



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDCT, FFT

### Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on August 1, 2019, in which the Tenant requested monetary compensation from the Landlord and to recover the filing fee.

The hearing of the Tenant's Application occurred over three days: November 14, 2019; January 20, 2020; and, March 26, 2020. Both parties called into the hearings and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

### Preliminary Matter—Evidence

The parties agreed that all evidence that each party provided had been exchanged.

At the hearing on November 14, 2019 counsel for the Landlord stated that only two weeks prior to that hearing was the Landlord provided with the Tenant's evidence in support of her claim. A review of branch records confirms that this information was also uploaded two weeks prior to the hearing. Although such late delivery of evidence may result in the evidence being excluded or an adjournment granted, the hearing on November 14, 2019 did not complete and was adjourned to a later date; as such the Landlord was afforded an opportunity to review and respond to that late evidence in accordance with my Interim Decision. I therefore considered the Tenant's evidence in making my Decision.

No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

#### Preliminary Matter—Date and Delivery of Decision

The hearing of the Tenant's Application concluded on March 26, 2020. This Decision was rendered on May 6, 2020. Although section 77(1)(d) of the *Residential Tenancy Act* provides that decisions must be given within 30 days after the proceedings, conclude, 77(2) provides that the director does not lose authority in a dispute resolution proceeding, nor is the validity of the decision affected, if a decision is given after the 30 day period.

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them.

#### Issues to be Decided

1. Is the Tenant entitled to monetary compensation from the Landlord?
2. Should the Tenant recover the filing fee?

#### Background and Evidence

The Tenant testified that the tenancy began February 2017. At the time the tenancy began monthly rent was \$1,670.00. She confirmed that rent was \$1,711.00 in April of 2018 when the construction began and is currently \$1,735.00 per month.

The Tenant stated that the rental unit is a one-bedroom unit in a 19-storey apartment building. She estimated that there are eight units per floor.

The Tenant's claim relates to her concerns over ongoing construction in the rental building in which the rental unit is located. She stated that construction began at the rental building in April 2018 when the Landlord began renovating five units on her floor and other units on other floors. The Tenant also stated that the renovations have moved to the common areas, such as the lobby, elevators and parking, and continued to the date of the final hearing.

In her Application the Tenant sought a 25% monthly rent reduction from September 15, 2018 to July 2019 for a total of \$4,444.25. In a Monetary Orders Worksheet filed in evidence she detailed her request as including: "loss of quiet enjoyment; asbestos removal; dust; noise; mail delivery problems; elevator shut downs; water shut downs; parking blockage and restricted access to the lobby.

The Tenant confirmed that although the construction began earlier, she only claimed from September 15, 2018 onwards as at that time the noise became intolerable. She stated that the jack hammering to the concrete flooring started at that time which was the most bothersome part.

The Tenant provided a timeline in evidence which included the following:

April – December 2018: the Tenant wrote that the renovation to suites started early with new ownership with increasing complaints about the noise and dust throughout the building (stairways in particular) by various tenants starting in the latter part of 2018. A formal notice was received around 11/30/18 regarding renovations to suites along with pets being allowed in the building for the first time in 29 years...

January 2019: the Tenant wrote of concerns regarding asbestos removal in the summer of 2019, the presence of dust, the impact on tenants while the walls were being removed as well as the jack hammering of the concrete floors.

February 2019 to May 2019: the Tenant recorded that the hallway, landing and laundry room demolitions which were scheduled to start March 1, 2019 and complete by June 30 were postponed to May 21, 2019 with continuous dust and noise during the entire period. She also writes that fire doors were left open during construction creating safety concerns.

June to October 2019: the Tenant wrote that from June 11, 2018 to August 28, 2018 one of the two elevators was inoperable. She writes that it came back into service for one day and was then shut down for another 3 weeks. The Tenant further notes that the remaining elevator was used by the construction workers to move out contaminated materials and appliances such that the wait time could be 20 minutes.

June 20, 2019 the Tenant writes that the water was turned off without notice.

June 22, 2019 the Tenant writes that the laundry room was closed two days prior to the intended start date for construction.

