



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Hollyburn Properties Limited and  
[tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      **MNDCT, OLC, FFT**

### Introduction

This hearing dealt with an application by the tenants under the *Residential Tenancy Act* (the *Act*) for the following:

- An order requiring the landlord to comply with the Act pursuant to section 62;
- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- An order requiring the landlord to reimburse the tenants for the filing fee pursuant to section 72.

The tenants attended. CA, KH and AW attended as agents for the landlord ("the landlord"). CA was the sole agent who provided testimony. The parties were given a full opportunity to be heard, to present affirmed testimony, make submissions, and call witnesses. I explained the hearing process and provided the parties with an opportunity to ask questions. The parties did not raise any issues regarding the service of evidence.

I have only considered and referenced in the Decision relevant evidence submitted in compliance with the Rules of Procedure to which I was referred.

### Issue(s) to be Decided

Are the tenants entitled to:

- An order requiring the landlord to comply with the Act pursuant to section 62;
- A monetary order for compensation for damage or loss under the *Act, Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;
- An order requiring the landlord to reimburse the tenants for the filing fee pursuant to section 72.

### Background and Evidence

This is an application by the tenants for compensation for loss of quiet enjoyment during an approximately 5-month period of construction involving the building in which their unit is located. The 12-storey building in which the unit is located was built in 1968. The tenants are a mother and daughter; the daughter provided translation services for the mother during the hearing as the mother had reduced comprehension of English. The tenants submitted considerable written and video evidence. In total, over 300 files were submitted as evidence.

The tenancy began on August 1, 2013 and continues for monthly rent of \$1,705.27 payable on the first of the month. The tenant provided a security deposit of \$725.00 which the landlord holds. The tenant submitted a copy of the signed tenancy agreement which does not include parking.

The landlord testified as follows. The unit includes a parkade which is partially beneath the structure. As a result of an engineer's report listing structural deficiencies, the landlord obtained the necessary permits and started repairs on the parkade. The repairs began in early March 2020 and were completed July 18, 2020, according to the landlord, and are still ongoing, according to the tenants. The tenants of the building were advised periodically of the status of the project throughout the construction period.

During the construction period, the tenants claimed that their enjoyment of the unit was curtailed. They described the sound of jackhammers, heavy equipment and other construction machinery during the working day. The tenants summarized their position in their application, stating in part:

*[the construction] involves the demolition and restoration of the concrete and waterproofing membrane which have me directly exposed to noise, toxic dust, chemicals, no privacy, etc. The solutions provided by the landlord were*

*unreasonable.*

The tenants testified that the “deafening”. sound of the construction was unbearable and ruined all enjoyment of their lives. The construction caused plumes of “toxic” dust to blow across their balcony and enter their unit. They could not use the balcony except for storage only. Each tenant testified to decreased health and significant mental and physical repercussions from the construction. They provided considerable evidence in support of their assertions about the deleterious effects of the construction. They expressed extreme distress about the conditions during the construction; they also expressed anger and frustration at the landlord for failing to take their complaints seriously and for not providing a viable solution.

The conditions were particularly concerning to the 69-year-old mother who testified she was in poor health and recovering from a serious medical condition. The daughter was upset and distressed as she is the primary care giver for her mother and felt powerless to protect her mother from the effects of the noise and dust.

The tenants sent a 6-page typed letter of complaint to the landlord on April 27, 2020, a copy of which was submitted as evidence. Portions of the letter are as follows:

*[My apartment] is located on the third floor of the 12 story building, is located directly above the first and second floor parkade, and adjacently/adjoining to the roof of the second floor parkade. Therefore, more so than other apartments located on higher floors (ex: 7<sup>th</sup> or 12<sup>th</sup>), my apartment is particularly and directly subjected, and affected by the dust, noise, chemicals, stench, and lack of privacy emitted and resulting from the demolition and restoration of the concrete and waterproofing membrane of the 2 levelled parkade.*

*The nature of this work is extensive, and involves, among other, cutting through concrete and through lead, jackhammering through solid concrete, and ubiquitous hammering. This noise is so extremely loud and bothersome that it creates throbbing, uproar and vibrations all throughout my apartment, all throughout the building, and it can even be heard 3 buildings [away], as demonstrated in my video recording. [The noise] can be heard [throughout the unit] making my suite completely dysfunctional for the day and most afternoons.*

The tenant stated in the letter that the so-called “Quiet Time” identified by the landlord in communication with all tenants during construction was not actually quiet and the tenants had no break during the working day from the construction.

The tenants continued in the letter to describe the increased inconvenience of the pandemic during the construction period. They said that they initially tried to be patient and stalwart about the inopportuneness only to have the construction extended as the working day was shortened during the pandemic.

