Policy Guideline 6, I therefore find that the Landlord breached section 28 (b) of the Act by failing to act reasonably and expediently in protecting the Tenant's right to quiet enjoyment when they first became aware of the issues cause by the upstairs tenant in November 2019. I also find that this breach was continued and exacerbated by the Landlord's lack of appropriate or expedient action with regards to subsequent incidents and complaints from the Tenant arising after November 2019.

Pursuant to section 62 (3) of the *Act*, I order the Landlord to take immediate, reasonable, and substantive steps to protect the Tenant's right to quiet enjoyment, such as ending the upstairs tenant's tenancy, moving the Tenant to a suitable and substantially similar rental unit in the building with the same or cheaper rent, if available and agreeable to the Tenant, or taking other reasonable steps to protect the Tenant's rights under section 28 of the *Act*, as appropriate.

Should the Landlord fail to comply with this decision and order, they may be subject to administrative penalties of up to \$5,000.00 per day pursuant to sections 87.3 and 87.4 of the *Act*. The Landlord should also be aware that they may be liable to compensate the Tenant pursuant to section 7 of the *Act*, for any loss suffered by the Tenant as a result of the breach of section 28 of the *Act* or any failure to comply with this decision and order.

In the hearing the Tenant also sought an order ending the tenancy for a breach of a material term of the tenancy agreement; however, the Application states that the Tenant is seeking an order for the Landlord to comply with the *Act*, regulation, or tenancy agreement and makes no mention of seeking an end to the tenancy as a result of a breach of a material term of the tenancy agreement. Further to this, although section 45 (3) of the *Act* allows a tenant to end a fixed-term tenancy as a result of a breach of a material term of the tenancy agreement, it requires that the tenant provide the Landlord with written notice that they are seeking to end the tenancy for a breach of what they believe to be a material term of the tenancy agreement and provide the Landlord with a reasonable amount of time to correct the breach. If the Landlord fails to correct the situation within a reasonable period after the Tenant gives this written notice, the Tenant may then end the tenancy effective on a date that is after the date the Landlord receives the notice.

As the Application does not disclose that the Tenant is seeking to end the tenancy for a breach of a material term of the tenancy agreement, I find that I cannot render a decision granting this remedy for the Tenant as the Landlord was not provided with adequate notice of this claim or an opportunity to review and respond to this claim prior to the hearing date. However, I find that protecting the Tenant's right to quiet enjoyment is a material term of the tenancy agreement and since I have already found above that the Landlord has breached section 28 of the *Act* by failing to protect the Tenant from unreasonable disturbance, I therefore find that the Tenant has sufficient grounds to end the tenancy for a breach of material term, should they wish to do so.



As the Tenant has already provided the Landlord with several notices of the breach, both verbally and in writing, and given the Landlord ample opportunity to correct it, I find that the Tenant has complied with the majority of section 45 (3) of the *Act*. The Tenant is therefore entitled to end their tenancy for a breach of a material term of the tenancy agreement by providing the Landlord with written notice that they are ending the tenancy for a breach of a material term effective on a date that is after the date the Landlord receives the notice, without the need to provide the Landlord with further opportunity to correct the breach. In the alternative, the parties may mutually agree to end the tenancy pursuant to section 44 (1)(c) or the Tenant may apply to the Branch seeking an order ending the tenancy.

### Conclusion

I find that the Landlord breached section 28 (b) of the *Act* by failing to act reasonably and expediently in protecting the Tenant's right to quiet enjoyment and I therefore grant the Tenant's Application.

I order the Landlord to take immediate, reasonable, and substantive steps to protect the Tenant's right to quiet enjoyment, such as ending the upstairs tenant's tenancy, moving the Tenant to a suitable and substantially similar rental unit in the building with the same or cheaper rent, if available and agreeable to the Tenant, or taking other reasonable steps to protect the Tenant's rights under section 28 of the *Act*, as appropriate.

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: July 8, 2020

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Residential Tenancy Branch