



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC

### Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, seeking monetary compensation for loss of quiet enjoyment.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties confirmed receipt of the others' evidence. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Issue(s) to be Decided

Has the Tenant proven that he is entitled to monetary compensation for loss of quiet enjoyment?

### Background and Evidence

This tenancy began on November 1, 2014, and was for an initial fixed term of one year through to October 31, 2015. Following the initial term, the tenancy may continue on a month to month basis. It is unclear when the written tenancy agreement was signed by the Tenant and his spouse who appears to be a co-tenant, as the Tenant only provided the first page of the tenancy agreement. Only the male Tenant is named in this Application.

The rental unit is on the 14<sup>th</sup> floor of the building and is approximately 750 square feet. It is a one bedroom, one bathroom unit, with a balcony. It appears the rental unit has

been renovated to some degree, as it contains an updated counter top and dishwasher, while some of the other units in the same building do not have these items.

The monthly rent is \$1,550.00 and the Tenants paid a security deposit of \$775.00 on October 4, 2014.

The Tenant also submitted a copy of the Application for Tenancy used by the Landlord at the outset of the dealings between the parties. On this document both applicants indicate the reason they are leaving their previous living space is it was, "too noisy". The application for tenancy is dated October 4, 2014.

The Tenant and co-tenant testified that they used to live in downtown Vancouver, but wanted a quieter place to live, and so that is why they moved.

The Tenant testified that when they viewed the subject rental unit they asked the Landlord's Agent, the property manager at that time, if there was going to be construction at a site across the street from the rental unit. According to the Tenant the Agent for the Landlord informed them that no construction was to occur.

The spouse of the Tenant testified that she noticed some cars were parked across the street on the dirt lot and specifically asked the Agent for the Landlord if construction was going to start. According to the spouse the Agent replied that nothing was going up there.

Both the Tenant and his spouse testified they would not have rented a unit in the building if they knew that construction was going to occur across the street.

The tenancy started on November 1, 2014, and 13 days later construction started on a new building across the street. The new building is being constructed by the Landlord and apparently is a twin to the tower where the subject rental unit is located, albeit it seems to be a smaller high rise building containing rental units and will be 14 floors in height.

The Tenant testified that the initial four months of construction sounded like an open pit mine. He testified that windows were rattling and dishes were jumping. He testified that many of the renters already in the building vacated.

The Tenant testified that both he and his spouse work late and often odd hours, as they are both employed in the film industry. The Tenant alleges that the Landlord has ruined

the quality of life for all the renters in the building. The Tenant suggested the Landlord should offer rent abatements to all the renters in the building.

The spouse of the Tenant testified that when construction started she cried every morning for a week at home and at work. She testified it was very stressful with the construction noise.

In evidence the Tenant supplied a photograph of a sign ostensibly on the construction site indicating the following:

“City of North Vancouver Noise control Bylaw  
[Building address ...]  
Hours permitted for Construction:  
Monday to Friday 7:00 a.m. – 8:00 p.m.  
Saturday 9:00 a.m. – 7:00 p.m.  
Sundays and Statutory Holidays – Prohibited”

[Reproduced as written.]

The Tenant has used these allowed construction times to calculate the alleged loss of quiet enjoyment and the subsequent abatement of rent sought.

The Tenant sets out in the particulars of the application that since the hours of construction are 13 hours per day on weekdays and 10 hours per day on Saturdays, the construction noise will be for 75 hours out of the 168 hours in a full seven day week, and concludes the Tenant and co-tenant will not have quiet enjoyment of the rental unit for 44.6% of the week.

The Tenant then requests the rent be reduced by 44.6% per month in the amount of \$691.00.

The Tenant asks for a retroactive abatement from November 13, 2014, to the present time and an ongoing reduction in rent. In total compensation for the duration of the lease, the Tenant seeks **\$7,995.00**

In reply the Agents for the Landlord testified that the Agent for the Landlord who worked with the Tenant and co-tenant at the outset of the tenancy was no longer employed by the Landlord. He testified that the prior Agent may not have been aware of the when the construction was to start. He agreed the Tenant made it clear they were moving from their previous place due to noise.

The Agent testified that at the time the Tenant and his spouse were first looking at the subject rental unit, there was hoarding around the building site. He agreed that the building is owned by the Landlord, although construction is being dealt with by a separate division of the Landlord's company.

The Agent testified that when the Tenant first approached them about the noise issue and that they would not have agreed to the rental unit if they knew construction was to occur, the Landlord agreed to give the Tenant a free parking stall and storage area for the initial term of the tenancy which had a usual cost of \$70.00 per month for the year. There was also testimony that they agreed the Tenant could end the fixed term tenancy with one month of notice and move out, and have the security deposit returned.

The Agents testified that the Tenant and his spouse went to Florida on vacation for a month starting on December 18, 2014. The Agent testified that during this time the Tenant sub-let the rental unit out to a third party.

The Agents further testified that there was a significant amount of construction going on in the area where the rental unit building is located, and that construction is being conducted by many different companies, not just the Landlords'. Some of these projects are very large.

The Agent further testified that the Tenant requested they be put on the waiting list for a rental unit in the new building when they become available.

