

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Gilday v. Ulta Enterprises Ltd., 2016 NSSM 41

**BETWEEN:**

Name Michael (Mike) Gilday  
Brittany Gilday

**Appellant/  
Tenant**

Name Ulta Enterprise Limited

**Respondent/  
Landlord**

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Date of Hearing: April 21, 2016

Date of Decision: April 26, 2016

Mike and Brittany Gilday appeared on their own behalf.

Bertha McKay and Philippe Haddad appeared on behalf of the Landlord, Ulta Enterprise Ltd.

**DECISION**

This is an appeal of the Decision and Order of Residential Tenancies Officer, Jason Warham, dated April 7, 2016. That decision followed two separate applications, one by the tenants concerning a parking space issue with customers of a commercial tenant in the building and the other by the landlord seeking to evict the tenants for excessive noise. The parking issue was settled by way of a mediated settlement and is not before me on appeal.

This appeal concerns Mr. Warham's decision regarding the noise complaint. The Residential Tenancies Officer dismissed the application for vacant possession instead finding the tenants in breach of statutory condition 3, the condition requiring good behaviour. He ordered simply that:

“The tenant shall not again breach a lease or an obligation pursuant to this Act, specifically the provision concerning Statutory Condition 3 regarding noise complaints.”

The landlord did not appeal this finding. The tenants actually appealed the order seeking to have this condition lifted. The reasons given by the tenant were as follows:

...”The way the order is written gives permission for the complaining unit [...] to make false complaints that could result in eviction without them having to follow the proper channel of lodging a complaint through bylaw services.”

The tenants’ assumptions are incorrect. Any complaints concerning landlords and tenants of residential premises are governed by the *Residential Tenancies Act* (“the Act”). That legislation requires all applications be made to the Director of Residential Tenancies. This requires filing of an application at Access Nova Scotia to be heard before a Residential Tenancies Officer. Secondly, regardless of whatever conditions are imposed, they must be lawful and consistent with the Act. Furthermore, any breach of such conditions must be proven on a balance of probabilities with evidence, whether before a Residential Tenancies Officer or on appeal, before a Small Claims Court Adjudicator.

In my view, had the tenants known this, they may well not have decided to appeal. The tenants were successful before the Residential Tenancies Officer. The conditions of the Order from the Officer are designed to act as a warning. Its violation would still need to be proven on a balance of probabilities. However, for different reasons, I have difficulty with the language of the Order. In any event, I find the landlord has not adduced enough evidence to establish a breach of Statutory Condition 3. Indeed, their evidence falls far short of it. The evidence as to the level of noise in the apartment came from Mr. Gilday. I have commented on that further in this decision. A brief review of the facts and issues are in order.

### **The Facts**

The parties entered into a Standard Form of Lease for the premises [...]. The lease, dated June 14, 2014, is a year to year lease with a starting date of June 1, 2014. There are several apparent errors on its face. For example, the date given for notice to quit is shown as May 1, 2015. However, the Act requires at least three months notice, i.e. at least on or before March 1, 2015 (or possibly later, given the date the lease was signed). I also note that only Brittany Gilday is showing as the tenant. The other occupants are shown as Mike Gilday and the couple’s [minor son]. Despite that Mike Gilday did not sign the lease, I find that a landlord-tenant relationship exists between both Mr. and Mrs. Gilday and the landlord.

No objection was made to the form or content of the application form or the lease. Consequently, I will make no further comments on it.

Brittany Gilday works outside the home while Mr. Gilday is a “stay at home Dad”.

Mike Gilday is an avid “gamer” in that he enjoys playing video games on his Nintendo PlayStation through the day, particularly *Call of Duty*, a simulated war game. To enhance the sound, he has the PlayStation hooked up to a surround sound system. It is clear he enjoys significant bass which resonates through their apartment and causes the couch to shake whenever there are explosions in the game.

Next door to the Gildays [...], live Gerald and Kathy Conway. Mrs. Conway runs an at home business from her apartment, where, according to Ms. McKay, she is on contract to handle shipping and phone orders for Staples in the US. The Conways’ unit has two bedrooms, with the one used by Mrs. Conway sharing an adjoining wall with the Gildays’ living room, where Mr. Gilday’s gaming system is located.

The landlord alleges that the tenants create excessive noise due to Mr. Gilday’s use of the surround sound while playing.

### **The Issues**

Was the noise from the tenants’ surround sound system sufficient to violate the requirement of good behaviour prescribed in Statutory Condition 3?

### **The Evidence**

Bertha McKay is employed by the landlord as the building superintendent [...]. During her evidence in chief, she testified that she has received numerous calls regarding the noise coming from the Gilday’s apartment, particularly concerning the gaming system. She attended to the Conway’s house and heard what she described as “boom, boom” noises. She spoke with Mr. Gilday and described him in court as uncooperative.

