Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH 415 & 435 Michigan Apartments Ltd. Inc. and Devon Properties Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for a monetary order for damage or compensation under the Act of $34,880.68; and to recover the $100.00 cost of his Application filing fee.

The Tenant and two witnesses, F.D. and J.R., an agent for the Landlord, E.S. ("Agent"), and counsel for the Landlord, R.H. and S.D. ("Counsel"), appeared at the first teleconference hearing and gave affirmed testimony. The Tenant and the Counsel, R.H., appeared at the second and third hearings. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it.

During the hearing the Tenant and the Agent were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Tenant provided his email address in the Application and confirmed it in the hearing, and Counsel provided an email address for the Landlord in the hearing. They confirmed their understanding that the Decision would be emailed to both Parties and

any Orders sent to the appropriate Party.

Before the Parties testified, I advised them that pursuant to Rule 7.4, I would consider their written or documentary evidence to which they pointed or directed me in the hearing. I said I may not have an opportunity to review evidence that was not presented in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

At the outset of the hearing, I asked Counsel for the Landlord's name in this matter, as the Landlord identified on the Application was different than that in Counsel's written submissions. Counsel advised me, and the Landlord's documents indicate that the property management company [D.P.] named by the Tenant as the Landlord, is authorized to represent the owner. However, Counsel also submitted a land title search, which indicates the ownership of the residential property. In order to ensure that the Landlord is properly named in this matter, and pursuant to section 64 (3) (c) of the Act and Rule 4.2, I amended the Respondent's name in the Application, to include the owner of the residential property, as well as the property management company, [D.P.]

At the start of the first reconvened hearing, the Tenant indicated that he was unwell. I asked him if he would like to adjourn, if he could not present his case ably; however, the Tenant said: "I really appreciate both of you agreeing to propose an adjournment, but let's see if I can answer your questions." We continued with the hearing, and the Tenant did not indicate that he was unable to participate fully at any point thereafter.

This proceeding involved a significant amount of documentary submissions from the Parties, in addition to three hearings worth of testimony. I am grateful to the Parties for their well-organized, well-identified evidence that they submitted. However, there are hundreds of pages of evidence, and as noted above, not all of the Parties' documentary submissions are mentioned in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a Monetary Order, and if so, in what amount?
- Is the Tenant entitled to Recovery of the $100.00 Application filing fee?

Background and Evidence

The Parties agreed that the periodic tenancy began on July 1, 2010, in this one-bedroom apartment on the sixth floor of a fourteen-floor apartment building. The current

monthly rent is $1,131.82, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of $490.00, and no pet damage deposit. They agreed that the Landlord still holds the Tenant's security deposit in full.

The Parties agreed that the Landlord undertook a renovation project of the residential property. As set out in the affidavit of the building manager, N.A., dated August 29, 2018, the project consisted of the following:

3. Specifically, the renovation project would include maintenance, repairs and capital work to: corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, windows & doors, unit renovations, energy efficient systems and mechanical equipment replacement (the 'Project').

The Tenant said he seeks compensation from the Landlord for the breach of his quiet enjoyment of the rental unit that he says resulted from the Project. The Parties agreed that the Project lasted from December 2015 through November 2019. In the Tenant's written submissions for this matter, he said he is, "Seeking retroactive rent abatement for loss of quiet enjoyment, failure to maintain, etc."

The Tenant set out the sections of the Act on which his claims are based:

Section 28 – loss of quiet enjoyment,
Section 32 – poor state of maintenance and repair,
Section 27 – reduced or no access to facilities.

The Tenant has applied for the following compensation from the Landlord in this matter:

Rent abatement for renovation period:	$19,446.00
Professional cleaning → asbestos dust:	$ 334.68
→ window tape removal:	$ 100.00
Aggravated damages:	$15,000.00
RTB Application filing fee:	$ 100.00
TOTAL	**$34,980.68**

#1 RENT ABATEMENT FOR RENOVATION PERIOD → $19,446.00

In his written statement, the Tenant explained his claim more thoroughly:

The renovations and failure to maintain were extensive and had a significant impact on quality of life within the building for me and my neighbors.

- Through wilful negligence or intent, the renovations were as maximally disturbing as possible, and may have dire implications on my health long-term.

- The landlord failed in their responsibility to mitigate and cannot demonstrate any meaningful effort made to minimize discomfort or prioritize tenant wellbeing.

- The landlord has a long demonstrated history of wilful negligence.

- The RTA guidelines indicate that tenants are entitled to quiet enjoyment whether renovation work is required for maintenance or not. These renovations were cosmetic, not necessary for maintenance, which is not relevant under the act, but does worsen the psychological impact of the experience for tenants.

- The impact of the conditions was worsened by the landlord's conduct and the severity of their negligence, and subsequently;

- The requested retroactive rent abatement and aggravated damages are appropriate for the impact of the landlord's severe willful negligence

In the first hearing, the Tenant spent time explaining how he organized/presented his documentary submissions. He said that his first issue is the reduced and insufficient management of the residential property when the new Landlord took over. To be clear, the Tenant clarified that it was not the owner who changed, but the property management company representing the owner who changed.

The Tenant anticipated the Landlord's position being that some of his claims are not worthy of compensation. The Tenant said: "...contributed overall, no individual claims on their own." He said: "The claims are not meant to be isolated. My original calculations are broken down month by month and diminish through 2019, as conditions were improving. I hope you can consider the wearing impact of all of this stretching on for four years." However, we must examine the Tenant's claims one at a time, before considering their overall impact.

The Tenant took most of the first hearing to present the organization of his evidence. However, near the end of the first hearing, Counsel expressed some concern over procedural fairness, saying that the Landlord needs an equal opportunity to testify and to ask questions of witnesses. The Tenant responded, saying that he had provided the Landlord with his responses to the Landlord's submissions in his service of documents. The Tenant noted Counsel's acknowledgement of having received, reviewed, and responded to the Tenant's submissions.

I assured the Parties that I had every intention of allowing them equal time to present their cases and to respond to each other's testimony. In order to save time, and with the agreement of the Parties, I allowed the Tenant to present his evidence fully, and then Counsel presented the Landlord's position fully without interruption of either. I advised the Parties to take good notes of questions that arose for them during the other's submissions in anticipation of their opportunity to respond.

The Tenant said the residential property was purchased by the current owners in December 2015. He explained the first few months of their ownership, as follows:

> **December 2015** - This building, along with its neighboring tower and two others nearby ([addresses]), were acquired by [S.] Investments. Eviction notices were issued to some tenants. The community, advocates and local politicians rallied to prevent the evictions. Most tenants received a $2500 incentive offer to vacate. [L.] Property Management was hired to manage the buildings. Resident managers were not retained. For these two towers, four resident managers were replaced with one non-resident building manager. Maintenance of the property mostly ceased in December 2015 and it began to grow progressively more dirty as renovations ramped up in vacant suites, common spaces, and the grounds were staged for exterior renovations.
>
> **January 2016** - Through early 2016 work intensified as tenants vacated. By summer there were approximately twenty suites at various stages of renovation. Suite renovations involved demolitions to bathrooms, kitchens, removing the wall between kitchen and living room, etc. and were quite loud, reverberating through the building. The entire property became a very busy construction zone, inside and out, with large numbers of trades active from 7:00 AM through evenings on weekdays and Saturdays, and sometimes into the nights and on Sundays. The yard became a construction staging area. A first WorkSafeBC Stop Work order was posted in the building in January of 2016 after tenants reported to WSBC

> that workers were carting demolished, asbestos-containing materials through the hallways in open barrels.
>
> [Reproduced as written]

The Parties agreed in the hearing that there was no construction on the residential property between December 12, 2016, and September 2017.

Counsel drew my attention to an affidavit of [N.A.] dated August 29, 2018 ("Affidavit"), in which [N.A.] swore that she started as the building manager at the residential property in December 2015. I infer this was the case, until [D.P.] took over property management in October 2016, as set out in Counsel's Submission Brief on behalf of the Landlord.

In the Landlord's submission brief, Counsel's comments included:

> 11. In or about Fall 2015, the ownership group, [S.] Investments undertook a project to maintain and repair the residential complex pursuant to their obligation in section 32 of the *Residential Tenancy Act* (the "Act"). This project, in part, as a response to address the deterioration of the concrete balconies on the Premises. The Landlord received a property condition assessment from [P. a hazardous building materials assessment company] indicating the state of disrepair of the balconies. [P.] Report (Landlord Evidence Package pages 57 - 63).
>
> 12. The renovation project included work on corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, windows & doors, unit renovations, energy efficient systems and mechanical equipment replacement. Notice to all residents dated October 30, 2015 (Landlord Evidence Package page 54-56)
>
> 13. The Landlord employs various contractors and consultants to work on their buildings. The Landlord at all times strives to employ workers that are highly-regarded in each city and expect these workers to operate within all Federal, Provincial and Municipal regulations and bylaws. [S.] renovation policies & procedures (Landlord Evidence Package page 14)

The Tenant submitted the following claim charts, setting out the amount his claims for each of the Landlord's activities from December 1, 2015, through November 1, 2019.

I will focus on the Tenant's claims set out in these charts, as follows:

A. Failure to Maintain & General Loss of Quiet Enjoyment – Everything other than renovation noise
B. Loss of Quiet Enjoyment – Frequent or daily noise from other suite, interior commons, and yard renovations
C. Loss of Quiet Enjoyment – jack hammering & concrete drilling
D. Loss of Access to Balcony
E. Loss of Access to Seasonal Pool

The Tenant has set out six claim periods in the renovation that are set out in the charts below. These periods are:

First Period..... December 1, 2015 → May 2016

Second Period..... July 1, 2016 → November 2016

STOP WORK ORDER → December 14, 2016
→ In hotel from January 29, 2017 – March 11, 2017