The Tenant also wrote that the hallway construction, which was supposed to take 4-8 weeks, took 6-7 months creating issues with dust, dirt and noise at the same time as the suite demolitions/renovations.

The Tenant also notes that the lobby construction was scheduled to take 6-8 weeks but was not completed 12 weeks later. This negatively impacted mail delivery for the tenants.

The Tenant noted that the workers were protected by Worksafe regulations, but the tenants were not provided any protection against excessive sound or dust.

In her testimony, the Tenant described the construction noise and disruption as ongoing and consistent. She further stated that even though she asked for notice so she could leave and stay elsewhere they never gave her notice of the jack hammering. She stated that the sound was 100 decibels and is more than the permitted 80 decibels. She confirmed she received this information from a neighbour whom she claimed was an expert in the field. In support of her testimony, the Tenant provided numerous video recordings of the sound from the construction which was clearly audible in her rental unit.

In terms of the impact on her personally, the Tenant stated that she is a yoga instructor and an author and requires quite and peace of mind to prepare her yoga classes and to write. To supplement her income, she also works part time as a security guard such that she both works at home and works nights and therefore needs to sleep during the day.

The Tenant testified that at times, she has had to leave her apartment because the noise was so loud. She further stated that she asked the Landlord for some prior notice so she could make arrangements to go elsewhere during the day, yet despite her requests the Landlord did not provide her written notice of when the jack hammering would occur. She stated that the unexpected nature of some of the construction was such that it affected her emotionally.

The Tenant also provided a letter from her doctor who wrote that she was “deeply affected emotionally and mentally and was suffering from anxiety and lack of concentration” due to the construction noise.

The Tenant provided in evidence numerous photos of the construction, copies of notices from the Landlord as well as 59 videos which she took from inside her rental unit as well as in the hallways of the rental building. Although the Tenant asked that I review all the videos and photos submitted, the Tenant drew my attention to the following specific digital evidence:

- photos of the hallway construction in February 2019: 8263 and 8264;
- photos related to the elevator closure in June 2019: 9491 and 9492;

- photos confirming the mailroom closure in October 2019: 0446;
- a photo of a blocked off door covered in caution tape taken May 30, 2019 9013; and,
- photos of the elevator taken October 24, 2019: 0476;

The Tenant confirmed that the unit renovations which were the most impactful were due to the jack hammering; she provided numerous videos confirming the sound of hammering, sawing and jack hammering including videos taken in November 2018, January 2019, February 2019, May 2019, June 2019 and July 2019.

The Tenant testified that she attempted to address these issues with the Landlord directly. On November 14, 2018 the Tenant sent a letter to the Landlord about her concerns wherein she requested monetary compensation and reported the following:

- One of the elevators is occupied by the construction crew.
- Construction occurs Monday to Friday 8:00 a.m. to 8:00 p.m. and there is dust in the hallway.
- The Tenant had difficulty speaking to management and when she did, they downplayed her concerns.
- The Tenant has a right to peaceful and quiet enjoyment of her housing and to be free from excessive ongoing noise and disturbance.
- The noise from the jackhammering and construction is unbearable at times, leaving her unable to concentrate or complete tasks at home, unable to sleep or relax before or in between her work, such that she is overtired when she works.
- The noise is loud from any location in her apartment, including her bedroom, living room and kitchen. Even with earplugs the noise does not allow her to relax in her home.
- The Tenant is a professional author and uses her home for writing and has not been able to write or create during the construction.

The Tenant stated that the Landlord's response to her request was that they would not offer any compensation for this disturbance. The Tenant acknowledged that she received a \$25.00 visa gift card from the Landlord for loss of use of the laundry room. She stated that all tenants received this as everyone lost use of the laundry room for approximately one month. The Tenant stated that aside from this gift card, she has not received any rent reduction or compensation for the impact of this construction.

The Tenant made a second request to the Landlord for compensation on July 5, 2019. A copy of that letter was provided in evidence and included the following:

...

Over 10 months have now passed and construction/renovations appear to still not be near completion. When I ask how much longer renovations are expected to take, I get a vague answer of "hopefully not much longer."