The tenants described, “unbearable noise, hazardous dust, stench, lack of privacy, restricted access to parade, inability to stay connected or to carry a conversation due to the obnoxious noise disruptions, etc.”. The daughter tenant stated, “my mental health, physical health, low morale, high blood pressure, anxiety, restlessness, nervousness and unprecedented irritability have reached a cumulative point”. The daughter tenant was emotional during the hearing and described herself as “depressed and suicidal” from the experience.

In the letter, the mother described a previous “cranial accident where I almost died from serious brain bleeding and damage”. She described her hospitalization and instructions to get “ample rest at home” including a lot of sleep and low stress situations. The mother said the constant noise and jackhammers “made the ordered rest and recovery impossible”. She described “continuous and persistent noise all throughout the day [which] gives me migraines, elevates my blood pressure... and makes me stressed, unrested, weak, very upset, feeling hopeless, powerless and overall depressed”. She described crying and being exhausted with no where to turn because of the curtailed mobility during the pandemic. She stated that she had to leave the unit to take important medical calls because the noise prevented a normal conversation with her medical team. Because of the pandemic isolation, she had no where to go and felt increasingly helpless and isolated.

The tenants also believed that toxic chemicals and asbestos removal were taking place during the construction. They reported seeing workers in “hazmat” suits. The landlord denied both assertions.

The landlord testified the landlord offered the tenants housing alternatives in buildings owned by the landlord. This included a recently refurnished suite, an unfurnished suite and other alternatives, such as an office, in which to spend the day. The landlord also offered the tenants noise reducing headphones which the tenants rejected as they would be unable to hear the phone when the mother received important calls. The landlord testified that the proposed housing was only a “few minutes drive” away.

However, the tenants stated that the landlord’s offer was not made in good faith; the

offer was spurious and insincere. They searched the “bed bug registry” and believed the proffered housing had been infested in the past, may have been infested at the time the offer was made, and therefore was not a genuine, workable suggestion. They believed that the alternatives may have been worse than their unit. The landlord denied that any of the suggested housing had bedbugs. (The tenants did not offer documentary evidence in support of their claim.)

The tenants also stated that the landlord did not propose helping the tenants move. Because of the senior tenant’s health concerns and pandemic restrictions, it was not feasible for her to go somewhere every day.

The tenants expressed puzzlement about why the landlord would suggest they spend the day in an office. In short, they were deeply offended by the offer which they saw as unhelpful, disrespectful and non-responsive to their predicament.

The landlord stated the landlord offered the tenants the opportunity to move to a furnished suite on a 24/7 basis. However, the tenants deny that any such offer was made and stated that the only offers involved going somewhere for the duration of the working day which was not feasible for the above reasons. During the hearing, they adamantly rejected the landlord’s claims that they were offered at any time a full-time place to stay during the construction.

The landlord stated that because of the pandemic, the 8-hour work day was reduced to 6.25 hours. The landlord calculated that work was carried out during 17% of the tenancy occupancy time. The landlord offered to reimburse the tenant for each of those hours for the 4.5 months of the construction. The landlord calculated the compensation thus payable to the tenant to be \$285.00 monthly and \$1,282.50 for 4.5 months. The landlord proposed a reduction of the cost of purchasing a city parking permit for the tenants.

The tenants asserted that the offer was inadequate given the terrible conditions in the unit during the construction and the fact that the calculation of the construction time overlooked the reality of it occurring during most of their waking hours. The offer overlooked the serious effects of the construction on the tenants as described.

The daughter, who provided most of the testimony during the hearing, was distressed and emotional talking about the landlord’s indifference to their suffering and the danger to the mother’s health, as well as the landlord’s callous refusal to adequately compensate them or even indicate comprehension for what they went through.

The tenants testified the construction was still ongoing at the time of the hearing; the landlord claimed that everything was substantially completed except cleaning up and that most noise had stopped.

### Analysis

The parties submitted substantial documentary evidence, including lengthy correspondence and videos, a total of over 300 files, the videos having been taken over the period of the construction. The hearing lasted 150 minutes.

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the submissions and arguments are reproduced here. The relevant, admissible and important aspects of the claims and my findings are set out below.

Section 7(1) of the Act provides that if a landlord does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord must compensate the tenant for damage or loss that results. The party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Section 22 of the Act deals with the tenant's right to quiet enjoyment. The section states as follows:

22. *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.*

[emphasis added]

I have considered *The Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment* which states as follows:

*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. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

...

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

[emphasis added]

Section 60 of the Act establishes that if damage or loss results from a tenancy agreement or the Act, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. The purpose of compensation is to put the claimant who suffered the damage or loss in the same position as if the damage or loss had not occurred.

The claimant bears the burden of proof to provide sufficient evidence to establish on a balance of probabilities **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the Act, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. The claimant has done what is reasonable to mitigate or minimize the amount of

the loss or damage claimed, pursuant to section 7(2) of the *Act*.

In this case, the onus is on the tenants to prove entitlement to a claim for a monetary award. The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. I find the tenants have met the burden of proof on a balance of probabilities with respect to all four tests.