Third Period..... March 11, 2017 → August 2017

Fourth Period..... September 17, 2017 → February 2018

Fifth Period..... March 1, 2018 → October 2018

Sixth Period..... November 1, 2018 → November 1, 2019

		A	B	C	D	E			
		A	**Failure to Maintain & General Loss of Quiet Enjoyment -** Everything other than renovation noise						
			B	**Loss of Quiet Enjoyment -** Frequent or daily noise from other suite, interior commons and yard renovations.					
				C	**Loss of Quiet Enjoyment -** Jack hammering & concrete drilling.				
					D	**Loss of Access to Balcony**			
						E	**Loss of Access to Seasonal Pool**		
Dec 01 2015	**$980.00**	5%	10%				= **15%**	**$147**	**First Period:** Increasing Renovations, Almost No Maintenance
Jan 01 2016	**$980.00**	10%	15%				= **25%**	**$245**	
Feb 01 2016	**$980.00**	15%	20%				= **35%**	**$343**	- Loud noise from suite demos / renos six days a week - Larlyn unreachable, no resident manager, building manager working for four
Mar 01 2016	**$980.00**	15%	20%				= **35%**	**$343**	- Workers residing in demolished suites, working in evenings & Sundays, loud 7:00 AM on
Apr 01 2016	**$980.00**	15%	20%				= **35%**	**$343**	- Almost no maintenance / cleaning occurring - Security concerns - front door left open continuously
May 01 2016	**$980.00**	15%	20%			5%	= **40%**	**$392**	- Windows very dirty - Seasonal pool neglected and unsightly - Yard lost to unsightly staging area, landscaping in other areas neglected - Lobby monopolized by workers and storage for supplies - Reduced elevator availability - Reduced parking availability - Water shut-offs (announced and not) The various issues were ramping up in this period, but some were full-on immediately, such as the interior renovation noise, the impact of the presence of many contractors who were not conducting themselves respectfully, the common spaces and lawn being lost to staging area and construction clutter, etc. The interior renovation noise was loud and near constant during this period, often seven days a week and late into the evenings.
Jun 01 2016	**$980.00**	15%	30%		10%	5%	= **60%**	**$588**	**Second Period:** Jackhammering and Most Severe Conditions
Jul 01 2016	**$1,023.86**	15%	30%		10%	5%	= **60%**	**$614**	
Aug 01 2016	**$1,023.86**	15%	30%		10%	5%	= **60%**	**$614**	- Jackhammering / drilling / grinding six days a week, 8:00 AM through afternoon - Loud noise from suite demos / renos six days a week, often Sundays & evenings
Sep 01 2016	**$1,023.86**	15%	30%		10%	5%	= **60%**	**$614**	- Scaffolding up, building covered with shroud, workers outside windows
Oct 01 2016	**$1,023.86**	15%	30%		10%	5%	= **60%**	**$614**	- Workers residing in demolished suites, working in evenings & Sundays, loud 7:00 AM on - Windows closed / sealed in building with no AC
Nov 01 2016	**$1,023.86**	15%	30%		10%		= **55%**	**$563**	- Bare concrete hallways - Almost no maintenance / cleaning occurring - Very dirty, poorly maintained common spaces - Yard lost to staging area, landscaping in other areas degrading - Security concerns - front door left open continuously - Security concerns - scaffolding unsecured - Windows growing progressively more dirty - Lobby monopolized by workers, storage for supplies - Seasonable pool available, but surrounded by very loud / active construction on three sides - Reduced elevator availability - Reduced parking availability - Water shut-offs (announced and not) This was certainly the worst period. The daily jackhammering, obstructed view, heat and loss of air, torn-up hallways, heavy dust, the conduct of the workers - the impact on quality of life was extreme. I was locked out of my unit for 48 hours in October after reporting significant dust ingress after the abatement of my balcony.

		A	B	C	D	E			
		A	**Failure to Maintain & General Loss of Quiet Enjoyment** - Everything other than renovation noise						
			B	**Loss of Quiet Enjoyment** - Frequent or daily noise from other suite, interior commons and yard renovations.					
				C	**Loss of Quiet Enjoyment** - Jack hammering & concrete drilling.				
					D	**Loss of Access to Balcony**			
						E	**Loss of Access to Seasonal Pool**		
Dec 01 2016	**$1,023.86**	25%	30%		10%		= **65%**	**$666**	**Stop Work Dec 14th**
Jan 01 2017	**$1,023.86**	25%	30%		10%		= **65%**	**$666**	- Stop Work resulting from asbestos mishandling - Extensive media coverage, gossip and fear of health implications - No workers (including Canada Post, contractors, managment) allowed to access building - No cleaning / mainteance - Renovations abandoned, tools and supples on scaffolding, in lobby, in hallways, etc. - Three sides of building blocked by scaffolding & shroud Stop Work order issued in mid-December resulted in cessation of jack-hammering, but later in the month other loud work continued on the building and the neighboring tower, and audibly seemed to be occurring in neighboring suites, perhaps because the contractors were living in them so not barred from entry by WSBC? During this Stop Work period there was no maintenance whatsoever as the property manager could not conduct work within the building. The rough state of the grounds and building worsened, the loss of access to air and view continued, people were still on the scaffolding, so curtains still needed to be drawn, mail service was interrupted, there was constant growing conversation / concern with neighbors about the hazardous materials. My rent had been increased by the maximum legal limit to the penny during this period.
VIHA Asbestos Evacuation: in hotel Jan 29th through March 11th, no rent paid									
Mar 11 2017	**$1,023.86**	20%	10%		10%		= **40%**	**$266** ★	**Third Period:** Summer 2017 - behind degrading shroud
Apr 01 2017	**$1,023.86**	20%	10%		10%		= **40%**	**$410**	★ .65 for partial month
May 01 2017	**$1,023.86**	20%	10%		10%	5%	= **45%**	**$461**	
Jun 01 2017	**$1,023.86**	20%	10%		10%	5%	= **45%**	**$461**	- Abandoned shroud degrading in wind, blocking view, getting more noisy over time - Renovations in vacant suites - Bare concrete hallways
Jul 01 2017	**$1,061.74**	20%	10%		10%	5%	= **45%**	**$478**	- Yard lost to staging area, landscaping in other areas degrading - Dirty, poorly maintained common spaces - Security concerns - front door left open continuously - Security concerns - scaffolding unsecured - Windows growing progressively more dirty - Seasonable pool available, but surrounded by very loud / active construction on three sides - Reduced elevator availability - Reduced parking availability - Water shut-offs (announced and not) The period after the evacuation was free from jack-hammering, though I recall work starting mid-summer on the neighboring tower and noise from interior renovations ongoing, but conditions were significantly uncomfortable nonetheless. Wincows and balcony door had been left sealed and blocked shut by pieces of wood on the outside, so it was another uncomfortable hot and stuffy summer. There were exactly zero improvements to any conditions in the building - the hallways remained dirty bare concrete, the flora continued to degrade from neglect out front, etc. The workers had vandalized the area outside my balcony window so when I did open curtains it was a particularly cluttered view of paint streaks, hanging fabric and garbage. On any windy nights the shroud was loud enough moving against the scaffolding to make sleep difficult, necessitating sleeping with ear plugs. I recall no notice of when work would renew, so though this period offered respite from the severe noise, there was the stress and dread of knowing the ordeal was not behind, was being delayed, there were worse conditions still ahead. The shroud ended up not being required when the work renewed, so it had been left up almost a complete additional year after the Stop Work for no discernable reason. My rent was increased during this period the maximum legal amount to the penny.
Aug 01 2017	**$1,061.74**	20%	10%		10%	5%	= **45%**	**$478**	

		A	B	C	D	E			
		A Failure to Maintain & General Loss of Quiet Enjoyment - Everything other than renovation noise							
			B Loss of Quiet Enjoyment - Frequent or daily noise from other suite, interior commons and yard renovations.						
				C Loss of Quiet Enjoyment - Jack hammering & concrete drilling.					
					D Loss of Access to Balcony				
						E Loss of Access to Seasonal Pool			
Sep 01 2017	**$1,061.74**	15%	30%		10%	5%	= **60%**	**$637**	**Fourth Period:** Second Six Months of Jackhammering
Oct 01 2017	**$1,061.74**	15%	30%		10%	5%	= **60%**	**$637**	
Nov 01 2017	**$1,061.74**	15%	30%		10%		= **55%**	**$584**	- Jackhammering / drilling / grinding five to six days a week, 8:00 AM through afternoon - Loud noise from suite demos / renos five to six days a week
Dec 01 2017	**$1,061.74**	15%	30%		10%		= **55%**	**$584**	- Scaffolding up, workers outside windows
Jan 01 2018	**$1,061.74**	15%	30%		10%		= **55%**	**$584**	- Shroud degrading in wind, finally down around end of November - Windows closed / sealed in building with no AC
Feb 01 2018	**$1,061.74**	15%	30%		10%		= **55%**	**$584**	- Bare concrete hallways - Very Insufficient maintenance / cleaning occurring - Very dirty, poorly maintained common spaces - Yard lost to staging area, landscaping in other areas degrading - Security concerns - front door left open continuously - Security concerns - scaffolding unsecured - Windows growing progressively more dirty - Lobby monopolized by workers, storage for supplies - Seasonable pool available, but surrounded by very loud / active construction on three sides - Reduced elevator availability - Reduced parking availability - Water shut-offs (announced and not) This period re-introduced jack-hammering and other loud work and was almost as uncomfortable as the worst period in 2016 with a couple differences: 1 - The workers kept a lower profile, they didn't yell from the yard and scaffolding at 7:00 am each morning, I was able to often sleep until 8:00 before the daily noise. 2 - The shroud came down partially in a wind storm in November and was completely removed some weeks later, allowing full light and view on the north-east of the building, though for privacy it was still necessary to keep curtains drawn most of the time. Beyond those two partial improvements, it was still exceedingly uncomfortable & necessary to vacate the building six days a week. There was no improvement to any of the other conditions.
Mar 01 2018	**$1,061.74**	15%	20%				= **35%**	**$372**	**Fifth Period:** Renovations Slowing Down
Apr 01 2018	**$1,061.74**	15%	20%				= **35%**	**$372**	
May 01 2018	**$1,061.74**	15%	20%			5%	= **40%**	**$425**	- Loud noise from suite demos / renos / window replacement / etc - Swing stage up for window replacement, workers still frequently outside windows
Jun 01 2018	**$1,061.74**	15%	20%			5%	= **40%**	**$425**	- Repeated 5 day accommodations for window replacement
Jul 01 2018	**$1,104.21**	15%	20%			5%	= **40%**	**$442**	- Ground floor hallway surfaces torn out and left bare for a few months - Mailboxes installed in lobby & left in unfinished 2x4 framing .
Aug 01 2018	**$1,104.21**	15%	20%			5%	= **40%**	**$442**	- Bare concrete hallways / work in hallways
Sep 01 2018	**$1,104.21**	15%	20%			5%	= **40%**	**$442**	- Yard lost to staging area, landscaping in other areas degrading - Very dirty, poorly maintained common spaces
Oct 01 2018	**$1,104.21**	15%	20%			5%	= **40%**	**$442**	- Security issues - front door left open daily - Security issues - scaffolding unsecured - Seasonable pool available, but surrounded by very loud / active construction on three sides - Reduced elevator availability - Reduced parking availability - Water shut-offs (announced and not) Access to balcony was regained. Workers were still up & down replacing windows, there was still significant daily noise from that and other work in common interior spaces, suite renovations, table-saws outside, etc. Hallways were finally re-carpeted. Other hallway work (painting, baseboards, tile work, adding drywall to the suspended lighting frames, etc) continued into late 2018. Enjoyment of home was still highly impacted by all these conditions, the state of the yard, etc. There was still more than enough activity to make the pool undesirable to use through that summer.