I have endured a very long struggle of hearing jackhammers, machinery, hammering and banging along with coughing and other physical reactions to dust, painting, glue, etc., closed laundry room, and obstructions at the parking entrance. There are also long waits for an elevator, as construction crew occupy them frequently.

The notes management leaves by elevators offer very vague timelines of each renovation going on, leaving me to not know what time of day or which days of the week I can expect to hear the noise or plan around it.

I have been very agitated by the noise, causing me stress, lost sleep and unable to concentrate on my professions of writing and yoga practice while in my own home. I can hear the noise from every room in my home.

This is the 2<sup>nd</sup> time now I am writing requesting monetary compensation for unreasonable and ongoing noise. This noise contravenes my right to peace and quiet enjoyment as a tenant.

Section 28 of the *Residential Tenancy Act* states:

28 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

As a landlord, you have a legal obligation to make a reasonable effort to correct the situation. Should the matter not be resolved, I have the right to apply for dispute resolution through the Residential Tenancy Branch (RTB) to ask for an order that you comply with section 28, as well as monetary compensation for loss of quiet enjoyment. I am hopeful that we can resolve this matter without the need for dispute resolution.

For additional information, please see RTB Policy Guideline 6 – Right to Quiet Enjoyment or contact the RTB ([gov.bc.ca/landlordtenant](http://gov.bc.ca/landlordtenant)) at 604-660-1020 or 1-800-665-8779..."

The Tenant provided a copy of the Landlord's response to her second request wherein the Landlord provided some explanation as to the delays, as well as their policy of informing neighbouring units of jackhammering. The Landlord also wrote that they would not provide compensation as they believed they were working within the city

bylaws, Worksafe requirements and the *Residential Tenancy Act*. In this letter the Landlord invited the Tenant to make an application to the Residential Tenancy Branch.

The Tenant testified that a year and a half later there is no clear date as to when the work is going to be completed.

At the time the Tenant filed for dispute resolution in August 2019, she sought \$4,400.00 in monetary compensation representing 25% of her rent from September 15, 2018. She confirmed that her rent was \$1,690.00 and it was raised to \$1,711.00 in February of 2019. She further noted that the rent was raised again to \$1,756.25 as of February 2020.

In response to the Tenant's claim the Landlord's Property Manager, K.W., testified as follows. He confirmed he has been the property manager since February 2019. He confirmed that he was not present when the construction began, although he reviewed the Landlord's records in preparation for giving testimony.

K.W. stated that the suite renovations started "well before his time". He stated that they started in approximately May of 2018. Counsel clarified that it is the Landlord's position that the unit renovations that would have affected this Tenant occurred during K.W.'s employment.

K.W. stated that there are 138 units in the building which is concrete 20 story tower built in the 1970's. He stated that the current Landlord took over in May of 2018.

K.W. stated that the building was showing lots of signs of neglect and required significant renovations; the nature of the renovations include the following:

- As tenants would move out they would update their particular unit.
- If the unit was an original condition unit, which most of them were, the Landlord would go in and do a full renovation.
- Some units had a "partial update" but this was not to the Landlord's standard such that they would also be fully renovated.
- The Landlord also updated the common areas including the lobby, hallways and laundry room. In February 2019 the Landlord provided the tenants with a general notice that they were going to start common area work, lobby, hallways and laundry room with a start date March 1, 2019, and hopefully finish by June 30, 2019.

K.W. confirmed that the Tenant lives on the 14<sup>th</sup> floor. K.W. stated that the renovation of each suite takes from 40-45 days.

K.W. stated that there are noisier times during the renovation, typically during the first 5 days of renovation as there are 2-4 days of jack hammering to remove the existing floor tile. He stated that not all units have floor tile, but most do. In terms of the noise after, it is general construction noise where you might hear it from the hallway: installing flooring, cabinets, painting. He also stated that the sound was intermittent depending on the trades; for example, it takes the kitchen installer three days at which time the tenants might hear screws going into the walls, however, when they are painting, you would not hear anything.

K.W. acknowledged that of the Tenant's videos, the February 2019 videos showed the most disruption; however he stated that according to the Landlord's records there were 3-4 units being worked on in approximately February 2019 on the same floor as the rental unit. K.W. stated that there are six units on her floor and four of the units have been updated.