In reaching this conclusion, I have considered the considerable testimony and documentary evidence. As noted, the parties have contrasting narratives.

I found the tenants' evidence forthright, credible and articulate. I give considerable weight to their testimony which was supported in all material respects by the documentary evidence, particularly the impactful video files and the lengthy correspondence to the landlord describing what they were undergoing

As a result of my assessment of the credibility of the parties, I gave greater weight to the tenants' account; where the evidence of the parties' conflicts, I prefer the tenants' version of events.

In listening to the testimony and reviewing the documentary evidence including correspondence between the parties, I find that I concur with the tenants' assessment that the landlord appeared indifferent and unresponsive to their complaints. Therefore, when the version of events differs, I prefer the tenants' version which is well supported by an articulate first-hand account, in-depth documentary evidence and many videos.

In hearing the testimony and reviewing the considerable submitted evidence, I concluded that the landlord dismissed the tenants' claims of loss of quiet enjoyment as unreasonable, unrealistic, baseless and unsubstantiated, despite the evidence of major construction happening at the tenants' doorstep, the mother's medical condition, and the articulate verbal and written descriptions of the negative impacts.

I find the landlord throughout was primarily lacking comprehension of the effect of the construction on the tenants' mental and physical health as relayed by them. I find the landlord was aware of interferences or unreasonable disturbances on the tenants through multiple verbal complaints and the detailed and lengthy written complaint but failed to take reasonable steps to correct the situation or to compensate them.



I have considered the different accounts of the offer to the tenants of accommodation. For the reasons stated above, I prefer the tenants' version and I find the landlord either did not offer a viable alternative unit or did not communicate the offer to the tenants. I find the tenants reasonably believed they were being invited to make their own way without assistance to another unit/office which may or may not be furnished where they could wait out the noise; I find this was not a reasonable solution in the circumstances.

The tenants acknowledged the landlord had an obligation to repair the parkade. However, in hearing the testimony and reviewing the evidence, I find the landlord failed to balance the landlord's right and duty to repair the structure with the tenants' right to quiet enjoyment.

While the landlord was notified many times of the tenants' complaints, I find the landlord was clearly and undisputedly put on notice of the range and nature of the tenants' claim for loss of quiet enjoyment in the exhaustive 6-page letter of April 27, 2020 and the frequent verbal protests. The landlord acknowledged receipt of this letter. I find the landlord did not address the tenants' concerns after this articulate, lengthy notification. I find the loss of quiet enjoyment ended to a large extent in mid-July, although I except the tenants' testimony that disruption at a lesser extent continued to the end of July 2020.

In consideration of the quantum of damages, I refer again to the *Residential Tenancy Policy Guideline # 6* which states:

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

As stated above, I find that the landlord ignored obligations to the tenants to provide quiet enjoyment. I find the offer of an alternative place to stay was not seriously intended, as indicative of the inclusion of an office that the tenants could go to during the day. I find the situation was serious, the loss of quiet enjoyment extensive during most working hours, and that the tenants were unable to use or enjoy their unit as described by them.

I find the tenants were able to live in the unit during this period but were significantly deprived of their right to live peacefully by the landlord's failure to act or to respond adequately. I find that, while the source and extent of the disturbances varied from time

to time, the tenant was consistently denied full quiet enjoyment for this period during the working day.

I have considered the history of this matter, the parties' testimony and evidence, the Act and the Guidelines. I find the tenants have met the burden of proof on a balance of probabilities for a claim for loss of quiet enjoyment from March 2020 to July 2020, a period of 5 months, for the disturbance caused by construction. I find the actions and failure to act of the landlord amounted to egregious failure to protect the tenants' quiet enjoyment.

In view of the circumstances, I find it is reasonable that the tenant should receive compensation in the amount of 75% of the rent paid for this period which I find is \$6,394.76.

The tenants are also entitled to reimbursement of the filing fee of \$100.00 for a total monetary award of \$6,494.76.

As I find the construction has completed, I make no award under that the landlord comply with section 62 of the Act.

### *Summary*

I direct that the following award is made pursuant to the tenant's claims for the following:

- A monetary order for compensation for damage or loss under the *Act, Residential Tenancy Regulation ("Regulation")* or tenancy agreement pursuant to section 67 of the *Act*;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

In summary, I award the tenant the following:

ITEM	AMOUNT
Loss of quiet enjoyment 75% x \$1,705.27 x 5	\$6,394.76
Reimbursement filing fee	\$100.00
<b>TOTAL AWARD</b>	<b>\$6,494.76</b>

I direct the tenants may deduct this amount from monthly rent until the full amount is paid.

Conclusion

The tenants are granted a monetary order in the amount of **\$6,494.76** which may be deducted by the tenants from rent until the full amount is paid in full. This order may be filed and enforced in the Courts of the Province of British Columbia.

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: August 6, 2020

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Residential Tenancy Branch