



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC

### Introduction

On December 8, 2016, the Tenants applied for dispute resolution seeking money owed or compensation for damage or loss under the *Residential Tenancy Act* (“the Act”), regulation, or tenancy agreement.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The evidence was reviewed and was confirmed received by each party. The parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to present affirmed oral testimony and to make submissions during the hearing.

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.

### Issues to be Decided

- Are the Tenants entitled to a monetary order for money owed or compensation for damage or loss?

### Background and Evidence

The parties testified that the tenancy for the current unit commenced on April 1, 2013, as a month to month tenancy. As of April 2017, the Tenants pay rent of \$1,059.81 on the first day of each month. Prior to April 2017, the Tenants paid rent of \$1,022.00 per month.

The Tenants are seeking compensation for a loss of use and loss of quiet enjoyment the rental property due to construction on the property.

The Tenants testified that the rental property has four concrete buildings of which two are 23 storey towers. The Tenants are a retired couple living in a one bedroom unit in one of the towers.

The Tenants testified that a renovation of the building began on June 6, 2016. The Tenants testified that they have lost the use of their balcony and they have suffered a loss of quiet enjoyment. The Tenants submitted that the balcony is 131 square feet and looks out to a park, with a mountain view.

The Tenants testified that extreme noise started at the end of June 2016. They testified that the front of the concrete balconies on the building are being removed using jackhammers, drills, and power tools, and will eventually be replaced by glass panels. The Tenants' testified that the removal of the concrete causes noise, dust, and fumes from the jack hammering and concrete saw. The Tenants submitted that their single pane windows do not protect from outside noise.

The Tenants submitted that they purchased ear protection to help cope with the ongoing noise and to protect their hearing.

The Tenants submitted that the severe noise usually started between 8 am and 9 am and continued until shortly after 4 pm Monday to Friday. They submitted that work also took place on Saturdays. The Tenants submitted that the construction work was approximately 45.5 hours per week.

The Tenants testified that the Landlords are also performing other renovation work on the property. They testified that the lobby, hallways, and renovations to other units are ongoing.

The Tenants' submitted that they have the right to quiet enjoyment of the property and referred to the Residential Tenancy Policy Guideline #6 Right to Quiet Enjoyment.

The Tenants testified that they have paid the full rent, which includes the use of the balcony, but they have had no use of their balcony since June 27, 2016.

The Tenants are seeking compensation from the Landlord as follows:

Loss of use of the balcony	July to November	10% of rent - \$500.00
Loss of quiet enjoyment	June to November	15% of rent - \$825.00
Potting soil		\$20.00
Ear protection		\$41.94
	total	\$1,386.90

The Tenants submitted that they sent emails to the property manager requesting compensation for the loss of quiet enjoyment and for the loss of use of the balcony and their request was denied.

The Tenants provided color photographs of the construction occurring on the rental property to support their testimony on the loss of use of the balcony. The Tenants also provided video files which contain the sound of the construction noise to support their testimony on the loss of quiet enjoyment. The Tenants testified that the audio recordings are not from the deconstruction of their balcony but rather from other balconies on the property. They testified the audio recording are from the work performed to resurface the floor of the balconies which is less noisy than the noise caused during the removal of the balconies.

The Tenants testified that they were affected by the noise of the removal of the balconies all around them. They testified that their audio evidence demonstrates that the work done on the 13<sup>th</sup> floor echoes and the noise affects them.

The Tenants testified that the work on the balconies was cosmetic and the majority of the work on the property was done to modernize the rental property.

The Tenants testified that the Landlord, Ms. S.D. only started working at the property in September 2016. They testified that the Landlord was not present when the noise was at its worst in July and August.

In response, the Landlord, Ms. S.D. testified that the property was built in the 1970's, and this is the first remediation of the property. The Landlord testified that the concrete is deteriorating and there is a drainage issue, so the balconies are being removed in phases.

The Landlord Ms. S.D. testified that there are 168 units in the tower, and it takes 5 days per suite to remove a concrete balcony enclosure. She testified that the removal of the balcony enclosure presents the worst noise. She testified that as the work to remove

the balconies moves around the building, there is less noise. She testified that her office is in the lobby and the noise occurs daily, but she is used to it.

The Landlord, Ms. S.D. testified that the construction started each day at 8:00 am and was completed by 4:30 pm, with occasional work on Saturdays until 4:00 pm starting in February. She testified that completion of the work was delayed because of bad weather.

The Landlord submitted that the occupants of the property were given weekly notices on the progress of the construction. The Landlord provided copies of the notices.

The Landlord's lawyer, Mr. A.C. submitted that in accordance with the Residential Tenancy Branch Policy Guideline # 6, Right to Quiet Enjoyment, the Landlord cannot allow a residential property to fall into a state of disrepair, and Tenants have to allow for some inconvenience.

The Landlord's lawyer submitted that they have given evidence that the work was required and the Landlord had a legitimate reason to perform the work, and for that reason, there should be no finding of a loss of quiet enjoyment.

The Landlord's lawyer submitted that construction on the property occurred during the hours of the day permitted by the city bylaws.

The Landlord's lawyer submitted that the legal test for what constitutes a breach of quiet enjoyment is set out in *Stearman v. Powers* 2014 BCCA 206. The Landlord's lawyer submitted that the Tenants must prove that the interference was of a grave and permanent nature. He submits that the jack hammering on the balconies is not a grave and permanent nature. He submitted that the noise diminishes as the work on the balconies moves around the building.

