Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Cecconi Property Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ARI-C

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") and the *Residential Tenancy Regulation* (the "**Regulation**") for an additional rent increase for capital expenditure pursuant to section 23.1 of the Regulation.

The landlord was represented at this hearing by three agents, JC, NH and SH ("the landlord").

The seventeen tenants present at the hearing are listed on the first page.

The parties were informed that no recording of the hearing was permitted.

This hearing was reconvened from a hearing on January 4, 2022. The Arbitrator issued an Interim Decision on January 4, 2022.

The hearing lasted 3.3 hours.

The tenants had not decided on a group representative. Accordingly, all tenants who attended the hearing were granted the opportunity to ask questions of the landlord and to make oral submissions.

Submission and Service of Documents

The Interim Decision set out the date by which each party were to submit and serve documents as well as the manner of service.

No issues were raised with respect to the submission and service of documents by the landlord or the tenants.

An 11-page written submission dated March 21, 2022, by the tenants MR and FG was submitted. The landlord acknowledged receipt.

Issue(s) to be Decided

Is the landlord entitled to impose an additional rent increase for capital expenditures?

Background and Evidence

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

The apartment building contains 34 units on three floors. The building was constructed in 1971 and the elevator was original to the building.

As stated above, the tenants MR and FG submitted an 11-page written submission ("the written submission"), the only documentary evidence on behalf of the tenants. The authors were the tenants MR and FG who stated their belief that the written submissions reflected the opinions of most of the tenants.

The written submission describes the building:

> Villa Anna Apartments is somewhat unique insofar as it was family built, owned and operated by two generations of the same family since 1971 to the present day. The tenants of Villa Anna Apartments are 55+ and many are quite elderly some requiring home care. Most live on pensions and personal savings. Many have limited personal savings to draw on and need to budget carefully especially given the challenges of ever-increasing inflation and the cost of living. Rent already consumes a high percentage of most pensioners monthly expenses.

A landlord may apply for an additional rent increase if they have incurred eligible capital expenditures or expenses to the residential property in which the rental unit is located.

To raise the rent above the standard (annual) amount, the landlord must have either the tenant's written agreement or apply to the RTB for either an Additional Rent

Increase for Expenses (ARI-E) or an Additional Rent Increase for Capital Expenditures (ARI-C).

None of the tenants consented to the increase.

The landlord is seeking to impose an additional rent increase for a capital expenditure of $266, 929.72 incurred to pay for work done to the building's elevator. The landlord had the building's elevator modernized including replacement of all electrical and mechanical elements (collectively, the "Work"). The landlord testified the Work was done because of the age of the elevator, frequent break downs, difficulty in getting parts and repairs, and increasing unreliability. The landlord submitted a copy of the contract and an overview by the contractor of the components of the upgrade.

The tenants acknowledged that the Work was necessary as the elevator was old, unreliable and required inconvenient repairs. The tenants stated that many residents were seniors, and some had mobility issues. When the elevator did not work, those residents may be confined to their units.

The landlord applied on November 2, 2021. The 18-month period prior to the application therefore began May 2, 2020. The landlord claimed cost of Work as follows based on submitted invoices with the payment dates written on each:

	DATE INVOICE	DATE PAID	AMOUNT
1.	February 20, 2020	March 9, 2020	$59,903.55
2.	April 30, 2020	May 19, 2020	$3,902.85
3.	[illegible], 2020	June 26, 2020	$61,499.99
4.	September 25, 2020	October 7, 2020	$38,339.26
5.	October 20, 2020	October 29, 2020	$29,951.78
6.	November 6, 2020	November 17, 2020	$1,161.86
7.	November 20, 2020	November 26, 2020	$9,983.93
8.	November 20, 2020	December 17, 2020	$22,186.50
	TOTAL CLAIMED		**$226,929.72**

The tenants acknowledged the landlord incurred this expense of $226, 929.72.

However, the tenants claimed that the amount of the capital expenditure should be reduced by two claimed expenses as follows.

1. Invoice dated February 20, 2020, paid March 9, 2020 - $59,903.55

The tenants claimed that the capital expenses should be reduced by the amount of $59,903.55 paid by the landlord on March 9, 2020, pursuant to an invoice dated February 20, 2020, from the contractor. A copy of the invoice with payment date written on it was submitted. The payment was made before the 18-month period began.