		A	B	C	D	E			
		A	**Failure to Maintain & General Loss of Quiet Enjoyment -** Everything other than renovation noise						
			B	**Loss of Quiet Enjoyment -** Frequent or daily noise from other suite, interior commons and yard renovations.					
				C	**Loss of Quiet Enjoyment -** Jack hammering & concrete drilling.				
					D	**Loss of Access to Balcony**			
						E	**Loss of Access to Seasonal Pool**		
Nov 01 2018	$1,104.21	10%	15%				= 25%	$276	**Sixth Period:** Hallways Complete, Six Months of Lobby Work, Yard Work through Summer
Dec 01 2018	$1,104.21	10%	15%				= 25%	$276	
Jan 01 2019	$1,104.21	10%	15%				= 25%	$276	- Loud noise from suite demos / renos / lobby work many days but more intermittently - Ground floor hallway surfaces torn out and left bare for months
Feb 01 2019	$1,104.21	10%	15%				= 25%	$276	- Major lobby work underway for more than six months
Mar 01 2019	$1,104.21	10%	15%				= 25%	$276	- New front doors blown off in wind, temporary plywood/Plexiglas entrance built - Noise most week days from table saws, drilling, nail guns, suite demolitions, etc.
Apr 01 2019	$1,104.21	10%	10%				= 20%	$221	- Laundry room renovated & not available for a few weeks
May 01 2019	$1,104.21	10%	10%			5%	= 25%	$276	- Privacy lost again in summer, workers up sides of building to repair the new windows - Yard and other landscaping still unrestored, mud, signage, trucks, bins, etc.
Jun 01 2019	$1,104.21	10%	10%			5%	= 25%	$276	- Reduced elevator availability (one elevator has been non-functional Jan through March)
Jul 01 2019	$1,131.82	10%	10%			5%	= 25%	$283	- Reduced parking availability - Water shut-offs (announced and not)
Aug 01 2019	$1,131.82	10%	10%			5%	= 25%	$283	- Jack-hammering on ground floor after flooding late summer
Sep 01 2019	$1,131.82	5%	10%			5%	= 20%	$226	- Four months of loud yard work (trees down, retaining walls demolished, new concrete, etc) - Privacy lost again in November, workers up sides of building to examine buidling envelope
Oct 01 2019	$1,131.82	5%	5%			5%	= 15%	$170	- Intercom non-functional for approx one month in fall, still buggy when operating
Nov 01 2019	$1,131.82	5%					= 5%	$57	Some notable diminishment of negative conditions, unfortunately counter-balanced by how long the conditions were persisting.
Dec 01 2019 through 2021	$1,131.82						= 0%	$0	- Loud yard work and remaining lobby renovations completed - Bins / trucks / porta-potty / etc removed from lawn. Maintenance and building condition are still not good (ground full of dying plants, unfinished unmatched retaining walls, elevator floors perpetually dirty, elevator moving curtain up endlessly, ongoing problems with loud whistling heating pipes, still occasional loud suite renovations ...), but no significant ongoing renovation noise or heavy presence of contractors. Ultimately it's a poorly managed and less comfortable building, but nothing worthy of dispute.
Total Rent	**$50,904.78**							**$19,446**	**Total Retroactive Rent Abatement**
								$335	**Professional Cleaning after Concrete Dust Ingress**
								$100	**Professional Window Tape Removal / Cleaning**
								$100	**RTB Dispute Fee**
								$15,000	**Aggravated Damages**
								$34,981	**Total Claim**

A. Failure to Maintain & General Loss of Quiet Enjoyment

➔ Everything other than renovation noise

In the hearing, the Tenant said:

> In terms of maintenance, in December 2015 – the ownership, [S.], brought in [L.] property management. They were pretty much unreachable and hands off. They were managing the building from the end of 2015, until September 2016. [N.A.] was the building manager, replacing the two manager who had been resident here. She was responsible for both managers, as renovations were ramping up. She was also managing two other buildings …. There was virtually no maintenance – no cleaning of the lobby, hallways – and they were coming in with a significate amount of debris and dust and it was growing with the renovations; it was very messy.

> Workers were blocking garbage trucks, and garbage would overflow and there'd be garbage in the parking lot for days. The lobby was full of debris. I complained about a lot of this stuff. I complained about a lot of stuff that is trivial in and of itself - such as strips of tape on windows. It's not going to account for any percentage of rent with that. But it was so frustrating; it was so poorly maintained throughout from the street to throughout the building. Windows were not cleaned; it was visually apparent, constant, and an embarrassing reminder of how abandoned the building felt.
>
> That was really severe through 2016 – no maintenance, whatsoever. If you had a plumbing emergency, it was quite difficult to deal with, but once they were switched to [D.P.] that improved somewhat. Late in 2016, it was quite apparent that they were trying to communicate better – trying to be reachable and responsible.
>
> December 2016 and January 2017 – during stop work period – the building was blocked to anyone, due to dust found with asbestos. There was no maintenance at this time. In February 2017 – we were evacuated to hotels to remove the contaminated asbestos.
>
> In March 2017, there was no cleaning or not regular cleaning. There might be a colourful piece of paper still there six weeks later. It was not as bad as it had been the previous year.
>
> In mid-2018 they started to bring in third party contractors to do regular mopping and vacuuming and so on.

The Tenant indicated that the common areas were not maintained well, starting in December 2015, but improved over the course of the four-year renovation project.

In his statement, the Tenant said:

> [L.] Property Management was hired to manage the buildings. Resident managers were not retained. For these two towers, four resident managers were replaced with one non-resident building manager. Maintenance of the property mostly ceased in December 2015 and it began to grow progressively more dirty as renovations ramped up in vacant suites, common spaces, and the grounds were staged for exterior renovations.

The Tenant submitted described, dated photographs, as follows (which I have put in chronological order):

July 14, 2016, September 15, 2016, March 25 and 26, 2018:

[Photos of] tenant garbage bins filled beyond capacity with dumped construction supplies in July 2016, September 2016, March 2018;

August 10, 2016: A sizeable spider web in an elevator at the residential property;

March 11, 2017 Sink filled with sewage from pipes after evacuation period;

March 18, 2017: Building supplies and garbage left on balconies for months;

July 29, 2017: Remodeled elevators covered with moving blankets on three sides "for the majority of the time";

Sept. 30, 2017: Greasy hand prints in elevator left uncleaned;

Nov. 25, 2017: View of hallway floor from elevator after carpeting was pulled;

Feb. 22, 2018: Snow on the walkway not cleared – "dangerously slick, angled walkway";

March 4, 2018: Lobby door glass not cleaned for months;

April 25, 2018: Supplies often left in lobby overnight;

April 27, 2018: Pet accidents in the elevator left uncleaned – a "frequent" problem, "left unclean for days without a resident manager;

. . . and dozens of other photographs to evidence this claim.

The Tenant submitted a letter he wrote to [D.P.] dated January 11, 2018:

Attn: Property Manager for [residential property address]

Re: Building conditions and issues with [rental unit]
- No Carpets in Hallways for Extended Period
- Mail Service Disruption
- Compromised Building Security - Doors

- Compromised Building Security - Scaffolding
- Failure to Maintain Reasonable Cleanliness
- Windows Uncleaned for Extended Time
- Loss of Use of Balconies
- Loss of Access to Fresh Air
- Interior Construction Noise
- Concrete Grinding Noise
- Significant Exposure to Construction Dust
- Unsightly Grounds for Extended Period
- Unfinished Hallways and Common Spaces
- Loss of Use of Lawn
- Renovation Noise During Quiet Hours
- Loss of View and Access to Light
- Reduced Elevator Usage

As you are aware, conditions in this building have been dramatically uncomfortable for tenants for an extended period of time. The list above represents some of the conditions I have experienced that have reduced my ability to quietly enjoy my home. Beyond noise disturbance, many of these conditions have caused me significant stress, safety fears, and health concerns. For the cumulative effect these conditions have had and continue to have on my tenancy, I am requesting a 75% rent reduction, retro-active and ongoing until these conditions are fully resolved.

Please respond in writing before January 26, 2018, otherwise I/we may proceed with a complaint to the Residential Tenancy Branch.

In response to the Tenant's submissions, Counsel noted that the residential property was built in the 1960s, and that the Landlord has the right to undergo repairs and construction activities without vacating of the tenants. Counsel asserted that it would create an unfair precedent to award the Tenant with damages for construction disruptions, as the Landlord undertook the Project in compliance with the Act. They mitigated the damages as much as possible. Counsel said that the Tenant's rent reduction request is excessive, "not rational", she said, as there was almost no disturbance during the Stop Work order period. She said there was minimal yard work after February 2019, and that unfinished hallways do not interfere with his lawful right to enjoyment.

Counsel said:

> Again, some disturbance is to be expected, given the nature of the renovations. A few hallways or windows does not prove that the Landlord never cleaned. Policy Guidelines require cleaning to be done at reasonable intervals. The Landlord cleaned exterior windows. . . They offered a vacuum replacement program – see pages 32 and 33 of the Landlord's evidence. The Landlord did more than is required. It was not kept in a pristine state, but it was relatively clean.

Counsel said the Tenant's claim for negligence is unproven and not within this Tribunal's jurisdiction. She noted that the Tenant:

> …is not an expert of any kind to determine that they were negligent. It is a legal issue to be determined at another level of court. The alleged negligence is the Tenant's opinion and speculation, and it is not supported by evidence.

Counsel also noted that the Tenant's claims regarding loss of elevator use and water shut offs are not supported with when this occurred. Counsel said that the Tenant's evidence does not support that these losses were "frequent and ongoing".

Pages 32 to 33 of the Landlord's evidence is a notice to tenants of the residential property dated March 8, 2017, from D.P., the property managers. In this letter, the property managers advise the tenants who are staying in a hotel, that the residential property may be re-occupied, "…following an aggressive cleaning program and ongoing testing of surface areas and air quality levels."

The re-occupancy occurred on Thursday and Friday, March 9 and 10, 2017, with the Landlord providing transportation between the hotel and the residential property on these days between 7:00 a.m. and 7:00 p.m. on the 9th, and 7:00 a.m. and 12:00 p.m. on the 10th.

The letter also addressed re-occupancy details, including that week's gift cards, grocery gift cards, anticipated dust accumulation in rental units, a vacuum cleaner replacement program, and the need to run the taps and flush the toilets upon entry.

The property managers also sent the Tenants a memorandum dated March 8, 2017, from the environmental consultants that said:

> This letter confirms that a clean-up program, third party inspections, and air sampling has been completed in this building by [P.W. , environmental

> consultants]. The results of air testing for asbestos met a BC standard provided by the [Health Authority]. We conclude the asbestos dust has been effectively cleaned and that the building is safe for occupancy.

The Landlord submitted a letter dated March 7, 2017, from the regional health authority, which reviewed the testing and cleaning activities that were undertaken regarding the presence of asbestos in the residential property. The health authority summarized their findings at the end, saying:

> Summary:
>
> These findings suggest that the chance of exposure to airborne asbestos was not elevated at the time and locations of sampling. While these results are reassuring, it cannot be determined with certainty if they are representative of each suite within the building or at various time points in the past.
>
> Please also note that the sampling referred to in this document occurred before clean-up, and additional air testing has been taking place in every suite and in common areas of the building as part of the cleanup.

The letter was signed by the “Medical Health Officer”.

B. Loss of Quiet Enjoyment

➔ *Frequent or daily noise from other suites, interior commons, and yard renovations*

In his written submission, the Tenant said:

> I chose this building partly because it is concrete, which significantly reduces noise transference between suites. Regular sound (TVs, talking, walking around, etc.) does not transmit as well through a concrete structure. I can, for example, record acoustic guitar without picking up much background neighbor or outside noise, and I can make a degree more noise myself without bothering my neighbors.
>
> Unfortunately, as I've learned, though, a concrete structure provides better noise insulation for usual human activity; however, industrial impact noise (jack-hammers), drilling, grinding, hammering on a concrete structure has an amplifying effect inside that's quite horrendous. Since I tend to spend significant

> time at home, it's important to me that my home be bright to help me avoid depression.

In the Tenant's claim chart for March 11, 2017, through August 1, 2017, the Tenant said:

> The period after the evacuation was free from jack-hammering, though I recall work starting mid-summer on the neighbouring tower and noise from interior renovations ongoing, but conditions were significantly uncomfortable, nonetheless. Windows and balcony doors had been sealed and blocked shut by pieces of wood on the outside, so it was another uncomfortable hot and stuffy summer. There were exactly zero improvements to any conditions in the building – the hallways remained dirty bare concrete, the flora continued to degrade from neglect out front, etc. The workers had vandalized the area outside my balcony window so when I did open curtains it was particularly cluttered view of paint streaks, hanging fabric and garbage. On any windy nights the shroud was loud enough moving against the scaffolding to make sleep difficult, necessitating sleeping with ear plugs.
>
> . . .
>
> The shroud ended up not being required when the work renewed, so it had been left up almost a complete additional year after the Stop Work for no discernable reason.
>
> My rent was increased during this period the maximum legal amount to the penny.