The Landlord's lawyer submitted that the Tenants lost use of the balcony, but the loss should be a nominal amount; not 10% of the rent.

The Landlord's lawyer referred to the Residential Tenancy Branch Policy Guideline # 22 Termination or Restriction of a Service or Facility and submitted that the use of the balcony is not a material term or of essential use in the tenancy and therefore there is no loss of a service or facility.

The Landlord's lawyer submitted that the Tenants did not provide evidence of interior disruptions.

The Landlord's lawyer submitted that the Tenants' claims for the potting soil and the ear muffs should be dismissed as they were not necessary. The Landlord's lawyer submitted that if the ear muffs mitigate against a loss of quiet enjoyment then the Tenants' claim should fail because they cannot have both.

### Analysis

With respect to the Landlord's submission that the Decision of *Stearman v. Powers* 2014 BCCA 206, is the legal test for what constitutes a breach of quiet enjoyment, I disagree. The Court of Appeal decision is in regard to a commercial tenancy. I find that the commercial tenancy, and the specifics of the case, distinguishes it sufficiently to not be relevant to my consideration of a breach of quiet enjoyment and the Residential Tenancy Legislation.

I accept the Act, and the policy guidelines, including the Entitlement to Quiet Enjoyment, and Compensation for Damage or Loss; to be the authority for what constitutes a breach of quiet enjoyment.

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;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

The Residential Tenancy Branch Policy Guideline # 6 Entitlement to Quiet Enjoyment deals with a Tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. The Guideline provides:

*A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises.*

*A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment **even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.*** [my emphasis]

The Residential Tenancy Branch Policy Guideline #16 Compensation for Damage or Loss addresses the criteria for awarding compensation. The Guideline provides:

*Damage or loss is not limited to physical property only, but also includes less tangible impacts such as:*

- ***Loss of access to any part of the residential property provided under a tenancy agreement;***
- *Loss of a service or facility provided under a tenancy agreement;*
- ***Loss of quiet enjoyment;***
- *Loss of rental income that was to be received under a tenancy agreement and costs associated; and*
- *Damage to a person, including both physical and mental*

***[my emphasis]***

*The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due.*

The Residential Tenancy Branch Policy Guideline #22 Termination or Restriction of a Service or Facility states that a Landlord may restrict or stop providing a service or facility other than one that is essential to the Tenants use of the rental unit as living accommodation, or a material term of the tenancy, if the Landlord reduces the rent to compensate the Tenant for loss of the service or facility.

Section 32(1) of the Act states that 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 the tenant.*

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I make the following findings:

#### *Loss of Use of the Balcony*

I find that the Tenants lost the use of their balcony from July 2016, to November 2016 due to the construction. I find that the loss of use of the balcony was not a brief period

of time. The Tenants' requested compensation from the Landlord and the Landlord denied the request.

I find that the Tenants pay rent that includes the use of the balcony and they are entitled to compensation for the loss of access and use of the balcony.

The Tenants provided unrefuted testimony that the balcony is 131 square feet and looks out to a park, with a mountain view. I find that the Tenants request for compensation in the amount 10% of the monthly rent, for a total amount of \$500.00 is reasonable. I grant the Tenants compensation in the amount of \$500.00.

### Loss of Quiet Enjoyment

I find that the construction between June, 2016, and November 2016, resulted in noise, vibration, dust, and inconvenience to the Tenants. While I accept that the construction was necessary for the Landlord to maintain and renovate the property, I find that the ongoing noise and inconvenience resulted in a loss of quiet enjoyment for the Tenants.

The Tenants are retired, and as such, I find that it is likely they would be in the rental unit during the week while the construction work was ongoing.

I accept the Tenants' testimony regarding the noise which was supported by audio evidence. I find that the Tenants have established their claim to be compensated for a loss of quiet enjoyment. In the circumstances, I find that Tenants' claim for a \$150.00 per month rent reduction is reasonable.

I award the Tenants a rent reduction in the amount of \$150.00 per month, for the 5 months inclusive of July 2016, to November 2016, and an additional \$75.00 for a portion of June 2016. The Tenants are awarded a total of \$825.00 for loss of quiet enjoyment.

I grant the Tenants the amount of \$41.94 for the cost of the ear protection. I do not agree with the Landlord's lawyer that compensation to the Tenants for ear protection, to lessen the disturbance of the construction noise, prevents me from awarding compensation for the loss of quiet enjoyment as well as the cost of the ear protection. I find the claim to recover the cost of the ear protection is reasonable due to the noise.

I dismiss the Tenants' claim for compensation of \$20.00 for having to dispose of potting soil. There is insufficient evidence from the Tenants on why it needed to be thrown out and there was no receipt provided to establish the value.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. The Tenants were successful for the majority of their claim. I order the Landlord to repay the \$100.00 fee that the Tenant's paid to make application for dispute resolution.

Pursuant to section 67 of the Act, I grant the Tenants a monetary award of \$1,466.94 for loss of quiet enjoyment; for loss of use of the balcony; for ear protection; and for the cost of the hearing. I order that the Tenants may deduct the amount of 1,466.94 from future rent payments.

### Conclusion

The Tenants have established a claim for a loss of quiet enjoyment of the rental property and loss of use of the balcony due to construction on the rental property.

The Tenants are granted a monetary award of \$1,466.94 and I authorize the Tenants to deduct this amount from future rent payments.

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: June 23, 2017

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Residential Tenancy Branch