Under cross examination, she acknowledged calling the police once and was advised by Mrs. Conway and others of the noise. Only one other tenant mentioned the noise but that was second hand information. She did not provide a name. No other tenants spoke to her personally. I am not prepared to accept the evidence of this unnamed other tenant as admissible.

In her redirect evidence, she and Mr. Haddad both submitted that the Gildays are now accustomed to a high level of noise. She receives numerous complaints from tenants. She described Mr. Gilday as rude and unwilling to compromise.

Gerald Joseph Conway lives next door to the Gildays along with his wife. He described the adjoining wall as being next to their living room and his wife’s office. He described the noise as shaking pictures that eventually fell off the wall. He testified to calling the police once and the officer mentioned speaking with Mr. Gilday about keeping the noise down. He testified to not coming to see the tenants about the noise himself.

Cst. Martin St-Onge is a member of the Lower Sackville RCMP. He testified to visiting the building following a complaint from Kathy Conway about the noise next door. Without the Gilday's knowledge, he stood outside of their apartment and heard nothing. He knocked on the door and was invited into the unit by Mr. Gilday. He found the noise was not loud. He completed a report indicating that the complaint was unfounded. This report was tendered as an exhibit. He denied asking Mr. Gilday to turn the noise down. He did not speak with the neighbours about the impact of an unfounded call. In cross-examination, he acknowledged he would not know if other calls were made to the RCMP.

Angela Gilday is Mike Gilday's sister. She visits her brother during the daytime on occasion, always between 9 am to 2:30pm. She describes the sound system as having plenty of bass which you can feel in the couch but it is not loud. She does not hear anything until the apartment door is open and it is possible to have a conversation at "a normal level". She was in attendance when Cst. St. Onge attended. Ms. Gilday confirmed the conversation between Cst. St-Onge and her brother.

Devan MacGillivray lives [...] next door to Bertha McKay. He is a friend of Mike Gilday. He visits the Gildays on occasion. He owns an RCA surround sound system, the Gildays' system is a Panasonic. Mr. MacGillivray's lacks a subwoofer. Mr. MacGillivray described in detail the various settings on the systems. He uses his system frequently but it clearly does not disturb Ms. McKay. He has been in the Gildays' apartment when Mr. Gilday was using the system and described it as typically not loud. He sometimes plays his own game louder than Mr. Gilday typically would. He testified that Mr. Gilday tends to turn his system off when his son is there.

Mike Gilday testified that he and his wife took possession of the unit on June 27, 2014. They did not move before that time so as to provide their son with an opportunity to finish the school year. He likes the apartment as it is close to a new school which has programs that are well suited to his son's needs.

Mr. Gilday testified that after he and his family had lived in the apartment for about a month or a month and a half, he began receiving calls and visits from Ms. McKay regarding noise complaints. He invited her in to hear the system after the first complaint to show her the level of volume. He testified that Ms. McKay said "that's not loud at all". However, as there had been several other complaints from her since then, he attempted to adjust the volume and bass, including turning off the bass boost and turning the subwoofer down. The complaints persisted. He had turned the volume to level 11 out of 34 which he could "barely hear". In March 2015, he received a written complaint. This letter was not tendered into evidence by either party. The letter included a threat to call the police but they did not show until Cst. St. Onge's visit. He indicated there have been no further visits since May 6, 2015. He tendered into evidence a letter from Jim Donovan of Halifax By-Law Services who said there were no noise complaints related to the premises.

Brittany Gilday testified that she does not like having the gaming system on when she is at home. Once she and her son arrive, they tend to do other things, some involving the surround sound,

like watching movies; other times they watch TV, which does not require the system. She testified to them making several attempts at compromising with Ms. McKay but the complaints continue.

## **The Law and Findings**

Section 9 of the *Residential Tenancies Act* provides as follows:

**9 (1)** Notwithstanding any lease, agreement, waiver, declaration or other statement to the contrary, where the relation of landlord and tenant exists in respect of residential premises by virtue of this Act or otherwise, there is and is deemed to be an agreement between the landlord and tenant that the following conditions will apply as between the landlord and tenant as statutory conditions governing the residential premises:

3. Good Behaviour - A landlord or tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants, respectively.

Put another way, this means it is a condition of every lease that both tenants and landlords must demonstrate “good behaviour”. This includes that a tenant must not interfere with the possession or occupancy of other tenants. Excessive noise is one example of such interference.

In arriving at my conclusion, I must consider the evidence before me. I am able to draw certain inferences and make certain assumptions supported by the evidence. The law requires that I consider the sections of the *Residential Tenancies Act*. The tenants’ actions do not have to violate a punitive statute like the *Criminal Code* or a municipal by-law to constitute a breach of that condition.