In his claim chart for September 1, 2017, through February 1, 2018, the Tenant said that the noise included "loud noise from suite demos / renos five to six days a week".

In the hearing, the Tenant took issue with the Landlord's evidence on page 53, which is a Renovation Update setting out the hours of work for the project. The Tenant said:

> On page 53 of Landlord's evidence package is a notice posted by [L.], the first property manager – about four-fifths of the way down. It says: 'All work will be performed in compliance with city bylaws. Work hours are 7 am – 3 pm, Monday – Saturday'. In their submissions, [the Landlord indicates] it says 8 to 6, but the work was usually continuing on until 8 p.m. The other renovations often extended into the evenings.

In N.A.'s affidavit, she asserted that construction workers started when she did at 8:00

a.m.; however, she did not indicate how she knew how long the workers had been there when she arrived.

In the hearing, the Tenant provided a list of items of work that were done at the residential property through 2019. He said, this is despite the Landlord's assertion that only window caulking was done after January 2019. However, the Tenant said: "Here is what went on:"

- Installation of cedar planks over the front entrance;
- Tile work floor in lobby;
- Drywalling – near mail boxes;
- Failure of new sliding doors - popped out in the wind more than once;
- Demolition of plywood entrance;
- Construction of new entrance;
- Construction of concrete post by entrance;
- Wind-block wall from entrance - construction of;
- Installation of black metal siding – extensive drilling – very loud;
- Drilling for insulation of intercom overhang;
- Loud table saws;
- Building wide toilet replacement;
- Installation of cameras in common space;
- Reduced elevator access;
- Cutting down of large old trees in front of building;
- Jackhammering – front stone retaining wall;
- Framing pouring new front concrete for retaining wall and benches – and all the same at neighbouring tower across from the pool;
- Anytime you're dealing with jackhammering – loud from neighbouring and our towers, too;
- Ongoing renovations to suites – hard to tell if above or below you; and
- Cutting door frames for new fobs.

The Tenant said: "So that was a list of 25 things I can remember – contrary to their notions of completion." The Tenant stated the items in his list quite rapidly in the hearing; therefore, it appears that I missed or combined five activities in this list. However, the Tenant was thorough in his written and oral submissions, and I trust the missing items are set out elsewhere in his submissions and this Decision.

In the hearing, Counsel said that "…some disruption during daytime hours is to be

expected.” She went on:

> The Landlords submit that the Tenant’s evidence does not show significant loss of enjoyment. Stripped hallways, loss of use of a bike shed are not in the tenancy agreement, therefore this doesn’t warrant a rent reduction. Section 32 should bar a tenant from an award during this period.
>
> His photos of doorways left open taken during the daytime could be for the span of an hour. There were no reports of theft or sustained loss to show that he should be compensated per the RTB Guidelines and the Act.
>
> I can’t speak to the prior landlord’s cleaning, but there are no photographs of a substantial mess. . .. Also, he has alleged issues with the front yard or lawn, which are not for the exclusive use of the Tenant. These are minor inconveniences – he’s on the sixth floor.
>
> As for the elevators, there is nothing in writing to the Landlord that he was inconvenienced greatly or suffered . . .. Of course, this is inconvenient, but with the test for loss of quiet enjoyment, a temporary inconvenience doesn’t qualify for compensation. As the Tenant gave no notice to the Landlord in 2015 or 2016, this portion should be wholly dismissed.
>
> June through December 2016, he alleges is the most severe time of disturbance, with:
>
> - Jack hammering,
> - No cleaning,
> - Workers constantly around his window,
> - Hallways bare,
> - Windows progressively more dirty,
> - Elevator and parking availability reduced, and
> - Dust throughout.
>
> Cleaning protocols were in place before, but once [D.P.] took over in October 2016, there were regular cleaning protocols in place. See page 4 of Ms. [A’s] affidavit.
>
> Also, he said they were better and more responsive and that cleaning protocols were better while [D.P.] managed it.

> The exterior renovations and jackhammering occurred during allowable hours. The Landlord has a reasonable duty to abide by bylaws and restrict construction to this time. The Landlord is held to a reasonable standard, though not perfection.
>
> As for the mess, this is a construction project for five to six days a week. See page 62 of the Landlord's submissions. The building was constructed in 1962. The Landlord updated all of the balconies. This is not an essential service; therefore, it should represent a small portion of claim – a minimal award.

Page 62 of the Landlord's submissions is on page six of a seven-page report. The purpose of the report is said to be: "to conduct a Baseline Property Condition Assessment (BPCA)" dated October 13, 2015 ("Report"). The residential property address was listed as the "Site".

Page 62 of the Landlord's submissions are photographs in the Report showing areas of concrete deterioration in concrete balcony soffits of the Site buildings. It also states: "areas of corroded balcony hardware and damaged concrete mounting points were noted on Site Building B balconies". On page 60 of the Landlord's evidence, the engineering company said: "The balcony systems were generally noted to be in serviceable condition." On page 63, the Report states:

> Immediate concrete repairs relating to railing attachments and spalled concrete are recommended for both Site Buildings. Deck components of the balcony systems serving the Site Buildings were noted to be in aged but serviceable condition

Counsel continued:

> On the top of page 10 in the Tenant's evidence, is his claim surrounding the Stop Work Order. The Tenant is claiming for more than is alleged in previous cases: 65%. The Landlord would like to emphasize that no work was done while the stop work order was in place, so there was no renovation noise, and no need for additional clean up – less or no mess.

On page 10 of the Tenant's submission is a claim chart for December 2016 through January 1, 2017. For this phase, the Tenant has claimed a 25% rent reduction for failure to maintain and general loss of quiet enjoyment. He has also claimed 30% for this period for his loss of quiet enjoyment for all noise and disturbance, including jack hammering noise. The Tenant also claimed a 10% rent reduction for the loss of access

to his balcony. The total claim for this period is a rent reduction of 65%.

From the evidence before me, I find that the Stop Work Order ran from December 12, 2016, until March 9 or 10, 2017, when the Tenants were shuttled back to the residential property following remediation of asbestos discovered in the construction process.

C. Loss of Quiet Enjoyment

→ Jack hammering & concrete drilling

In her Affidavit, [N.A.] explained that:

> …the renovation project would include maintenance, repairs, and capital work, to corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, windows & doors, unit renovations, energy efficient systems and mechanical equipment replacement.

In this Affidavit, [N.A.] swore the following:

9. I have been on site at [the residential properties] intermittently while the Project has been going on.

. . .

11. Interior renovations for suites on tenant turnover began in or around December 2015 at [residential property]. Having been on side during these times, I verily believe that these renovations caused minimal noise.

[N.A.] also stated in the Affidavit that she did not receive numerous complaints from residents regarding excessive or unreasonable noise during the months of January 2016 to June 2016.

[N.A.] swore that:

15. As the building manager, I start my day at 8:00 a.m. or earlier if needed. I would see the construction workers at [the residential property] when I was at that respective building. I have seen, and do verily believe that the construction workers would not start their work involving excessive noise, such as jackhammering until around 8:00 a.m. to 3:30 p.m. in the afternoon.

The Tenant submitted evidence from his “expert witness”, [R.M.], in which [R.M.] stated the following:

> I am [R.M.]; I have a Master of Science in Occupational Hygiene and Bachelor of Science in Chemistry and have been a Certified Industrial Hygienist since December 14, 1990. I am currently President of [M.] Occupational Hygiene and Safety Consultants Ltd. I was an Occupational Hygiene Officer and Senior Regional Officer during my 28 year career with WorkSafeBC (WSBC) until I retired in February 2018. Prior to joining WSBC I provided Occupational Hygiene oversight and management of asbestos abatement projects, as a consultant, from Victoria BC to St. Johns Newfoundland. Project sites included multi-story office towers, hospitals, schools, apartment buildings, municipal operations, airports and military facilities.
>
> The following is my evaluation of the potential noise impact on tenants due to the construction/renovation projects at [residential property address], British Columbia.

[R.M.] commented on the Affidavit evidence, as follows:

> [N.A.'s] statements that suite and interior renovations caused minimal noise are contradicted by video evidence of the very clearly loud noise from interior and suite renovations.
>
> Her statement that she 'did not receive numerous complaints' is vague and out of context. What constitutes numerous? Were tenants able to contact her? Why would tenants contact her to complain about noise they had been informed would be occurring, what would they think she could do about it?
>
> Her statement that it is normal procedure to provide notices of water shut-offs may be true, but denies the fact that there were a multitude of unannounced / emergency shut-offs.
>
> Her statement that common space work started in October is contradicted by photographic evidence dated for August.
>
> Her statement that jackhammering ended by 3:30 is contradicted by video evidence and even the hours of work indicated on the posted renovation schedule notices.

In his letter to the tenants of the residential property dated January 8, 2019, [R.M.] said:

> Settled debris samples were collected from suites 303, 403, 406, 505 and 1206

> and common areas of the building. Samples were examined using Transmission Electron Microscopy to confirm which, if any, materials were present that would be regarded as asbestos, as opposed to other fibrous materials like cellulose.
>
> Sample results revealed the presence of three varieties of asbestos materials with the main material being chrysotile asbestos. The majority of the asbestos structures were less than 5 um in length with approximately 8% being fibres more than 5 um in length. The number of asbestos structures in some samples were extremely high with the highest being 15,600,000/cm 2 . Due to heavy particulate loading not all fibres were visible.
>
> The long term health implications for tenants depends upon individual susceptibility, the concentration of hazardous materials the individual was exposed to in their suite and common areas and whether there is a dose response relationship with the material and any disease that can develop (i.e. the more you are exposed to the greater the risk). Other factors can include whether they smoke. Some products like asbestos and tobacco smoke have synergistic effects that result in multiplied rather than additive risks of developing lung cancer. The age of the person also becomes a factor as some diseases have long latency periods (in adults) yet may progress rapidly in younger persons due to their metabolism.
>
> As a collective there are not likely to be many tenants that will develop diseases associated with asbestos and/or respirable crystalline silica. The epidemiological risk level combined with a relatively small population will result in a low probability of tenants developing a disease from the events that have transpired. For an individual tenant, that has been exposed to hazardous materials such as asbestos, respirable crystalline silica and/or lead, their relative risk of developing a disease due to the exposure is 50:50 with the disease developing or not.
>
> Diseases that can develop due to exposure to construction dusts include lung cancer, asthma, Chronic Obstructive Pulmonary Disease (COPD) and silicosis as well as the diseases associated with exposure to asbestos.
>
> [emphasis added]

In terms of [R.M.'s] evidence, Counsel said:

> The Landlord would like to emphasize that [R.M.'s] report is speculative. [The Health Authority] and [the engineering company] said that asbestos testing was

> not done in every single suite, and that this was done during the Stop Work Order, and then the units were cleaned. Also, says that [R.M.] contests findings of [the Health Authority] and WorkSafe BC. These are findings of individual authorities – not the Landlord. We contest the credibility of this argument. They did clean the building.
>
> [R.M.] concludes that there is a risk – of course there's a risk – it was present, but small. [R.M.] concedes that it was construction workers who were at the most risk, rather than the tenants, themselves.
>
> [R.M.] states that due to the relatively short exposure of tenants, compared to construction workers, they are unlikely to develop asbestos lung cancer at a rate of 55 out of 100,000 persons.