The Agent testified that the other Agent for the Landlord had shown the Tenant five or six other suites in the subject rental unit building, as they could have moved into a different rental unit in the building during the loudest part of the noise, at the outset of construction. The Tenant did not accept any of the alternative accommodation suggested.

The Agents testified that the new building should be complete by August of 2016.

The Agent testified that the area around these buildings is a "hot spot" for new condominium developments. The Agent suggested that it will be noisy anywhere in the area where these buildings are located.

In reply, the Tenant suggested that the reason they went on vacation in December was because of the noise. He suggested they might even be compensated for their travels to escape the noise. He explained they are interested in the new building because it will have a nicer view.

The Tenant explained they could have moved when the Agents offered them different rental units in the same building, or to end the lease, although they really like the area and did not want to move. The Tenant and his spouse also testified that they both have recently suffered physical injuries and are not currently able to move.

In their final summary, the Agents for the Landlord testified that at the time the Tenant moved in, there was a huge sign on the building site across the street. The Landlord was still negotiating a contract for construction and then suddenly the construction started.

The Landlord tried to make other rental units available to the Tenant including units that were higher up in the building so their view would not be obstructed, but the Tenant rejected these.

The Agents testified that the first noise complaint came from the Tenant on November 27, 2014. The Agent says he was initially instructed by the Landlord to tell the Tenant that he could move without penalty. He testified he showed the Tenant and his spouse five or six other rental units in the building, but they did not accept any of those.

In his summation the Tenant explained he liked the Agent for the Landlord and that it was a nice building. The Tenant explained they would not have moved into the rental unit had they known about the construction that was to commence. He testified that he was informed that it took 10 years for the Landlord to get the approval for the building and get started, so he alleged the Landlord was well aware of when the construction was to start.

The Tenant submitted that the Landlord should have told the Tenant that the construction was going to start soon. He testified they like the building and when they looked at other rental units they did not want to move again. He testified they like the view and it is hard for them to move.

The Tenant submitted they were entitled to compensation because they were not given all the facts when they moved in. They do not want to move as their unit is one of the nicer ones in the building.

## Analysis

In an application for monetary compensation against another party, the party making the claim has the burden of proof to prove their claim.

The burden of proof in civil claims is based on a balance of probabilities.

Sections 7 and 67 of the *Act* provide that an Arbitrator may make an award for monetary compensation to a party who has suffered a loss. Therefore, the applicant, here the Tenant, must prove the following when making a claim:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That this violation caused the party making the application to incur a monetary loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the claim acted reasonably to minimize the damage or loss (this is known as “mitigation”).

In this instance, the burden of proof is on the Tenant to prove the existence of the damage or loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Landlord.

Once that has been established, the Tenant must then provide evidence that can verify the value of the loss or damage.

Finally it must be proven that the Tenant acted reasonably to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this instance I find that the Tenant has proven he suffered a loss of quiet enjoyment of the rental unit. However, this must be balanced against the lawful rights of the Landlord to construct further buildings.

For this reason, I explained to the Tenant and his spouse during the hearing, that this decision would only pertain to them and their particular facts. The Tenant was of the mind that the Landlord should compensate all the renters in the building. I note that my decision here only pertains to this particular Tenant due to the particular facts that apply here. Other renters *might* be entitled to compensation for loss of noise, but that is for another arbitrator to determine, should those other renters apply.

I set this out because in the normal course of living in a large city, construction noise is unavoidable and does not in of itself constitute a loss of quiet enjoyment. More often than not a property owner has no control over construction noise coming from other locations around a rental building and may not be responsible for the loss of quiet enjoyment suffered by renters.

What differs in this situation is the fact that the Tenant and his spouse specifically made it known to the Agent for the Landlord that they were looking for a quieter space. They did this in writing in their Application for Tenancy and also asked the Agent about the site across the street. It appears they were misled about this, as it is an agreed fact the construction noise is coming from a site owned by the Landlord and, according to the Agent for the Landlord in this hearing, the construction signs went up around October of 2014.

For these particular reasons I find the Landlord and this prior Agent knew or ought to have known the construction noise would affect this Tenant and his spouse. I find the Landlord's Agent made a negligent misrepresentation to the Tenant and his spouse when he did not disclose that construction was to begin in the next few days. A negligent misrepresentation is a tort under the common law and is therefore considered a breach of the Act under section 91.

As a result of misleading the Tenant as to the imminent construction that was to occur, I find the Tenant relied on this information, and entered into a one year fixed term tenancy agreement, and has subsequently suffered a loss of the expected quiet enjoyment of the rental unit which has led to a diminution in value of the tenancy for the fixed term he was enticed to agree to. I do not allow the Tenant any losses following the one year fixed term, as this was the period the Tenant was enticed into agreeing to by the misrepresentation.