K.W. further stated that before renovations are completed on the floor, notice is given to the Tenants; they slide a notice under the door for noise (jackhammering) to warn the tenants. Counsel confirmed that they uploaded a copy of the notice that "would have been received" as they failed to keep a copy of the one sent to this Tenant. K.W. was not able to speak to how many notices would have been given to the Tenant and suggested that J.S. would have a better idea of this.

K.W. testified that there are currently no renovations occurring on her floor, the floor above, or the floor below. K.W. was not able to confirm when the units above and below her unit were completed.

In terms of the hallway renovations, K.W. stated that the hallway renovations started March 2019, and completed mid April 2019. He stated that they did the hallway renovations in phases; first they removed the carpets, then installed the tiles on the elevator landing and then installed the carpet and then painted.

In terms of the impact on the 14<sup>th</sup> floor, K.W. stated that it took a couple days to remove the fixtures. He stated that there was a week or two in between while the carpet was removed, and the Tenant would have had to walk on the concrete. K.W. further stated that the tiling would take a day, and then a few more days for the grout. K.W. claimed



that the noise would be minimal, except maybe a tile saw for a day when the tile was installed in the elevator landing. It was low noise for painting and carpet installation. K.W. stated that there was no impact on their ability to access their suites. He stated that when the doors were open for painting, they hired a security company.

In terms of the renovations to the coin laundry room, K.W. confirmed the Tenants did not have access to the laundry room for "a period of time". He noted that on May 22, 2019 the tenants were informed that as of June 22, 2019 the Tenants would not have access to the laundry room, as it would closed for 2-4 weeks. They offered all the tenants a \$25.00 Visa gift card for the 2-4 weeks they would not have access to the coin laundry. The gift card confirmation was provided in evidence by the Landlord and confirmed the Tenant received her gift card on July 31, 2019.

The building manager, J.S., intended to testify, however, when the hearing reconvened on March 26, 2020, J.S. had "fallen ill" and was not able to testify. K.W. confirmed they did not want an adjournment as he had been able to speak to J.S. and was therefore able to testify as to the timeline of the construction.

K.W. stated that he was able to speak to J.S. and review the internal records in the Property management software. He then provided the following additional testimony. He stated that all seven of the suites on the 14<sup>th</sup> floor were redone, beginning April 2018 and ending January 2019. K.W. stated that the "noisiest part of the work" was the chipping of the ceramic tile, which was 2-4 days, at the beginning of the renovation. Each suite took 40-45 to complete.

K.W. stated that they update the suites as tenants give notice. He confirmed that there were 2 renovated on the 16<sup>th</sup> floor, but the unit above (1504) and below (1304) are the original units and have not been renovated yet.

In summary, the Tenant stated as follows.

The Tenant stated that the tenants never received a notice about the construction, save and except for a "General Notice". She further stated that the notice and dates provided by the Landlord's representative at the January hearing, were not consistent with the actual work done. She also reiterated that she asked the Landlord for a heads up so that she could plan accordingly, yet the Landlord never provided this courtesy.

The Tenant stated that the nature of her tenancy is unique as she works from home writing and preparing her yoga classes such that she needs a peaceful living

environment in addition to her right to quiet enjoyment. She also reiterated that she works part time as a security guard, and has to do night shifts which means she has to sleep during the day at times.

The Tenant stated that she has been subjected to the dust and noise for two years. She further stated that the elevator has been used by construction workers to transport materials and tools thereby impacting her ability to access her rental unit (as she is on the 14<sup>th</sup> floor).

In response to the Landlord's claim that the only disruptive time was during the chipping of tile, for 2-4 days per unit, the Tenant stated that this is not true. The Tenant stated that the noise and disruption is never ending as the drilling, hammering, jack hammering, banging on the walls is constant. The Tenant also stated that without any notice, asbestos removal occurred on March 24, 2020.

The Tenant stated that she cannot move from the rental property as she can't afford it. She stated that she was aware that I could not order the Landlord to stop construction but believes she should be entitled to some compensation due to the duration of the work and its impact on her. The Tenant also noted that the rental building has 138 units and 20 floors. Of the 138 units, approximately 50-60% of the units have been renovated such that the work is only half done.