The landlord acknowledged that this payment was made before the 18-month period started. However, the landlord requested that the payment be included as there was delay in completion of the work because of circumstances involving supply that were beyond their control.

2. Invoice dated April 30, 2020, paid May 19, 2020 - $3,902.85

The tenants claimed that the capital expenditures should be reduced by a further amount of $3,902.85 for an invoice dated April 30, 2020, prior to the start of the 18-month period. The landlord paid the invoice on May 19, 2020, within the 18-month period. A copy of the invoice with the payment date written on it was submitted.

The parties agreed that the landlord has not imposed an additional rent increase pursuant to sections 23 or 23.1 of the Regulations in the last 18 months.

Tenant's Submissions

In the lengthy hearing, the tenants put forward many arguments against the rent increase. While key concerns are referenced below, I do not reproduce every argument or submission.

Selected illustrative comments of the many oral submissions and the written submission follow:

1. Many tenants disagreed with any increase when their fixed incomes were not being increased. They cited economic hardship, and some expressed the belief they were being marginalized after a "lifetime of being a working Canadian". One

tenant, who stated he lived on a fixed income, said the last increase in his fixed income allowed him “to buy one coffee a month”.

2. One tenant stated they had rented their unit shortly before the application without being informed their rent could rise above the allowable annual rent increase. The current application for another increase was “grossly unfair” in the circumstances.

3. Any increase continued after the landlord had been compensated and amounted to “unjust enrichment” as the increase continued forever, long after the landlord was fully compensated for the expense. There was no end date.

4. The landlord should not be able to claim capital expenses incurred before the legislation took effect. The written submissions stated in part as follows:

> We submit that the purpose and intent ofthe eligible capital expenditures regime which was established under RTA Reg 23.1 was, and should be interpreted, as prospective-in other words, for claims of capital expenses incurred after July 2021, and not retroactively allow claims for capital expenses incurred during 2020. In our respectful view, to interpret the meaning of "preceding “otherwise would defeat the publicly stated purpose of the amendments.

5. The written submissions contained a summary section repeated here:

> It is clear, at least from the perspective of tenants, that the entire eligible capital expenditure regime created by the BC government

and administered by the RTB is ambiguous and profoundly unfair. This unfairness will be acutely felt by many Villa Anna tenants who are elderly and on fixed incomes that cannot possibly meet such dramatic long-term rent increases.

It is our view, and that of most tenants in the Villa Anna, that the landlord should have been budgeting for the completely foreseeable replacement of an elevator which typically has a 25-30 year lifespan. They did not do this, and under the new legislation tenants must now pay the price for a landlords lack of budgeting foresight.

The tenants' main arguments why this application should not be allowed relate to the retroactive nature of the legislation, the hardship on tenants of any allowed increase, especially those tenants with fixed incomes, and the alleged failure of the landlord to budget and plan for a new elevator.

Analysis

1. *The Residential Tenancy Act*

To raise the rent above the standard (annual) amount, the landlord must have either the tenant's written agreement or apply to the RTB for either an Additional Rent Increase for Expenses (ARI-E) or an Additional Rent Increase for Capital Expenditures (ARI-C).

This Application is for an Additional Rent Increase for Capital Expenditures (ARI-C).

Section 43(1)(b) of the Act states that a landlord may impose a rent increase only up to the amount calculated in accordance with the regulations, ordered by the director or agreed to by the tenant in writing. The section states:

> **Amount of rent increase**
>
> **43** (1) A landlord may impose a rent increase only up to the amount
>
> (a) calculated in accordance with the regulations,
>
> (b) ordered by the director on an application under subsection or
>
> (c) agreed to by the tenant in writing.

Section 43(3) states that a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution. The section states:

> 43 (3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

Statutory Framework

Sections 21 and 23.1 of the Regulations set out the framework for

determining if a landlord is entitled to impose an additional rent increase for capital expenditures. *RTB Policy Guideline 37 – Rent Increases* provides guidance on the Act and Regulations.

The landlord has the burden of proof which is based on a balance of probabilities.

