Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes ARI-C

Introduction

The Landlord in this matter seeks an additional rent increase for capital expenditure pursuant to s. 43 of the Residential Tenancy Act (the "Act") and s. 23.1 of the Residential Tenancy Regulation (the "Regulation").

T.O., E.B., and S.R. appeared on behalf of the Landlord. The tenants R.H., S.K., M.S., B.G., and R.G. attended at the hearing. S.K. was joined by his support worker, J.J..

A preliminary hearing on this matter was held on January 3, 2023 and interim reasons issued on January 20, 2023 containing various procedural orders.

I was advised by the Landlord's agents that the interim reasons for judgment were posted to the door for all the named respondents. I have been provided proof of service forms signed by an agent for the Landlord as well as a summary sheet showing these were served on January 25, 2023. Of those tenants that attended, none raised issue with service of the interim reasons. I find that the Landlord served the interim reasons for judgment in accordance with the *Act* and pursuant to the direction I gave in the interim reasons for judgment.

Preliminary Matter – Procedural Issues Raised by M.S.

During the preliminary hearing, I enquired on service of the Landlord's evidence and was told that the Landlord had served evidence by way of registered mail or hand delivery. As outlined in my interim reasons, I found this was done in accordance with the *Act*. Further, none of the tenants who attended at the preliminary hearing raised issue with the evidence served by the Landlord.

At the adjudicative hearing, M.S. raised issue with service of the evidence based on conversations she had with other tenants at the building, namely that it did not appear that everyone got the same documents. M.S. raised further issue with the redactions in the Landlord's evidence.

The Landlord's agent E.B. reconfirmed that all the named tenants were served with the same evidence package, which included redactions of the names for individuals, descriptions of work completed, and other information. The Landlord has provided me a copy of the redacted version served on the Tenants as well as the unredacted version. According to E.B., the Landlord served redacted documents in the interest of privacy for the various vendors, which he argued had long-standing business relationships with the Landlord that they wished to maintain in good standing.

Dealing first with the objection by M.S. that not all the tenants were served with the same documents, I put little weight in this argument. There are 191 named respondents in this application. Of those that have attended the hearing, all confirm receipt of the same documents. M.S. makes vague allegations that some people did not receive some of the Landlord's evidence, though it is unclear who those people were or what documents they say they did not receive. It is also unclear why these unknown people did not attend the hearing to raise the issue themselves or provide written submissions to that effect. Indeed, one of the tenants who did not attend the preliminary hearing did, in fact, provide written submissions to me. I find that the objection is so vague as to be almost entirely meaningless and is directly contradicted by the proof of service provided to me by the Landlord.

Looking next at the redactions and leaving aside for the moment whether the redactions are appropriate or not, I take issue with the objection raised at the adjudicative hearing when a preliminary hearing was conducted to deal with these types of procedural issues. It bears consideration that an application of this nature, with as many respondents as named here, imposes a considerable administrative burden on the parties and the Residential Tenancy Branch. The whole purpose of having the preliminary hearing is to ensure that these are dealt with such that the adjudicative hearing deal solely with the substantive issues in the application.

I find that if there were issues with the redactions, they ought to have been raised by the tenants at the preliminary hearing. Had they been, they could have been dealt with prior to the adjudicative hearing. As such, I put no weight in the objection, nor do I order that the Landlord serve the unredacted evidence.

Having said that, I also find that it would be procedurally unfair to review and consider the unredacted documents provided to me as they were not served on the respondents in this matter. Some of the redactions, I accept, are personal identifying information. However, it is unclear to me how the descriptions of the work completed also fall within this category. In the interests of procedural fairness, I shall not review or consider the unredacted documents in rendering this decision as they were not served on the respondent tenants.

M.S. raised further issue with respect to disclosure of other documents from the Landlord. She says that I failed to consider a request she made at the preliminary hearing for documents from the Landlord. I have reviewed the preliminary hearing and at no point did M.S., or any other tenant, make a formal request for documents relevant to this dispute.

To be clear, M.S. did discuss an issue on whether the work completed was a property issue or a safety issue, though it was unclear to me then, as it is now, the nature of the issue raised by the Tenant. I then plainly put it to her and the other tenants on the line whether they require disclosure from the Landlord on alternate sources of funding for the work completed or maintenance records, both of which are grounds for disallowing the claim under s. 23.1(5) of the Regulation. At the preliminary hearing, M.S. did not confirm she was seeking such disclosure from the Landlord and ended her submissions.