Much of the landlord’s evidence and claims are not corroborated or completely lack any basis in fact. For example, Ms. McKay testified to several calls having been made to the police, yet only one witness came forward, Cst. St. Onge, who found the noise was not loud and the complaint unfounded. Mr. Conway testified that he was advised by the officer that Mr. Gilday was told to keep the noise down. This was denied by Cst. St. Onge. Cst St Onge has no stake in the outcome. I place considerable weight on his evidence. Much of the landlord’s other assertions were similarly refuted.

I find as a fact that Kathy Conway complained to Ms. McKay about the noise on many occasions. Further, I find that Mrs. Conway is the only tenant of the building who has complained directly to Ms. McKay. Mrs. Conway did not testify in support of the eviction. There is no direct evidence before me in support of a finding of unacceptable noise, aside from that of Mr. Conway. Mr. Conway’s evidence has not been corroborated with external evidence. In addition, it is significant that the tenants’ evidence has been corroborated by the testimony of Devan MacGillivray, Cst. St. Onge and the documentary evidence before me. Most of the allegations by the landlord have been discredited or lack foundation. There were allegations of illegal use of marijuana by the tenants, although the evidence did not support that either. I am

prepared to find there is marijuana use in the building. There is some evidence that Mr. Gilday's use is medically prescribed and I make that finding for this purpose only.

The Residential Tenancies Officer found a violation of Statutory Condition 3, and ordered, in effect, no further violations. In other words, it was a warning. Unfortunately, the terms of it were vague.

The evidence before me did not come close to establishing a breach.

If I am wrong in this finding, then I am not prepared to order the tenants to give vacant possession of the premises. The tenant's live in close proximity to [their son's] school. I think a more direct condition aimed at solving the problem is in order. Had I found a breach of the Act, I would order Mr. Gilday to completely cease use of the gaming system and surround sound or significantly limit its use to very specific times. A breach of that condition could be found to be a breach of the good behaviour clause. Hopefully, that would not be necessary.

As stated above, I find the tenants are not in violation of Statutory Condition 3. The Residential Tenancies Officer's order will be varied accordingly. The tenants were successful, but the appeal was brought based on a mistake and largely unnecessary. Rather than full costs, I allow costs of \$50 to be collected by a deduction for that amount from the tenants' rent for June 2016.

### **Noise Complaints**

This issue is less about noise and more about a dispute between two tenants. A few general comments are appropriate. They are not ordered but recommended.

Mr. Gilday testified to turning his system up to allow the bass to resonate through to his couch while watching movies or playing *Call of Duty*. He likes the volume and bass turned up when he uses the gaming system - at a level higher than 11 out of 34 on the surround sound's volume control. A few seemingly minor changes to the volume or bass could become an interference with another tenant's possession or occupancy. I indicated above my approach had a breach been found. However, that approach does not bind another Small Claims Court Adjudicator or Residential Tenancies Officer. If, in the future, the sounds from the gaming system or surround sound do create a violation of the lease or the Act, another Adjudicator or Residential Tenancies Officer may order something different, including an eviction. Where one of the main reasons the Gildays chose to live in the building is its proximity to the school where their son can receive the benefit of its programs, I recommend Mr. Gilday choose a more restrained approach to using his surround sound and gaming system, so the possibility of an eviction is a non-issue.

For their part, the landlord and the superintendent have done very little to help curtail the conflict between the Gildays and the Conways. I had occasion to observe Ms. McKay and Mr. Haddad give evidence. Mr. Haddad has very little direct involvement in the running of his property. Ms. McKay is convinced that the only way to settle this is to evict the tenants, stating, "they either turn down the system or they leave". I refuse to do that as she has not proven her case with

evidence. The evidence which Ms. McKay relies on is unreliable and does not prove any violation. Her evidence was largely embellished and self-serving. Further, Ms. McKay did not impress me as someone with the desire to mediate a dispute. A more objective, fact-based approach is required on the part of the landlord if they want to have any chance of settling this dispute. Mr. Gilday is playing video games and watching movies. He is not doing anything illegal, but it is not constructive or necessary either, so there should be flexibility on both parts. Perhaps a meeting between the Gildays and Conways can be set up and some common ground found.

### **Summary**

In summary, I find there was no breach of Statutory Condition 3 or any other provisions of the Act or lease. The appeal is allowed in part. The order is varied to lift the finding of a breach and I order costs of \$50.00 in the form of a reduction by that amount from the rent for June 2016.

An order shall be issued accordingly.

Dated at Halifax, NS,  
on April 26, 2016;

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**Gregg W. Knudsen, Adjudicator**

Original: Court File  
Copy: Claimant(s)  
Copy: Defendant(s)