The landlord must establish the following:

1. The number of specified dwelling units on the residential property – section 23.2(3)
2. The landlord must not make a subsequent application in respect of the same rental unit for an additional rent increase for eligible capital expenditures until at least 18 months after the month in which the last application was made – section 23(2)
3. The expenditures are *eligible capital expenditures* under section 23.1(4) in that they were incurred for one of the following:
    a. the installation, repair or replacement of a major system or major component in order to maintain the residential property, of which the major system is a part or the major component is a component, in a state of repair that complies with the health, safety and housing standards required by law in accordance with section 32 (1) (a) [landlord and tenant obligations to repair and maintain] of the Act– section 23(4)(a)(i)
    b. the installation, repair or replacement of a major system or major component that has failed or is malfunctioning or inoperative or that is close to the end of its useful life – section 23(4)(a)(ii);
    c. the installation, repair or replacement of a major system or major

component that achieves one or more of the following:

(A) a reduction in energy use or greenhouse gas emissions;

(B) an improvement in the security of the residential property

4. The capital expenditures were incurred in the 18-month period preceding the date on which the landlord makes the application – sections 23(1), 23(4)(b)
5. The capital expenditure is not expected to be incurred again within five years - section 24(4)(c)
6. The director must not grant an application under this section for that portion of capital expenditures in respect of which a tenant establishes that the capital expenditures were incurred
    a. for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord, or
    b. for which the landlord has been paid, or is entitled to be paid, from another source.

If a landlord discharges their evidentiary burden and the tenant fails to establish that an additional rent increase should not be imposed (for the reasons set out above), the landlord may impose an additional rent increase pursuant to sections 23.2 and 23.3 of the Regulation.

Each of the above elements are considered.

1. *The number of specified dwelling units on the residential property – s. 23.2(3)*

Section 23.1(1) of the Act contains the following definitions:

> "dwelling unit" means the following:
>
> (a) living accommodation that is not rented and not intended to be rented;
>
> (b) a rental unit;
>
> […]
>
> "specified dwelling unit" means
>
> (a) a dwelling unit that is a building, or is located in a building, in which aninstallation was made, or repairs or a replacement was carried out, forwhich eligible capital expenditures were incurred, or
>
> (b) a dwelling unit that is affected by an installation made, or repairs or areplacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

Based on the evidence before me, I find that there are 34 specified dwelling units.

2. *The landlord must not make a subsequent application in respect of the same rental unit for an additional rent increase for eligible capital expenditures until at least 18 months after the month in which the last application was made – s. 23(2)*

Based on the evidence before me, I find the landlord has complied with this requirement and there has been no previous application.

3. *The expenditures are eligible capital expenditures under section 23.1(4) i*

Based on the evidence before me, I find $226, 929.72 to be *eligible capital expenditures,* as discussed below.

Pursuant to section 23(4)(a)(i), I find the capital expenditures were incurred for the replacement and installation of a major system, the building's elevator. The Work took place to maintain the residential property in a state of repair in compliance with the Act pursuant to section 23(4)(a)(i).

In determining the useful life of an elevator, I referred to *RTB Policy Guideline 40 – The Useful Life of Building Elements*. This Guideline states the useful life of an elevator is 20 years. The elevator was original to the building built in 1971. I find the elevator was periodically malfunctioning and was at the end of its useful life.

4. *The capital expenditures were incurred in the 18-month period preceding the date on which the landlord makes the application - s. 23(1), 23(4)(b)*

Guideline 40 states:

> *A capital expenditure is considered "incurred" when payment for it is made.*

I disallow the claimed expenses relating to the February 20, 2020 invoice paid on March 9, 2020 in the amount of $59,903.55 as it was not incurred as defined within the allowable 18-month period.

Based on invoices submitted into evidence, I find that landlord incurred the following expenses totally $167,026.17 which are *eligible capital expenditures* within the allowable 18-month period:

	DATE INVOICE	DATE PAID	AMOUNT
1.	February 20, 2020	March 9, 2020	disallowed
2.	April 30, 2020	May 19, 2020	$3,902.85
3.	[illegible], 2020	June 26, 2020	$61,499.99
4.	September 25, 2020	October 7, 2020	$38,339.26
5.	October 20, 2020	October 29, 2020	$29,951.78
6.	November 6, 2020	November 17, 2020	$1,161.86
7.	November 20, 2020	November 26, 2020	$9,983.93
8.	November 20, 2020	December 17, 2020	$22,186.50
	TOTAL		**$167,026.17**

5. *The capital expenditure is not expected to be incurred again within five years - s. 24(4)(c)*

As stated above, the useful life for an elevator is 20 years. Based on the evidence, I find that the life expectancy of the components replaced will exceed five years and that the capital expenditure to replace them cannot be expected to reoccur within five years.