Counsel quoted [R.M.] from his affidavit:

> Due to the dose/response relationship, relatively short exposure duration (compared to working situations) and anticipated fibre levels it is unlikely, but not impossible, tenants will develop lung cancer due to this event.

Counsel referred me to page six of the Tenant's submissions about the expert via email exchanges. The email to which Counsel directed me, is dated November 11, 2020, from [R.M.] to the Tenant. In this email, [R.M.] explains that the technique he used to test "potential" exposures was conducted after the evacuation of the residential properties by the tenants. [R.M.] said:

> The technique used for analysis (TEM) is not normally used for counting as it is a newer and much more expensive technique. It does however allow for evaluation of individual fibre types due to the higher magnification and techniques involved so you are not counting hair, plant fibres and the like as asbestos. It would be a little like counting the number of felled trees in an aerial photo (conventional) versus the number of Hemlock trees and Hemlock tree parts in that same photo. Again using that same analogy the analyst would not actually count every tree but would look at the average density based upon an examination of up to 100 locations (trees per 100 sq m) to derive an estimate of the number of trees in an area that was 100 sq km.

Counsel said: "[R.M.'s] report is not the smoking gun the Tenant claims it is. [R.M.'s] report only presents probability and speculation." She said, "Some disruption during

daytime hours to be expected."

D. Loss of Access to Balcony

In his written submissions, the Tenant addressed this issue, saying it started with the erection of scaffolding in June 2016. He said in addition to the scaffolding, that a " thick white plastic shroud went up around 3/4 of the building (the sides with Balconies)". The Tenant went on:

> Balcony doors were locked from outside. The cosmetic updates to the balconies was completed and access to balconies regained almost two years later.

The Tenant said that he used the balcony for the following purposes:

> I used my balcony a lot.
>
> - I used to enjoy a clove cigarette from time to time in the evenings,
> - I had dinners and breakfasts with my partner,
> - I had drinks with friends,
> - I had seating and a table and a few plants,
> - I watched fireworks,
> - I sat and played guitar,
> - I was working on painting moss-graffiti art on the inside wall,
> - I kept the window open for air 24 hours a day, and
> - I kept the curtains open to wake up to the view and natural light.
>
> I can't live comfortably in an apartment with windows on only one wall and no balcony or visible green space, I get depressed without a lot of light and I feel tired and uncomfortable without a lot of fresh air, which is why I picked a more expensive elevated corner apartment with a balcony.
>
> Every spring I paid a bit more attention to improving my balcony, adding plants, etc. When, in June of 2016, we were instructed to clear our balconies, at first I moved all that stuff inside, but by late 2016 when it became clear this work was going to drag on for a very long time, I gave away everything - it was all in the way in my living room, I have no other space left to store it and the outdoor plants were dying inside. I'm not going to try to claim those costs, but yes, it was impractical to keep balcony furniture inside for years and I have since had to purchase new furniture and will have to start my little garden from scratch.

The Tenant had comments on how the structure of the new balconies adds fear, spiders, and a loss of privacy. However, the focus of this claim is on the effect on the Tenant of doing without the balcony during the Project.

> I sincerely preferred the original. Like all the things the new landlord changed, the previous was well considered, the new is not. These changes modernized the overall appearance of the building, they did not improve the tenant experience. Bottom-line, not having access to my balcony for two years was a real bummer.

The Tenant said that the major balcony and exterior surface work concluded by March of 2018.

Counsel said that the building was constructed in 1962 and that the balconies needed to be updated. She referred me to page 62 of the Landlord's submissions, which shows indecipherable photographs of what I infer are cement slabs, as the description reads:

> "Areas of concrete deterioration were noted on concrete balcony soffits of Site Building [A and B]" It also states: "Areas of corroded balcony hardware and damaged concrete mounting points were noted on Site Building B balconies."

Counsel said that balconies are not an essential service, and therefore, should be a small portion of the claim – "a minimal award." Counsel said:

The balcony was not available, but it is not an essential service. It is reasonable that use of such a facility is only seasonal. Any award should be minimal.
She referred me to a previous decision at page 153 of the Landlord's submissions, where the arbitrator states that indoor space is more valuable than outdoor space in terms of rent. As a result, the arbitrator deducted 50% of the square footage of the balcony in awarding compensation based on square footage. Counsel noted that this was also a rental unit on a higher level.

E. Loss of Access to Seasonal Pool

In his written submissions, the Tenant said the following about the pool:

> Issue 12: Loss of Access / Enjoyment of Pool
>
> The heated outdoor pool is seasonal, open six months of each year.

The pool was abandoned by [the Landlord's] first property manager, [L.], throughout 2016 and grew cloudy and unsightly. Former management had kept it maintained throughout the year so it was still visually appealing as part of the property even when not available for swimming through the winter.

It only became usable weeks after the usual season open date in 2017 when Steve, a resident at 415, volunteered to maintain it. For the first couple month he was maintaining it, it was often cloudy, not chemically balanced. He took a pool maintenance course that summer and has since maintained the pool.

It was technically available for use, most of the time, through the summers of 2017, 2018 and 2019 for anyone who might want to swim in the middle of an active and loud construction zone. There is no change room at the pool, so to access it, a tenant must walk, in swimming clothes, through the bare concrete hallway, elevator, lobby and portion of yard, almost certainly passing multiple contractors along the way. The pool is flanked by the two towers, so once at or in the pool, there was scaffolding or swing-stages with workers to the east and west. To the north right beside the pool was the staging area. If it was any day other than a Sunday, there would be significant and possibly intense noise, including jack-hammers at a distance close enough that the dBA levels could be loud enough to cause hearing damage.

To clarify here, exterior work on 415 began earlier in 2017 than work on 435. That was not a quiet summer.

The pool area has also been used for storage of windows & other building supplies for long periods.

The formerly pale blue tiles around the pool above the waterline have not been cleaned since before [the Landlord] took ownership in 2015 and are now covered in brown build-up.

The pool was only inaccessible for a month or so into the usual season in 2016. At that point a tenant at 415 volunteered to maintain it. He had some trouble with the chemicals for the first while until he took a course on pool maintenance sometime that summer.

The sun goes behind 415 Michigan around the same time that the workers finish most days, and James Bay is frequently very windy and cool even in the

> summer, so it's rare that the pool is desirable to use in the evenings. It's in shade with a cool wind, so generally it's only on the warmest summer days, in the afternoon when the sun is high, that the pool is pleasant to use.
>
> Since Steve got the chemicals balanced sometime in the summer of 2016, the pool has been technically available, but surrounded on three sides by often very active and very loud construction. To use the pool Monday through Saturday through much of this period would mean walking in swimwear past the contractors in the elevator, hallways, lobby, yard, (there is no change-room at the pool) swimming or lounging at the pool in view of workers on scaffolding or suspended swing-stage, hearing jack-hammering and/or table saws and/or compressors and whatever other noise just a few meters away from any or all three sides, and walking past workers in a damp towel on the way back up.
>
> To put this further in context, consider that in 2016 there was a police raid on one of the contractors who was selling drugs out of 415 Michigan & was in possession of a handgun. VICPD could not release any information about this, but several tenants, including Steve the pool guy, witnessed the raid and arrest. These were the types of workers on site, working above on the buildings to either side of the pool. We all knew what types of contractors these men were, we passed by them every day, heard their talk through our windows. It wouldn't be comfortable swimming in the middle of a construction site populated by the best of workers, even less so when the workers are at worst criminals and at best obviously incompetent and extremely inconsiderate.
>
> I don't think it's fair to argue that the pool was available when it was surrounded by busy and extremely loud construction activities all around and above. Obviously almost nobody would be comfortable using the pool under those conditions.

The Tenant said that he chose not to use the pool during the Project. Counsel’s position was that there is no evidence before me that the pool was ever closed during the Project.

In her written submissions, Counsel said the following about the pool:

> I find that the Tenant has failed to establish that his ability to use the pool during its normal operating period was restricted for any significant period of time. In reaching this conclusion I was heavily influenced by the Tenant’s inability to

> recall when the pool was not available for use during its normal operating period and by Legal Counsel's testimony that she does not know if the pool was ever closed as a result of construction. As there is no evidence that the pool was closed during its normal operating period for any significant period of time, I cannot conclude that the Tenant is entitled to any compensation as a result of a pool closure.
>
> While I accept that the Tenant chose not to use the pool because of the construction items being stored in the area; that does not constitute a reduction in service. Any compensation the Tenant is entitled to as a result of the appearance of the pool will be considered in conjunction with the general appearance of the residential complex.

The Tenant did not indicate how much he would use the pool prior to the Project taking place.

#2 PROFESSIONAL CLEANING

- ➔ Asbestos Dust: $334.68
- ➔ Window tape Removal: $100.00

In his written submissions, the Tenant stated the following about these claims:

> These two monetary claims are detailed further in the description of email exchanges and photographs.
> **Professional Cleaning - Abatement Dust = $334.68**
>
> The bill was $334.68. I bought the workers a quick lunch and drinks as they did not break all morning and were clearly exhausted, and tipped each $20 for their hard work. My total out of pocket cost was $334.68 + $28 + $60, and I missed two full days of work for this cleaning alone. I'm requesting compensation only for the invoiced amount.

The Tenant submitted an invoice for the amount claimed for this cleaning, which took two cleaners 4.25 hours to clean the rental unit of "large amount of concrete dust throughout the entire apartment". This is billed at $75.00 per hour. I note that this invoice was billed on October 13, 2016.

> **Professional Cleaning - Window Tape Removal = $100.00**

> Management declined to remove the tape and residue from the windows because they would be replaced eventually. I contacted Caroline Armstrong at Devon to request it be a priority as the window replacement had no fixed schedule and might be months ahead. The conclusion of the conversation was "Go ahead and have someone clean it, we are not paying for it."

The Tenant submitted an invoice dated January 10, 2018, which he received for this service from a handyman for the amount claimed. The Tenant said in his written submissions that the windows were not replaced "…until well into the following year." As such, he would have to have put tolerated tape marks on his windows for months extra, if he had not had the windows cleaned.

Counsel said in her written submissions that when tenants complained of dust in their suites cleaning was provided by the contractor.

In her written submissions, Counsel said the following about cleaning:

30. On or about March 8, 2017, the Landlord provided a notice to all residents regarding the re-occupancy schedule of the Building. A shuttle service was again provided for all tenants beginning on March 9 and through to March 10, 2017.

31. On the same day, the Landlord provided a further letter sharing several re-occupancy details with the residents. They provided further gifts cards to assist with expenses while tenants re-occupy the Building. Further, the Landlord provided an attached letter from [the contractor] regarding the cleaning measures that were taken and offered a vacuum replacement program to tenants as well, agreeing to replace any vacuums where residents were concerned with construction dust. In their letter, [the contractor] confirmed that the asbestos dust was effectively cleaned and that the Building is safe for occupancy.