In closing counsel for the Landlord submitted as follows.

Tenants right to Quiet enjoyment has to be balanced against the Landlord's obligation to repair and maintain the rental property pursuant to section 32 of the *Residential Tenancy Act*. Counsel submitted that the rental building is from the mid 1970's and hadn't undergone significant remediation until the Landlord took over a couple of years ago.

Counsel also noted that *Residential Tenancy Policy Guideline 40* contemplates fixtures having a 25 year lifespan. A substantial remediation could have been contemplated in the 1990's and the useful life of these fixtures would still be long past.

Counsel submitted that temporary discomfort and inconvenience does not constitute a breach of quiet enjoyment. He further stated that the common law test is that loss of quiet enjoyment must be "grave and permanent". It can't be temporary, and it should be grave and permanent.

Counsel further submitted that this is not a case where there was jackhammering every day, nor was there evidence that the work has been prolonged.

Counsel submitted that the cases submitted by the Tenant involved evacuations, stop work orders, or their trades were not able to complete the work in a reasonable sort of way. This is not a case like that.

Counsel submitted that the Landlord's cases should be preferred. The Landlord's cases involved this Landlord (albeit in a different building) renovations, jack hammering, and tile removal. The quiet enjoyment claims were consistently dismissed because there wasn't anything unusual.

Counsel also stated that this is a Tenant that doesn't seem to make a distinction between noise that occurs close to her suite or noise that is occurring 4 floors down. As an example, in the video recordings submitted by the Tenant, there is one from February 22, 2019, which was taken after the suites on her floor were completed. Counsel submitted that the video was taken on the 18<sup>th</sup> floor, four floors above her suite; he stated that she was up there, without any business of being there, taking videos of this.

In response to the Tenant's claim that her tenancy is unique, counsel submitted that obviously there were days when sleeping during the day would be difficult. The noisiest parts of the work, that would have been in close proximity of her suite were 2-4 days over several units. However, counsel noted that clause 14 of her tenancy agreement specifically provides that the suites aren't intended to be used for commercial purposes.

The Tenant also claimed that she had loss of access to the laundry facilities. However, counsel stated that she accepted a gift card as her compensation.

Counsel submitted that lobby access was diverted for only three non-sequential days and hallway access was never impeded.

Counsel confirmed that there have not been any rent reductions provided to the Tenant, save and except for loss of use of the laundry, for which she received a gift card.

The Landlord submits the claims should be dismissed, or the damages be nominal. Counsel submitted that there could be compensation if the Landlord was not complying with safety protocols, the building was evacuated, or the construction was delayed, but that is not the case.

## Analysis

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Tenant has the burden of proof to prove her claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

In this case, the Tenant alleged that her right to quiet enjoyment was negatively affected as a result of the renovation project at the rental building and seeks monetary compensation equivalent to a 25% rent reduction for the devaluation of her tenancy.

A tenant's right to quiet enjoyment is protected under section 28 of the *Residential Tenancy Act*, which reads as follows:

### **Protection of tenant's right to quiet enjoyment**

**28** 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.

Further guidance can be found in *Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment* which provides in part as follows:

“...Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment.

...

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

...

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it.

...

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed...

A Tenant's right to quiet enjoyment must be balanced against a Landlord's obligation to repair and maintain the rental property pursuant to section 32 of the *Act* which provides in part as follows:

**32** (1) 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 a tenant.

In this case there was no dispute that upon taking ownership of the building, the Landlord underwent extensive renovation work to the common areas and individual units in the rental building. Although the rental building was built in the 1970's, there was no evidence before me to support a finding that the work was necessary, or that the rental building was in a deteriorating condition; rather, the work appears to be more cosmetic, than structural. While *Residential Tenancy Branch Policy Guideline 40* acknowledges that building elements have a useful life and may require replacement due to age, a landlord is not obligated to update a rental property unless such work is necessary to ensure the rental unit complies with health safety and housing standards and is suitable for occupation by a tenant. Such cosmetic renovations may generate higher rental revenue for a landlord, however, they are not required by section 32 of the *Act*.