For the above-stated reasons, I find that the capital expenditures of

$167,026.17 was incurred to undertakethe Work and $167,026.17 is an eligible capital expenditure.

6. *The capital expenditures were incurred*

   a. for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord, or

   b. for which the landlord has been paid, or is entitled to be paid, from another source.

Having established a prima facie case of capital expenditures, I must now consider subsection 23.1(5) of the Regulation, which states:

> 23.1 (5) The director must not grant an application under this section for that portion of capital expenditures in respect of which a tenant establishes that the capital expenditures were incurred
>
> (a) for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord, or
>
> (b) for which the landlord has been paid, or is entitled to be paid, from another source.

As stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditures. I find the tenants have not met the burden of proof under section 23.1(5) although I recognize and appreciate their submissions.

The tenants' main arguments why this application should not be allowed relate to the retroactive nature of the legislation, the hardship on tenants of any allowed increase,

especially those tenants with fixed incomes, and the alleged failure of the landlord to budget and plan for a new elevator. Each of these arguments is addressed.

Legislation may have a retroactive effect. I acknowledge the tenant's argument that this appears to them as unjust. However, if the intended retroactive effect is expressed sufficiently clearly, as in the case of the ARI-C provisions of the Residential Tenancy Act and Regulations, the statute is effective according to its terms.

The tenants' second main argument relates to the effect of the legislation and the hardship on tenants who have fixed incomes. I acknowledge the sincere and eloquent submissions by tenants concerned about "making ends meet". They clearly expressed their surprise and dismay regarding the change in the law and the landlord's application. Nevertheless, this argument does not meet the narrow exceptions in section 23.1(5)(a) and (b). I find the argument has no merit.

The tenants' third argument relates to the alleged failure of the landlord to budget for the predictable expense of replacing the elevator. The tenants' wondered why there appeared to be no fund to which the landlord contributed regularly to save for maintenance. If such prudent budgeting had occurred, there would be no need for the landlord to ask for an additional rent increase.

Section 23.1(5)(a) allows for rejection of the landlord's application if there had been inadequate repair or maintenance on the part of the landlord, The tenants did not claim the landlord had not adequately repaired or maintained the elevator. They acknowledged the inconvenience of not having an elevator while it was inoperative during repairs. Several submissions related to tenants being unable to leave their units because they could not navigate the stairs. However, the landlord is not required to submit evidence of budgeting or financial planning for a predictable capital

expense.

Therefore, I find the tenants have not established grounds to reject the application under section 23.1(5)(a). I dismiss this claim which I find has no merit.

Conclusion

Summary

I find the landlord has met the burden of proof on a balance of probabilities that the total of $167,026.17 is an eligible capital expense. I find the landlord has established all elements necessary for an additional rent increase for the eligible capital expenditure.

Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the additional rent increase as the number of specific dwelling units divided by the amount of the eligible capital expenditure divided by 120.

In this case, I have found that there are 34 specified dwelling units and that the amount of theeligible capital expenditure is $167,026.17.

Accordingly, I find the landlord has established the basis for an additional rent increase for capital expenditures of $40.94 ($167,026.17÷ 34 units ÷ 120).

If this amount exceeds 3% of a tenant’s monthly rent, the landlord may not be permitted to impose a rent increase forthe entire amount in a single year. The

parties may refer to *RTB Policy Guideline 40,* section 23.3 of the Regulation, section 42 of the Act (which requires that a landlord provide a tenant three months'notice of a rent increase), and the additional rent increase calculator on the RTB website for further guidance regarding how this rent increase made be imposed.

Conclusion

Given the above, I grant the application for an additional rent increase for a capital expenditure of $40.94 to be applied in accordance with the Act and the Regulation.

I order the landlord to serve the tenants with a copy of this decision by posting to the door of each unit.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 14, 2022

Residential Tenancy Branch