#3 AGGRAVATED DAMAGES → $15,000.00

In his written submission, the Tenant's evidence on this matter includes the following:

> Where until this point, I had the luxury of not having any reason to fear premature illness and death, I now lay in bed at night considering the possibility that I may, in my late 40s, or 50s, or 60s, have my quality of life rapidly decline and quickly end. I had an uncle who died near my age of lung cancer. It's not a certainty that this will be my fate, but now it's a realistic possibility, with a degree of likelihood, I

> am forced to entertain. I often find myself feeling good, feeling optimistic, for example, about putting this tenancy battle behind me, moving on with my life and perhaps never having to think about [the Landlord] again ... and then I'm reminded that I have this potential ticking time bomb in my chest. There is no doubt my lungs are loaded with asbestos fibers and silica crystals, it's not possible to have occupied this building in 2016 and avoided exposure, that is now clear. This building was loaded with contaminated airborne dust, for months. The only relief I get from anxiety around this potential illness waiting in my lungs is to get old enough to die of other causes. After exposure to asbestos or silica, there is never an "all clear" diagnosis. The contaminants are inside you and the disease may develop at any point.
>
> The reason the asbestos and silica exposure was so dangerous to us… they wrapped the building in a shroud. They said they would be using a low-to-moderate process to remove the siding – use adhesive strips – remove without dust… but they switched to the high-risk procedure with negative air pressure area – collect dust in air . . . not expelling it to the street or into the building. But these guys were so inept - one air pressure matching filter was discharging air into the enclosure, not outside, so it was not pressurized. Consequently, the lack of negative air pressure to keep negative material in the enclosure…. They failed to consider the heat generated by occupants. The wind was acting like a bellows, forcing more air into the building. We were a kiln in the building that was having contaminated air into building from late July to December of 2016.
>
> Then the additional 42 days – they found asbestos levels extreme, so they evacuated all tenants from the building for six weeks for remediating and cleaning everyone's belongings and apartments. So that was something alarming at the time. I was very concerned. It was a major dust incident in my suite. Our correspondence shows that it took over 10 days to get [D.P.] to authorize cleaners. I knew that I should not vacuum with a regular vacuum. That sort of dust needs to be cleaned by specialists in space suits. The full gravity of this was not understood until the consultation with [my expert].

Intangible loss – I understand the severity of what's occurred – Merriman indicated the silica levels – cancer causing dust in construction. But usually if limit asbestos, will limit silica, also. The asbestos levels would have been severe in all level so built. Nearest to jack hammering – 250 – 300 times safe levels for approximately a 7 month period. I was exposed to 250 – 300 times the safe levels of silica and asbestos, too.

> It bothers me a lot. [R.M.]-type professionals can't put a likelihood of suffering – may die in a year may not affect for 30 years. The feeling I have – the good Saturday mornings and then the jackhammering stops. There are times when I feel good, but I realize I have millions of fibres in my lung – its typically fatal in 6 months of developing cancer. A young guy downstairs in a bachelor suite – windows sealed, view obscured, tiny vents over stove and in the bathroom. He has lumps in his lungs, no history of work related to asbestos – in his 30s. I know this is going to happen. If it's unrelated, it's going to happen with other neighbours. This event is now a feature in my life for the rest of my life. Now a pivotal shaping part of my life. I'm a musician with the most creative, productive period. Lost ability to do it in my home. It's exhausting going through this for so long and difficult to put it in context. Friends or family over and your buildings in this state. Like an abusive relationship – why you're not moving?… Why subject yourself to this?

The Tenant submitted reports from his expert (credentials noted above), [R.M.]. In a January 8, 2019, letter to the Tenant, [R.M.'s] statements included the following:

> Bulk sampling of the exterior of the buildings at [residential property address] for asbestos and lead was conducted by [P.] Ltd. on October 29, 2015 for [the Landlord]. The findings of the assessment were reported on November 2, 2015 and identified white textured paint on the exterior of both buildings as containing asbestos and lead. Caulking materials were also identified as ACM. The document is referenced in WSBC [IR …].

In this letter, [R.M.] Also summarized WSBC inspections and orders for failure to take appropriate precautions for work involving hazardous materials, including STOP WORK orders. The following summarized these in [R.M.'s] January 8, 2019 letter.

Please note that the following includes WCB inspections and orders for the accompanying building on the residential property that the Landlord was renovating, as well as the Tenant's building:

a. Jan 13, 2016 – [residential property address] - WSBC IR #201617356008A

i. Renovation work <u>without a site inspection report for hazardous materials</u>.

ii. Contractor was relying on a report for other suites and was deemed

to be inadequate as the sites that were assessed were not properly assessed.

b. Jan 13, 2016 - [residential property address] - WSBC IR #201617356020A

i. Significant deficiencies with the site inspection for hazardous materials report that was prepared.

ii. Assessment not conducted in accordance with procedures acceptable to WSBC.

c. Mar 1, 2016 - [residential property address] - WSBC IR #201611284012A

i. Site visit initiated by concerns about the requirement for respiratory protection in proximity to asbestos storage bin.

ii. No orders were issued. Site labels for the storage area were to be revised to comply with WHMIS 2015 labelling requirements.

d. Apr 6, 2016 - [residential property address] - WSBC IR #201617356045A

i. Vacated suites undergoing renovations were posted with Clearance letters from an asbestos abatement contractor yet disturbed materials suspected to contain asbestos were evident in the suites.

ii. Order was for failure to implement an effective exposure control plan for asbestos.

e. May 6, 2016 - [residential property address]- WSBC IR #201617356055A

i. STOP WORK order issued for failing to safely contain or remove asbestos-containing drywall joint compound in suites 201, 204, 303, 401, 501, 504, 604, 605, 1002, 1006, 1102, 1403, 1402.

ii. "Based upon the violation(s) cited in this Inspection Report, the Board has reasonable grounds to believe there is a high risk of serious injury, serious illness or death to a worker at this workplace."

f. June 28, 2016 - [residential property address] - Notice of Project E714463

i. The procedures that were specified, and in keeping with WSBC's best practices for work with asbestos, were not actually being followed

ii. “There are no records available to substantiate Swift Demolition Services Ltd. provided air monitoring services”

g. July 5, 2016 - [residential property address] - WSBC IR #201617190172A

i. Inspection of erected shrink wrapped scaffolding

ii. The pressure differentials exerted on the shrink wrapped scaffolding containment would render the air handling equipment ineffective in maintaining a reduced pressure to ensure airborne contaminants do not escape from the contained area.

h. July 13, 2016 - [residential property address] - WSBC IR #201617190179A

i. “A partially demolished balcony wall was left standing and not adequately braced … a substantial (approx. 10' x 3' x 2.75") concrete component fell approximately 60 feet to the ground below.“

i. July 18, 2016 - [residential property address] - WSBC IR #201617356075A

i. STOP WORK order issued to prime contractor due to deficiencies with asbestos abatement contractor’s containment area within the enclosed scaffolding.

j. July 18, 2016 - [residential property address] - WSBC IR #201617356076A

i. STOP WORK order issued to exterior asbestos abatement contractor due to use of an uncertified HEPA air handling system which was redirecting potentially contaminated air into a shrink wrapped enclosed space where unprotected workers were located and no monitoring was being conducted.

k. July 19, 2016 - [residential property address] - WSBC IR #201617356077A

i. Order issued for failure to conduct air monitoring of high risk asbestos abatement work in accordance with procedures considered acceptable to WSBC.

ii. Location, frequency and duration samples were to be collected were not being conducted as required.

l. July through December 2016 - multiple WSBC Inspection Reports

i. Follow up reports at [residential property address]

m. Sep 26, 2016 - [residential property address] – Notice of Project Asbestos/Lead E723317

i. "Start Date as listed would indicate work proceeded before WorkSafeBC was notified of the work activity."

n. Dec 14, 2016 **-** [residential property address] - WSBC IR #201617356141A

i. STOP WORK order issued for failure to ensure appropriate safe work procedures are used when asbestos is disturbed and failure to ensure that a qualified person confirms in writing that asbestos containing materials have been safely contained or removed.

ii. "The contractor did not use appropriate safe work procedures."

iii. "The work activity has disturbed the asbestos containing texture coat."

iv. "Based upon the violation(s) cited in this Inspection Report, the Board has reasonable grounds to believe there is a high risk of serious injury, serious illness or death to a worker at this workplace."

o. Dec 21, 2016 - [residential property address] - WSBC IR #201617190312A

i. Unauthorized Scaffold Use " … scaffold at the south end of the [residential property address] currently does not have any means of additional security to prevent use by unauthorized people"

p. Dec 28, 2016 - [residential property address] - WSBC IR #201611284107A

1. Violations of STOP WORK order

q. Jan 24, 2017 - [residential property address] - WSBC IR #201711284009A

1. Assessment of dust in suites 303, 403, 406, 505, 1206 and common areas. Identified hazardous materials include Chrysotile Asbestos, Actinolite Asbestos, and Tremolite Asbestos.

2. Consultant's report of assessment advises of abatement recommendations for Asbestos, Lead and Respirable Crystalline Silica.

r. Mar 7, 2017 - [residential property address] - WSBC IR #201611284108B

i. Overdue Notice of Compliance - was due January 3, 2017 s. Apr 3, 2017 - WSBC IR #201717356038A i. WorkSafeBC is imposing an administrative penalty because the Employer:

1. has failed to take sufficient precautions for the prevention of work related injuries or illnesses;

2. has not complied with sections 6.6(3), 6.7(1), 6.8(1), 20.112(7) and 6.3(1) of the Regulation;

3. has not maintained a safe workplace or safe working conditions;

4. did not exercise due diligence to prevent these circumstances. .

[emphasis added]

R.M. also stated in this letter:

9. STOP WORK orders are typically rare occurrences, there were, however, numerous orders issued in relation to the sites at [residential property address]

10. There was a very high turnover of prime contractors, contractors and hazardous material consultants throughout this period.

11. My first involvement was on March 1, 2016, when I conducted an inspection at [residential property address]. The inspection was due to concerns about the type of respiratory protection required in proximity to a storage bin holding bags of asbestos waste. While the issue was more of a labelling matter the site visit confirmed, for me, that:

a. Asbestos-containing materials were present on site.

b. The company performing asbestos abatement activities, at that time, was a local company from the Victoria area. I was familiar with their work practices which were considered to be acceptable.

c. The companies performing asbestos abatement activities and third party oversight of abatement activities in mid to late 2016 were generally not local companies. Unlike local companies that had perfected their work practices, over years of interaction with WSBC officers, these companies seemed to be still learning the business, or trying to conduct business on Vancouver Island as if

> they were still located on the lower mainland of British Columbia or farther afield in Ontario. This resulted in delays or an inability to properly monitor workplace conditions and an absence of qualified persons to effectively manage the hazardous materials abatement activities.

The Tenant has applied for $15,000.00 in aggravated damages, although, he initially applied for $10,000.00 for this claim. In his written submissions, the Tenant said the following about the amount he seeks:

> I'm asking you to please consider that this may be the sort of intangible loss Aggravated Damages was intended to allow for, and to please award me $15,000 for this aspect of my dispute. Although aggravated damage awards may be rare, and awards this size may be uncommon for RTB disputes in general, it is, truly, a trivial sum and mainly symbolic. It's not enough to recover the financial loss I've suffered investigating the exposure or helping my neighbors with their disputes, or to have any impact on $30B [Landlord's] future conduct, it's certainly not enough to provide compensation for the fear I am stuck with knowing my lungs are full of destructive fibers and crystalline structures … but it would provide a small bit of closure and a sense of justice.
> . . .
>
> There is an exhaustion to the cumulative effect of having these issues persist for so very long. If I live an average lifespan, this renovation project will have been a dominating feature of 5% of my life.
> . . .
> I'm an avid hiker and I greatly value my health. I will now forever suffer a lingering fear that one day, prematurely, my lung health will rapidly decline as a result of the asbestos, lead and silica I've been exposed to.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I advised them of how I analyze the evidence presented to me. I told them that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this

case, the Tenant must prove:

1. That the Landlord violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Tenant to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Tenant did what was reasonable to minimize the damage or loss.