The issue of disclosure from the Landlord was not addressed in my interim reasons because no request for disclosure was made. Again, the whole purpose of the preliminary hearing is to deal with these types of procedural issues. It is inappropriate, in my view, for a tenant to raise issue on disclosure at the adjudicative hearing when we had a whole hearing several months ago to deal with procedural issues. Accordingly, I put no weight in the objection raised by M.S. at the adjudicative hearing as she failed to make a request for disclosure at the preliminary hearing.

Issue to be Decided

1) Is the Landlord entitled to an additional rent increase for capital expenditures?

Evidence and Analysis

Relevant Legislation

Sections 21.1, 23.1, and 23.2 of the Regulation set out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. Landlords seeking an additional rent increase under s. 23.1 of the Regulations must prove, on a balance of probabilities, the following:

- The landlord has not successfully applied for an additional rent increase against the tenants within 18 months of their application.
- The capital expenditure was incurred for the repair, replacement, or installation of a major component or major system for the property.
- The capital expenditure was incurred for one of the following reasons:
    - to comply with health, safety, and housing standards required by law in accordance with the landlord's obligation to repair the property under s. 32(1) of the *Act*;
    - the major component or system has failed, is malfunctioning or inoperative, or is close to the end of its useful life; or
    - the major component or system achieves one or more of either reducing greenhouse gas emissions and/or improves security at the residential property.
- The capital expenditures were incurred in the 18-month period preceding the date on which the landlord applies.
- The capital expenditures are not expected to be incurred again for at least 5 years.

Tenants may defeat a landlord's application for additional rent increases for capital expenditures if they can prove on a balance of probabilities that:

- the repairs or replacements were required because of inadequate repair or maintenance on the part of the landlord; or
- the landlord has been paid, or is entitled to be paid, from another source.

Once the threshold question has been met, the Landlord must also demonstrate how many dwelling units are present in the residential property and the total cost of the capital expenditures are incurred.

Section 21.1(1) of the Regulation 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;
>
> […]
>
> **"major component"**, in relation to a residential property, means
>
> a. a component of the residential property that is integral to the residential property, or
> b. a significant component of a major system;
>
> **"major system"**, in relation to a residential property, means an electrical system, mechanical system, structural system or similar system that is integral
>
> a. to the residential property, or
> b. to providing services to the tenants and occupants of the residential property;
>
> "**specified dwelling unit**" means
>
> a. a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or
> b. a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

Landlord's Submissions

E.B. advises that the subject residential property comprises of two towers, in which tower 1 has 102 dwelling units and tower 2 has 90 dwelling units. E.B. confirmed that the numbers provided comprise all units, including those that are unoccupied and occupied the building managers. The Landlord's agent further confirmed that no previous application for an additional rent increase has been made by the Landlord with respect to this residential property.

The Landlord provides a written summary of in which the following capital expenditures are claimed:

Elevator Upgrade (Both towers)	$1,031,511.65
Boiler Upgrade (Tower one)	$118,820.00
Exterior Upgrades (Both towers)	$114,870.00

Looking first to the elevator upgrade, the Landlord's agent advises that the elevators were original to the buildings and installed sometime in the late 1970s. I am provided with portions of an elevator assessment report dated December 7, 2019 in which replacement of the "control and drive systems and other code related improvements and upgrades". I am also provided with various invoices to relevant contractors from January 31, 2021 to July 20, 2022 comprising a total amount of $1,031,511.65.

The Landlord in the written summary says the useful life of the elevator is expected to be 15 to 25 years, with the Landlord's agents saying this number was based on the advice they received from their consultant on the project. The Landlord's agent further made submissions that Landlord has a routine monthly maintenance contract with respect to the elevators and argued that the upgrades were not due to improper maintenance but because the elevator had reached the end of its useful life.

According to the Landlord's agents, the elevator replacement was treated as one project for both towers, such that there were no separate contracts for the elevator on tower 1 and tower 2. I am told the Landlord seeks to distribute the cost of the elevator upgrade on the towers proportional to the number of dwelling units in each tower.

The Landlord also seeks to recover the cost of installing a boiler in tower 1. The Landlord's agent advises that the building's previous boiler was installed in 2007 but argued that it had reached the end of its useful life. I was told by the agents that the boiler had failed in November 2021 as it was leaking gas and replacement parts could not be found. The agents further advise that their HVAC contractor recommended its replacement, though no formal recommendation letter or report was authored.