As to a verifiable amount of loss the Tenant has suffered though, I find that the Tenant has provided little evidence as to the actual impact the loss of quiet enjoyment has caused him, as I do not accept the Tenant or his spouse were in or will be in the rental unit for all the hours that construction is allowed to occur at the site. Likewise, the Tenant did not provide evidence of what the actual hours of construction were during this time. The Tenant and his spouse were also away for one month during what was apparently the noisiest period of the construction. Lastly the Landlord did offer alternate accommodation and did offer to allow the Tenant to terminate the fixed term tenancy without penalty. From these factors I find the Tenant did not fully mitigate his loss, although I find that the Tenant is still entitled to compensation.

For all these reasons I find that I must reduce the amount claimed by the Tenant.

I also note that the Landlord has already provided the Tenant with free parking and storage which is a \$70.00 per month value, which I have taken into consideration in making the following awards.

I also considered that the Tenant and his spouse do work odd hours and may have been home during the day more frequently than most workers; although they just as likely may have been away from the rental unit during the afternoon and evening more than most workers. I also considered that currently the Tenant and his spouse are at home more often as they both are unable to work due to injuries. While I did not hear evidence on how long the Tenant was off work, his spouse testified she would be at home for a period of three months.

I have also considered that these types of awards are seldom the product of an exact scientific accounting and that I must be cognisant of what a fair and reasonable award should be.

Therefore, considering all these factors, I calculate that the Tenant's losses as follows:

The rent for one year at \$1,550.00 per month is \$18,600.00, which amounts to a daily rent of \$50.95. For most of the tenancy I allow the Tenant a loss of quiet enjoyment of approximately six hours per day. I arrive at this amount based on six hours a day where they may have been in the rental unit during the construction noise periods. For example, an hour and a half from 7:00 am to 8:30 am, then four and a half hours from 3:30 pm to 8:00 pm, or some similar amount of hours. I have also considered the lower amount of hours of noise allowed on Saturdays, and the fact none was allowed on Sundays and left these in the Tenant's favour, in recognition that they were misled into entering a one year fixed term tenancy agreement. This also considers that the loss of quiet enjoyment was ongoing, variable in volume and continued for some months.

Therefore, for the period of November 13 to December 18, 2014, I reduce the rent by 25% or a reduction of \$12.75 per day. This amounts to an award of **\$446.25** for this period of time.

I do not award the Tenant any amount for December 19, 2014, to January 18, 2015, as they were not occupying the rental unit as they were away on holidays. I find the Tenant suffered no loss during this time, as he and his spouse were vacationing. I do not find



the Tenant or his spouse are entitled to any compensation from the Landlord for this vacation period.

For the 101 days between January 19 and April 30, 2015, I allow the 25% reduction and award the Tenant **\$1,287.75**.

For the months of May, June and July of 2015, I accept the Tenant and his spouse were home more often due to their injuries, although I am unable to accept they were home continuously or that the construction noise was continuous either. Therefore, I award the Tenant a 40% reduction for these three months which amounts to a rent reduction of \$20.40 per day, over 92 days, totalling **\$1,876.80**.

For August through to October 31, 2015, the months until the end of the fixed term tenancy, I allow the Tenant to reduce the rent by 25%. This reduction will be for 92 days which when averaged amounts to \$391.00 over three months. (92 days x \$12.75 = \$1,173.00, and \$1,173 divided by 3 months = \$391.00, and \$1,550.00 - \$391.00 = \$1,159.00).

Therefore, I order that the Tenant may reduce the monthly rent payment to **\$1,159.00** a month for the months of August, September and October, 2015.

As the fixed term tenancy will end in October 2015, I find this adequately compensates the Tenant for the losses suffered during the fixed term he was misled to enter into. I do not award the Tenant any compensation or rent reduction following October 31, 2015. The Tenant testified he liked the building and did not plan on moving, and in fact, they have asked to move into the new building when it is complete. This tends to indicate that the Tenant has agreed to endure the noise following the end of the fixed term and will not be mitigating his losses any further.

Based on section 67 of the Act, I grant the Tenant a monetary order of **\$3,610.80** for losses incurred between November 2014 and to the end of July 2015. I have reduced the rent from August to the end of October to **\$1,159.00**.

The Tenant may enforce the monetary order for \$3,610.80 in the Provincial Court, or, pursuant to section 72 of the Act, the Tenant may use this amount to offset the reduced rent of \$1,159.00 that will be owed for each of the months from August to the end of October, 2015.

Should the Tenant decide to offset the award against the reduced rent, and as the Tenant and Agents for the Landlord appeared to be on relatively amicable terms during

the hearing, I would suggest that the Tenant discuss the accounting of the monetary order reducing the rent with the Agents if he decides to go this route. This should tend to avoid any misunderstanding between the parties.

### Conclusion

In this particular case, the Tenant has proven that there was a negligent misrepresentation made by the Landlord and that due to this the Tenant has suffered a loss of quiet enjoyment for the duration of this fixed term tenancy.

The Tenant is awarded **\$3,610.80** for losses up to August of 2015. From August to October 31, 2015, the rent has been reduced to **\$1,159.00**. The Tenant may apply the monetary award to offset the reduced amount of rent, although it is advisable for the Tenant to discuss this with the Agents for the Landlord to avoid any misunderstandings.

The Tenant is granted a monetary order enforceable in Provincial Court, if it is necessary to enforce the order.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: July 22, 2015

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Residential Tenancy Branch