("Test")

Section 32 of the Act requires that a landlord maintain the rental unit in a state of decoration and repair that complies with the health, safety, and housing standards required by law, and having regard to the age, character, and location of the rental unit, which make it suitable for occupation by the tenant. A Landlord is required to maintain a residential property pursuant to section 32 of the Act.
Section 28 of the Act sets out a tenant's right to quiet enjoyment of the rental unit, and states that tenants are entitled to "reasonable privacy, freedom from unreasonable disturbance, exclusive possession of the rental unit, subject only the landlord's right to enter the rental unit in accordance with section 29, and use of the common areas for reasonable and lawful purposes, free from significant interference."

Policy Guideline 6, "Right to Quiet Enjoyment", states:

Policy Guideline #6 ("PG #6") states:

> 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 landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Compensation for Damage or Loss

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.

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. .

[emphasis added]

A landlord is required to maintain a residential property, while ensuring to respect and protect tenants' legislated right to quiet enjoyment of the residential property. I must determine if what the Landlord did was reasonable in all of the circumstances; I must determine if this work unreasonably disturbed the Tenant; and if so, what would be appropriate compensation from the Landlord to the Tenant.

Section 65 of the Act authorizes the Director to allow a tenant to deduct from rent an amount awarded for costs incurred by the tenant in terms of maintenance or repairs, when a landlord has been found to not comply with the Act, regulation, or tenancy agreement.

#1 RENT ABATEMENT FOR RENOVATION PERIOD → $19,446.00

The Tenant has applied for an increasing percentage of a rent reduction for this category throughout the renovation period. He claimed 10% for December 2015, 15% for January 2016 and 20% for February through May 2016. As of June 2016, the Tenant has combined this claim with that of the next section for a total requested reduction of 30% for June 2016 through January 2017.

During the time when the tenants were evacuated from the residential property, due to

asbestos remediation from January 29 through March 11th, the Tenant has not applied for a rent reduction, since rent was not paid during this time. I also note that the Landlord tried to ease the tenants' discomfort and inconvenience for this stage by waiving rent, and providing parking and internet at no cost to the tenants. A complementary breakfast was provided every morning, and the Landlord also gave the tenants gift cards for purchase of groceries, as mitigation for inconvenience of being relocated, and there was a dedicated telephone number for residents to call if they had any questions.

The Tenant then decreased the amount of the rent reduction he'd applied for to 10% for the period of March 11, 2017 through August 2017. In September 2017 through to February 2018, the Tenant again requested a 30% rent reduction for claims in sections B and C. From March 2018 through to October 2018, the Tenant requested a 20% rent reduction.

A. Failure to Maintain

➔ Everything other than renovation noise

The Tenant indicated that the common areas were not maintained well, especially starting in December 2015, but improving over the course of time, once [D.P.] was hired. The Tenant did not indicate that he had any issues in the rental unit that required the assistance of a building manager or a trades person during this time; however, he requested a rent reduction for this claim of 5% in December 2015, increasing to 10% in January 2016, 15% in February 2016 through November 2016. The requested rent decrease rose to 25% in December 2016; however, the Tenant urged me to consider the effect of these issues overall, not on a one-off basis; however, he structured his claim in time periods and issue-based, which is understandable.

I find that the Tenant's testimony and photographs provide sufficient evidence to fulfill his burden of proof on a balance of probabilities to prove that the residential property was in not cleaned to a reasonable level for the duration of the Project, and not in compliance with section 32 of the Act.

While the Landlord's evidence is that cleaning protocols were in place once [D.P.] was the property manager, which I have found to have occurred in October 2016, the Tenant's photographic and testimonial evidence tell a different story. I find that the Tenant has provided sufficient evidence to meet his burden of proof on a balance of probabilities for compensation for this claim for "Failure to Maintain".

However, I am concerned with the percentages that the Tenant has assigned to this claim throughout the years of renovations. I find from the evidence, and from common sense and ordinary human experience, that the common areas represent a small portion of the living space that the Tenant occupies in the residential property. The Tenant did not indicate that he had any issues within his rental unit relating to reduced or insufficient maintenance. Given that it was more likely than not cleaner at some stages and dirtier at other stages of the renovations, I grant the Tenant a **10% reduction per year** for this claim for the months in which the Project was underway, except for the Stop Work period in which the Tenant was in a hotel and not paying any rent.

Please note that this award is not for the reduced amount in the first year to be further reduced by 10% each subsequent year, but for one reduction of 10% to apply to the full amount of rent owing each year, pursuant to the tenancy agreement.

The calculation for this is set out in the Summary section below. Based on that calculation, I award the Tenant with **$4,988.13** from the Landlord pursuant to sections 28, 32, and 67 of the Act for the Landlord's failure to maintain the residential property during the Project.

B. Loss of Quiet Enjoyment

→ *Frequent or daily noise from other suite, interior commons, and yard renovations*

And

C. Loss of Quiet Enjoyment

→ Jack hammering & concrete drilling

I have combined these categories, because the Tenant has done so in his claim, and because they are related.

As noted above, section 28 of the Act sets out a tenant's right to quiet enjoyment of the rental unit, and states that tenants are entitled to "reasonable privacy, freedom from unreasonable disturbance, . . ., and use of the common areas for reasonable and lawful purposes, free from significant interference." However, I must balance the Tenant's right to quiet enjoyment with the Landlord's obligation to maintain and repair the residential property, pursuant to the Act.

Pursuant to section 7 of the Act, a party who does not comply with the Act, regulation or

tenancy agreement must compensate the other party for the resulting damage or loss. Policy Guideline #16 states that damage or loss is not limited to physical property only, but also includes less tangible impacts, such as loss of rental income that was to be received under a tenancy agreement.

Counsel argued: The Landlords submit that the Tenant's evidence does not show significant loss of enjoyment. Stripped hallways, loss of use of a bike shed are not in the tenancy agreement, therefore this doesn't warrant a rent reduction. Section 32 should bar a tenant from an award during this period. Further, Counsel suggested that the Tenant's claims in 2015 and 2016 "should be wholly dismissed", because he gave no notice to the Landlord of any issues he experienced. Section 32 (5) states:

> **32** (5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

Subsection (1) (a) states:

> **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

The Tenant provided evidence that what he endured during the Project negatively affected his enjoyment and use of the rental unit. The Tenant listed 25 items (not all of which I recorded), which affected his ability to enjoy the rental unit. I agree with the Tenant that the situation could be better viewed as a whole, rather than focusing on how the Tenant was affected by the cedar planks over the front entrance, or the failure of the new sliding doors, or the loud table saws, the cutting door frames for new fobs, etc. I find it more likely than not that the scale and length of the Project must have been overwhelming for the tenants of the residential property.

Further, I find that there is limited, if any, evidence that was presented to me demonstrating how the Landlord minimized or mitigated the impact that the Project would have on the tenants. As Counsel points out, Policy Guidelines require that landlords clean the residential property at reasonable intervals. However, I find that during an undertaking the size and scope of the Project, reasonable intervals should become more frequent and extensive. The Landlord did not direct me to evidence that the cleaning done increased in intervals. Rather, I find from the undisputed evidence

before me that the Landlord replaced two live-in building managers that handled the residential property during ordinary times with one absent building manager who handled other buildings, too, and had too handle these buildings during a large construction project. I find this displays the opposite of mitigating the effect of the Project; it shows a bizarre failure to recognize the impact of the Project on the tenants.

However, I give the Landlord credit for their treatment of the tenants while they were evacuated to a hotel. The rent was waived, parking and internet were provided at no cost, and a complementary breakfast was provided every morning. The Landlord also gave the tenants gift cards for purchase of groceries, as mitigation for inconvenience of being relocated, and there was a dedicated number for residents to call if they had any questions. However, Counsel did not draw my attention to other mitigation techniques used by the Landlord while the tenants were in their rental units during the Project.

When I consider the evidence overall, I find that the Tenant was reasonable in his varied claims – reducing the amount based on the work that was going on at the time. I find that the Tenant provided sufficient evidence to meet his burden of proof on a balance of probabilities. I find that the Tenant's claims in this section are reasonable in the circumstances. I, therefore, award the Tenant with **$9,292.62** what he seeks in this category, as set out in his charts above, and as summarized below.

D. Loss of Access to Balcony

Counsel had referred me to another arbitrator's decision for another tenant in the Landlord's complex. That arbitrator considered the balcony space to be less important than the indoor space in the rental unit.

I did not read that whole decision, and I do not know the impact of balcony loss on that tenant; however, I find in the case before me that the Tenant had multiple uses for the balcony, all of which were eliminated for almost two years, and definitely two summers.

Counsel noted that balconies are used "only seasonally"; however, in this case, the balcony was not usable during the relevant seasons of 2016 and 2017. Further, access to the balcony on nice days in other seasons was also unavailable to the Tenant.

I find that the balcony was important to the Tenant, as he used it for multiple activities, as well as for allowing sunshine and fresh air to flow into the rental unit.

The Tenant has claimed a 10% rent deduction for the months in which he was unable to

use this aspect of the rental unit. I find for this Tenant that the balcony brought an opportunity to do activities such as playing guitar and/or having a drink with friends. I find that the balcony offers also helps the Tenant's mental health, as he said the fresh air and sunshine are beneficial to depression.

I find that the Tenant has provided sufficient evidence of the importance of the balcony to him, and I therefore, award him with 10% per month for June 2016 through to and including February 2018.

E. Loss of Access to Seasonal Pool

I find that the Tenant expressed concern about the manner in which the Landlord maintained the pool; however, I find that that is a separate matter from the use of the pool as associated with the Project.

I find that the Tenant's submissions in this regard are focused on the pool surroundings during the Project, and that it was uncomfortable to walk through the construction zone in the residential property. He said that people would be uncomfortable doing this.

I find on a balance of probabilities that the Tenant did not submit sufficient evidence to establish that he was negatively affected by the Project - that it prevented him from swimming. As such, I find that he has not met the burden of proof in this matter on a balance of probabilities, and therefore, I dismiss this claim without leave to reapply.

#2 PROFESSIONAL CLEANING

- ➔ Asbestos Dust: $334.68
- ➔ Window tape Removal: $100.00

<u>Asbestos Dust Clean Up</u>

The Landlord argued that that it is expected that there would be a large amount of dust accumulating during a construction project such as this. They offered to replace tenants' vacuum cleaners, both of which indicate to me the Landlord's acknowledgement that the Tenant faced a large amount of concrete dust in the rental unit after the evacuation, as the cleaning receipt indicates.

I find that the Tenant has proved his claim in this regard on a balance of probabilities, and therefore, I award the Tenant with recovery of this expense from the Landlord in the amount of **$334.68**, pursuant to sections 32 and 67 of the Act.

Window Tape Removal

In terms of the window tape removal, I find that this was a reasonable expense for the Tenant to have expected the Landlord to bear, as the evidence before me is that the windows were not replaced "…until well into the following year". I award the Tenant recovery of this expense from the Landlord in the amount of **$100.00**, pursuant to sections 32 and 67 of the Act.

#3 AGGRAVATED DAMAGES → $15,000.00

Policy Guideline #16, "Compensation for Damage or Loss", states the following about aggravated damages:

- "Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money, or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.