I find that as the rental units became vacant, the Landlord “gutted” the units. This work involved jackhammering and removal of the tile floors, removal and replacement of fixtures and cabinetry as well as replacement of the flooring and painting. The work was extensive and generated significant noise as evidenced by the Tenant’s video recordings.

I find that as a result of the duration and extent of the project, the elevator was frequently unavailable to the Tenant as at times one elevator was inoperable, and at other times they were used by construction workers. The rental unit is on the 14<sup>th</sup> floor such that the impact on this Tenant was more pronounced than for a unit more easily accessed by stairs.

I also find the laundry room was inaccessible for a period of one month. While the Tenant accepted a \$25.00 gift card, I find this to be insufficient for the lack of use of laundry facilities.

I find that the hallway renovations resulted in temporary disruptions to the Tenant’s access to her floor. I agree with counsel for the Landlord that walking through the hallways during the renovation was not as pleasant as before or after the work was completed, but this did not impact the Tenant’s access to her rental unit. The renovations to the parking garage were similarly inconvenient, but not unreasonably disruptive.

After consideration of the testimony and evidence before me, and in particular, the video recordings provided by the Tenant, I am satisfied that this Tenant experienced more than a temporary discomfort and inconvenience. I am satisfied she was unable to write or prepare her yoga classes due to the disruption caused by the construction. Although she does not regularly work from home, and her tenancy agreement specifically prohibits the use of the rental unit for business purposes, I accept her testimony that she does require peace and quiet in order to write and prepare her classes. I am also satisfied that she regularly works night shifts and required quiet in order to sleep during the day. I find these activities are consistent with a residential tenancy and encompassed by a tenant’s rights under section 28.

I accept the Tenant’s testimony that, despite her requests, she was not provided specific dates and times for the jackhammering. While the Landlord submitted a general notice in evidence, they were unable to provide the specific notice provided to the Tenant at this time. I am satisfied that while the Tenant was informed of the nature of the work contemplated, she was not provided specific information regarding

jackhammering near her unit and as such could not make arrangements to be away from her rental unit. I am also satisfied that the unpredictable nature of the work created additional anxiety for this Tenant.

The evidence before me confirms that the impact on this Tenant has been significant. This is evidenced by her own testimony, which I found compelling. I found the Tenant to be matter of fact and sincere in her testimony, and I did not feel she was exaggerating the impact the construction had on her. At times during her testimony the Tenant sounded as if she were close to tears. I have no doubt that she has been very negatively affected by the duration of this construction. The Tenant admitted that she would move if she could afford to, acknowledging that the suite renovations were likely to continue for some time (as only 50% of the work has been accomplished thus far).

I also accept the Tenant's letter from her doctor confirming their view that the Tenant was "deeply affected emotionally and mentally and was suffering from anxiety and lack of concentration" due to the construction noise.

Although I am satisfied the Landlord has attempted to perform the work as quickly as possible and with as little disruption to the tenants, the projected timeline has been extended in some cases. For instance, the Landlord issued a notice on February 19, 2019 wherein they advised the tenants that the hallway, lobby and laundry room work would be completed by June 30, 2019. In a "Lobby Renovation Update" later issued to the tenants, they were advised the lobby renovation would begin August 19, 2019 and would complete 6-8 weeks later, which pushed this portion of the project to as late as October 11, 2019, some three and a half months after the original estimate. Although this is not a case of extraordinary delays, as in some cases before the Branch, the evidence indicates the construction has gone on for a year and a half and may continue for as many more. I agree with counsel for the Landlord that this work is (hopefully) not a permanent situation, but it is also not "temporary".