Counsel argued that [R.M.'s] report is speculative, that the Health Authority and the engineering company said that asbestos testing was not done in every single suite. He also noted that this testing was done during the Stop Work Order, and then the units were cleaned.

I find it to be reasonable, and consistent with common sense and ordinary human experience that the workers would not test every unit in a building of this size. Further, the units were cleaned *after* the tenants were evacuated; however, prior to this evacuation and cleaning, the tenants were living in the construction zone. This was a construction zone in which WSBC found multiple violations, including: renovation work without a site inspection report for hazardous materials; the sites that were assessed were not properly assessed; significant deficiencies with the site inspection for hazardous materials report that was prepared; and the assessment not conducted in accordance with procedures acceptable to WSBC.

The residential property was wrapped in a shroud surrounding their building, and the evidence before me is that incompetent workers did not manage the shroud or expulsion of the asbestos dust properly, raising the level of asbestos and silica fibers in

the units. I find that the Landlord is responsible for the construction workers that are hired, and for their actions or omissions, big or small.

Further, while Counsel suggested that the basis for an award of aggravated damages must be substantial, and not a mere inconvenience, I find that the possibility of developing lung cancer, or the other possible ailments noted by [R.M.] is much more than a mere inconvenience. [R.M.] said:

> For an individual tenant, that has been exposed to hazardous materials such as asbestos, respirable crystalline silica and/or lead, their relative risk of developing a disease due to the exposure is 50:50 with the disease developing or not.

I find that for a landlord to have put this many tenants up in a hotel for six weeks, offering grocery and other gift cards, and waiving the requirement to pay rent, the asbestos level in the residential property must have been as extreme as the Tenant, WCB and the expert reports say it was.

Counsel said that "…a fear of loss or potential loss that has not materialized does not amount to damages….speculation and feelings are not proof. If he had evidence from counsellors or a doctor's note – three years after work started - maybe." However, the actual illness is not that for which the Tenant seeks aggravated damages. The Tenant seeks these damages, because the Landlord's actions or inactions caused the Tenant to now experience the possibility of getting sick from asbestos exposure at some point in his life.

In *Sahota v. Director of Residential Tenancy Branch,* 2010 BCSC 750, the Court said the following:

> [46] For the following reasons, I have concluded that the DRO did not err in law in awarding aggravated damages.
>
> [47] Aggravated damages are a compensatory award that takes account of intangible injuries to the plaintiff, such as distress and humiliation, caused by a defendant's insulting behaviour. Aggravated damages are to compensate the plaintiff for such things as anguish, grief, humiliation, wounded pride, and damaged self-confidence or self-esteem suffered as a result of the defendant's conduct: *Vorvis v. ICBC*, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085.
>
> [48] There is a close relationship between aggravated and punitive damages. The harshness of the defendant's conduct may give rise to both. There

> need be no finding of harsh, vindictive, reprehensible and malicious conduct in order to award aggravated damages. That type of conduct supports an award of punitive damages. The conduct for the award of aggravated damages need only be high handed. However, it is important that a plaintiff not be compensated twice for the same harm or the defendant punished twice for the same type of moral culpability: *Huff v. Price* (1990), 1990 CanLII 5402 (BC CA), 51 B.C.L.R. (2d) 282 (C.A.).
>
> [49] The difference between aggravated and punitive damages was discussed in *Huff*:
>
> ... aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's highhanded conduct.

Could or should the Landlord have known that the Project could put the tenants in contact with dangerous asbestos dust? I accept the Tenant’s testimony and his expert’s documentary submissions noted above, which indicate that the Landlord failed to protect tenants properly through proper testing for hazardous materials, and with the means by which the asbestos containment was effected. As noted above, R.M.’s report indicates that the Project was closely monitored by WSBC, and found to be non-compliant with legislation and required safety protocols. I find that this left the workers and the tenants of the residential property at risk of contamination by asbestos dust and silica fibres.

Tenants lived in the residential property while asbestos dust was released during the construction process, and prior to the Stop Work Order, which resulted in the tenants

being evacuated from the residential property and moved to a hotel for six weeks. I find that this is a matter of serious concern for the tenants in the residential property, and I find it is an appropriate scenario for an award of aggravated damages.

I find that the Tenant's expert's evidence is that typically, the health effects from asbestos fibres in a person's lungs do not appear for years after the exposure. As such, I find from the Tenant's testimony that he is left with an ongoing fear for his health, which I find will affect him in the long-term. Please note that I am saying that the **fear** will affect the Tenant and not that he *will* incur lung cancer or other health ailments, as a result. I find that this fear or concern is an injury to the Tenant caused as a direct result of the mishandling of the Landlord's Project.

Aggravated damages are an award or an augmentation of an award of compensatory damages for non-pecuniary losses (intangible losses for physical inconvenience and discomfort, pain and suffering, loss of amenities, mental distress, etc.). Aggravated damages are designed to compensate for aggravation to the injury caused by the wrongdoer's behaviour, and are measured by the wronged person's suffering.

The damage must be caused by the deliberate or negligent act or omission of the wrongdoer. However, unlike punitive damages, the conduct of the wrongdoer need not contain an element of wilfulness or recklessness in order for an award of aggravated damages to be made. The damage must also be reasonably foreseeable that the breach or negligence would cause the distress claimed, which I find to be the case.

They must also be sufficiently significant in depth or duration or both that they represent a significant influence on the wronged person's life. They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must be specifically sought. They were sought in this case, and I find that they are warranted.

In determining the amount of aggravated damages that are appropriate, I consider the seriousness of what the Tenant has experienced, including the length of his exposure to the asbestos dust and silica fibres. I also note that this fear will accompany the Tenant for the rest of his life. Further, I note the significance of the Landlord's safety violations, which affected so many tenants and workers. Based on the evidence before me overall, I award the Tenant with the amount he initially claimed for this category, that being **$10,000.00**, pursuant to section 67 of the Act.

Summary

A. Failure to Maintain & General Loss of Quiet Enjoyment

The Tenant is awarded a 10% reduction in rent per month for the entire time of the Project, except for when the tenants were at a hotel during the Work Stop. These calculations are as follows:

DATE	RENT	% DEDUCTED	AWARD
2015	$980.00	10% for 1 month of 2015	$98.00
2016 Jan – June July – Dec.	 $980.00 $1,023.86	 10%/mth for 6 months 10%/mth for 6 months	 $588.00 $614.34
2017 Jan – June July – Dec.	 $1,023.86 $1,061.74	 10%/mth for 4 months (*less Feb & Mar - hotel*) 10%/mth for 6 months	 $409.56 $637.04
2018 Jan. – Jun. July – Dec.	 $1,061.74 $1,104.21	 10%/mth for 6 months 10%/mth for 6 months	 $637.04 $662.53
2019 Jan. – Jun. July – Dec.	 $1,104.21 $1,131.82	 10%/mth for 6 months 10%/mth for 6 months	 $662.53 $679.09
		TOTAL	**$4,988.13**

B. and C. Loss of Quiet Enjoyment

DATE	RENT	% DEDUCTED	AWARD
2015 December	$980.00	10%	$98.00
2016 January February	 $980.00 “ “	 15% 20%	 $147.00 $196.00

March	" "	20%	$196.00
April	" "	20%	$196.00
May	" "	20%	$196.00
June	" "	30%	$294.00
July	$1,023.86	30%	$306.90
August	" "	30%	$306.90
September	" "	30%	$306.90
October	" "	30%	$306.90
November	" "	30%	$306.90
December	" "	30%	$306.90
2017			
January	$1,023.86	30%	$306.90
February	$1,023.86	Evacuated	$0.00
March	$1,023.86	10% (½ evac.)	$102.39
April	$1,023.86	10%	$102.39
May	$1,023.86	10%	$102.39
June	$1,023.86	10%	$102.39
July	$1,061.74	10%	$106.17
August	$1,061.74	10%	$106.17
September	$1,061.74	30%	$318.52
October	$1,061.74	30%	$318.52
November	$1,061.74	30%	$318.52
December	$1,061.74	30%	$318.52
2018			
January	$1,061.74	30%	$318.52
February	$1,061.74	30%	$318.52
March	$1,061.74	20%	$212.35
April	$1,061.74	20%	$212.35
May	$1,061.74	20%	$212.35
June	$1,061.74	20%	$212.35
July	$1,104.21	20%	
August	$1,104.21	20%	$220.84
September	$1,104.21	20%	$220.84
October	$1,104.21	20%	$220.84
November	$1,104.21	15%	$220.84
December	$1,104.21	15%	$165.63
			$165.63
2019			
January	$1,104.21	15%	$165.63
February	$1,104.21	15%	$165.63

March	$1,104.21	15%	$165.63
April	$1,104.21	10%	$110.42
May	$1,104.21	10%	$110.42
June	$1,104.21	10%	$110.42
July	$1,131.82	10%	$113.18
August	$1,131.82	10%	$113.18
September	$1,131.82	10%	$113.18
October	$1,131.82	5%	$56.59
November	$1,131.82	0%	$0.00
December→ 2021	$1,131.82		$0.00
		TOTAL	**$9,292.62**

D. <u>Loss of Access to Balcony</u>

2016			
January	$980.00	10%	$147.00
February	" "	10%	$196.00
March	" "	10%	$196.00
April	" "	10%	$196.00
May	" "	10%	$196.00
June	" "	10%	$294.00
July	$1,023.86	10%	$306.90
August	" "	10%	$306.90
September	" "	10%	$306.90
October	" "	10%	$306.90
November	" "	10%	$306.90
December	" "	10%	$306.90
2017			
January	$1,023.86	10%	$306.90
February	$1,023.86	Evacuated	$0.00
March	$1,023.86	10% (½ evac.)	$102.39
April	$1,023.86	10%	$102.39
May	$1,023.86	10%	$102.39
June	$1,023.86	10%	$102.39
July	$1,061.74	10%	$106.17
August	$1,061.74	10%	$106.17
September	$1,061.74	10%	$318.52
October	$1,061.74	10%	$318.52

November	$1,061.74	10%	$318.52
December	$1,061.74	10%	$318.52
2018			
January	$1,061.74	10%	$318.52
February	$1,061.74	10%	$318.52
		TOTAL	**$5,906.32**

AWARDS:

Failure to Maintain & General Loss of Quiet Enjoyment =		$ 4,988.13
Loss of Quiet Enjoyment	=	$ 9,292.62
Loss of use of Balcony	=	$ 5,906.32
Loss of Access to Seasonal Pool	=	$ 0.00
Post evacuation dust clean-up	=	$ 334.68
Window tape Removal	=	$ 100.00
Aggravated Damages	=	$10,000.00
TOTAL		**$30,621.75**

Given his success, I also grant the Tenant recovery of his $100.00 Application filing fee from the Landlord, pursuant to section 72 of the Act. I, therefore, grant the Tenant a Monetary Order of **$30,721.75** from the Landlord, pursuant to section 67 of the Act.

Conclusions

The Tenant is predominantly successful in his Application for a Monetary Order for damage or compensation from the Landlord, as he provided sufficient evidence to prove his claims on a balance of probabilities.

I grant the Tenant a Monetary Order of **$30,721.75** from the Landlord. This Order must be served on the Landlord by the Tenant and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

Although this Decision will be rendered more than 30 days after the conclusion of the proceedings, section 77 (2) of the Act states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a Decision affected, if a Decision is given after the 30-day period set out in subsection (1) (d).

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

Dated: February 16, 2022

Residential Tenancy Branch