Counsel for the Landlord submitted that the common law test for breach of quiet enjoyment is that the disturbance must be grave and permanent. In support counsel submitted the B.C. Court of Appeal decision *Stearman v. Powers*, 2014 BCCA 206. This case involved a commercial tenancy where the Tenant stopped paying rent and moved from the premises alleging a fundamental breach of the lease due to the presence of a creosote odour. The following passages from that decision are of assistance:

*Quiet Enjoyment*

[18] ...The meaning of the landlord's obligation to provide "quiet enjoyment", however, must be first examined as a matter of law. The Term was express in this case, but is implied in any lease. Such a covenant protects against a landlord's derogating from his own grant. Thus, Christopher Bentley, John McNaire and Mavis Butkus, the authors of *Williams & Rhodes' Canadian Law of Landlord and Tenant* (6<sup>th</sup> ed., looseleaf), state that the term provides "assurance against the consequences of a defective title and against any substantial interference, by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes." (At 9-1, my emphasis.). Similarly, Richard Olson, in *A Commercial Tenancy Handbook* (looseleaf), describes the covenant for quiet enjoyment as a right to "exclusive occupancy of the premises without interference by the landlord". (At 3.20.1; my emphasis.) The author cites *Firth v. B.D. Management Ltd.* (1990) 73 D.L.R. (4<sup>th</sup>) 375, in which this court observed:

To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor. It is conceded by counsel that the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough—the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.).

Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [At 379-80; emphasis added.]

While this case provides some assistance, it involved a commercial tenancy wherein the tenant alleged a fundamental breach and sought to end the tenancy. In the case before me, the Tenant relies on section 28 of the *Residential Tenancy Act* which codifies a residential tenant's right to quiet enjoyment.

The Tenant does not wish to end her tenancy, rather she seeks monetary compensation for the amount her tenancy has been devalued due to the ongoing construction; such requests are made pursuant to section 65(1) which reads as follows:

**65** (1) Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

...

(e) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;

Often a landlord will offer tenants a rent reduction during times of significant disruption due to construction. Landlords may also forego annual rent increases as an



acknowledgement of the effect on tenancies during renovations. In this case, the Landlord provided the Tenant with a \$25.00 gift card as compensation for her inability to use the laundry facilities for one month. No other financial compensation was provided. Further, the Landlord continued to increase the rent during the renovations.

In this case, I find the Tenant has provided sufficient evidence to show that the construction work has caused her ongoing discomfort, interference and an unreasonable disturbance. I find that her right to quiet enjoyment has been infringed by the nature of this work. I also find this tenancy has been devalued due to the extensive construction work.

The audio recordings provided by the Tenant provide an indication as to the disturbance during various times of this project. The recordings from November 2018, as well as during the months of January and February 2019 evidence very loud grinding, loud hammering and sawing. In one video taken November 20, 2018 the hallway is full of construction supplies. Most of these videos are taken within the rental unit and show the level of noise and the inescapable nature of the disruption. I find it highly unlikely the Tenant could write, prepare yoga classes, or attend to any activity which required any level of concentration during these times. As well, I find that the tenant would not be able to nap during the day and prepare for her night shifts.

The note from the Tenant's doctor is dated March 8, 2019 which indicates to me that at this point the Tenant was having difficulty coping with the constant noise and disruption.

In all the circumstances, I find that the tenancy was significantly devalued in November 2018, January 2019 and February 2019. I award the Tenant a 60% reduction in her rent for these three months. As the Tenant's rent was \$1,670.00 in November 2018 and January 2019, I award her **\$2,004.00** for these two months. The evidence indicates the Tenants rent was increased to \$1,711.00 as of February 2019; I therefore award her **\$1,026.60** for the month of February 2019.

While there are some videos taken from the rental unit in July of 2019, the grinding sounds are less disruptive, although clearly audible and disruptive. The same can be said for the videos from September 2019 and October 2019. In one video the Tenant notes that she is unable to nap with the level of noise. Presumably the videos represent the level of noise present when more distant rental units are renovated.

The videos and photos provided by the Tenant for the months July 2019, August 2019, September 2019, and October 2019 also show the disruption caused by the

construction in the common areas, including loss of use of the elevator and disruption to the Tenant's access to the pool, lobby and her mail.

In determining the amount of compensation to which the Tenant is entitled, it is notable that this Tenant requires a peaceful environment in which to write, prepare her yoga classes and rest for her night shifts. While some other tenants in the building may work away from their units during the construction hours and not be as affected, I find the impact on this Tenant was particularly determinantal. I find that while the noise was less audible, it would be disruptive to this Tenant.

At the time of the final hearing on March 26, 2020, the construction had been ongoing for 18 months. In her application, the Tenant sought a 25% rent reduction for the time period September 2018 to August 2019 (the date of filing her Application) as well as an ongoing rent reduction until the construction completes.

I find that this tenancy has been devalued throughout the entire period of construction. However, as the Tenant did not claim compensation prior to September 2018, I make no award for that time period. As well, I note that I have already awarded the Tenant a 60% rent reduction for November 2018, January 2019 and February 2019. I find, based on the evidence before me, that the impact on her tenancy for the remaining months is less. I am not satisfied she is entitled to a 25% rent reduction for these months; rather I award her a 10% reduction for the impact on her tenancy caused by the construction in the more distant units, the construction in the common areas, as well as the disruption to the elevators, mail service, laundry facilities and pool.

The Tenant claimed compensation from September 2018, I therefore award her compensation as follows:

Month	Rent payable	% Rent reduction	compensation
September 2018	\$1,670.00	10%	\$167.00
October 2018	\$1,670.00	10%	\$167.00
November 2018	\$1,670.00	60%	\$1,002.00
December 2018	\$1,670.00	10%	\$167.00
January 2019	\$1,670.00	60%	\$1,002.00
February 2019	\$1,711.00	60%	\$1,026.60
March 2019	\$1,711.00	10%	\$167.00
April 2019	\$1,711.00	10%	\$167.00
May 2019	\$1,711.00	10%	\$167.00
June 2019	\$1,711.00	10%	\$167.00
July 2019	\$1,711.00	10%	\$167.00

August 2019	\$1,711.00	10%	\$167.00
September 2019	\$1,711.00	10%	\$167.00
October 2019	\$1,711.00	10%	\$167.00
November 2019	\$1,711.00	10%	\$167.00
December 2019	\$1,711.00	10%	\$167.00
January 2020	\$1,711.00	10%	\$167.00
February 2020	\$1,711.00	10%	\$167.00
March 2020	\$1,711.00	10%	\$167.00
April 2020	\$1,711.00	10%	\$167.00
<b>TOTAL</b>			<b>\$5,869.60</b>

As the Tenant has been substantially successful in her Application, I also award her recovery of the \$100.00 filing fee for a total award of **\$5,969.60**.

As aptly noted by counsel for the Landlord, there is a significant difference between work which occurs near the rental unit, and work which occurs on floors some distance from the rental unit. The evidence indicates that approximately 50% of the units have been updated. As I was not provided with a specific timeline setting out which units had been renovated at times, I am unable to determine the future impact on this Tenant. It is notable that most of the units on her floor have been updated. However, given the level of noise generated from the jackhammering, grinding, sawing and hammering as evidenced by her videos, I expect her tenancy to continue to be significantly impacted and devalued when work is completed on units on the 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> floors.

I decline the Tenant's request that I make an order for an ongoing rent reduction. Rather, I grant the Tenant leave to reapply for further monetary compensation for the time period May 2020 onwards. I am hopeful that the parties will adopt the rent reductions contained within this Decision to facilitate any settlement of the Tenant's future claims. However, should the parties not be able to resolve matters by agreement, the amount of compensation to which the Tenant would be entitled is to be determined by the presiding Arbitrator.

Similarly, should the Tenant's rent have been raised as of February 2020 (which appears to be the date the Landlord annually raises rent), the Tenant is at liberty to apply for a further compensation for rent paid for February 2020-April 2020 on the basis of any increase in her rent.

### Conclusion

The Tenant's Application for monetary compensation from the Landlord is granted. The Tenant is entitled to the sum of **\$5,969.60** representing a rent reduction from September 2018 to April 2020 as well as recovery of the filing fee.

Pursuant to section 72(2)(a) I authorize the Tenant to reduce her future rent payments until the \$5,989.00 is recovered.

The Tenant is at liberty to reapply for monetary compensation for future loss of quiet enjoyment and devaluation of her tenancy for the time period May 2020 onwards. The Tenant is also at liberty to reapply for a retroactive rent reduction for the time period February 2020-April 2020, in the event her rent was increased as of February 2020.

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: May 6, 2020

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Residential Tenancy Branch