The Landlord's evidence includes copies of invoices dated between December 20, 2021 and February 24, 2022 in which total costs incurred was $134,820.00. The Landlord's agent also advise that the new boiler is a high efficiency model and was eligible for a rebate from Fortis BC. The Landlord's evidence includes a letter dated June 16, 2022

and a cheque for $18,000.00, which the agents say has been deducted from the Landlord's claim such that $116,820.00 is claimed for this amount.

Finally, the Landlord seeks the cost of exterior upgrades, which review of the evidence shows to be power washing and painting the balconies. The Landlord's agent argued that the paint for the balconies is part of the exterior membrane of the residential property and is thus a major component of the building. The Landlord's agent advises that the balconies were last painted over 10 years ago and that the expected lifespan of the paint, as per Policy Guideline #40, is 8 years.

The Landlord's evidence includes invoices dated between June 7, 2021 and October 7, 2021 totalling $114,870.00. I am told by the Landlord's agent that this expense was shared by the towers and that the Landlord seeks to have the cost distributed on a proportional basis in the same manner as the elevator upgrade.

Tenant's Submissions

R.H., who also provided written submissions, raised issue with the boiler expense being attributed to tower two when it was a cost solely benefiting tower one. Specifically, the application shares this cost between both towers, which R.H. says is an error based on the legislation. E.B. acknowledges the error in the initial application.

B.G. submits that the building has been well maintained over the years and that the purpose of s. 23.1 of the Regulation is intended to assist landlords fix rundown properties. She further argued that the expenses incurred are a cost of business. Finally, she disputes the timeframe provided by the Landlord with respect to the painting, saying it was not within two years from hearing.

Similar to B.G.'s argument, R.G. and, by written submission, S.G., argue that the expense is one for which the Landlord ought to have set funds aside over the years to ensure the cost would be covered when replacement was necessary. Both argued that these costs are usual costs associated with ownership that should not be recouped from the tenants. It was further argued by R.G. and S.G. that the costs of the increase in an inflationary period is inappropriate.

Finally, M.T. and H.Y., by way of written submissions, say they moved into their rental unit in July 2022 and that they should not be subject to the rent increase as the expenses were incurred prior to their moving in. Both argued they are paying high rent.

Elevator Upgrades

I accept that the Landlord has not previously made an application for an additional rent increase. I further accept that the cost of the elevator project was incurred within 18 months of the Landlord filing for the application, which they did on July 27, 2022. I further accept that the elevators for the towers are major systems within the definition set out under s. 21.1 of the Regulation.

The Landlord's evidence, as supported by the report dated December 7, 2019, supports that the elevators' drive and control systems had reached the end of their useful life and needed replacement. I accept that this was the case. I further accept that the cost of the replacement work, as demonstrated by the invoices provided, was $1,031,511.65.

The elevator project replacement was a single project, as evidenced by the invoices, and was not distributed to both towers respective to work done on each. Under the circumstances, I accept that distributing the costs proportionate to the dwelling units in each tower, as suggested by the Landlord, is appropriate rather than dividing the cost in half, since tower 1 is larger than tower 2. I accept that there are a total of 192 dwelling units, with 102 in tower 1 and 90 in tower 2.

Finally, I accept that this cost will not be reincurred within 5 years and accept that Landlord's submissions that its useful life is expected to be 15 to 25 years based on advice it received from its consultant. Indeed, the previous elevator components were original to the building that was constructed in the 1970s, such that one would expect the current system to last for many years to come.

Accordingly, I find that the Landlord has demonstrated an additional rent increase with respect to the elevator upgrades. The proportionate share for tower 1 is $547,990.56 ($1,031,511.56 x (102 ÷ 192)) and for tower 2 is $483,521.08 ($1,031,511.56 x (90 ÷ 192)).

Boiler Replacement

I accept that the Landlord has incurred this expense within 18 months of filing this application. I further accept that the boiler for tower 1 is a major system within the definition set out under s. 21.1 of the Regulation.

The Landlord submits that the boiler failed in November 2021 and was leaking gas such that its HVAC contractor recommended its replacement as no parts were available. Though I do not have a report to support this, I accept that the Landlord did receive this advice as I have been provided no evidence to suggest that this was not the case. Further, by inference I would anticipate that the Landlord would not incur the expense of replacing a boiler, which is fairly significant, if it was not required to do so.

I accept that the boiler replacement for tower 1 was necessary as it failed. I further accept that a high efficiency boiler as the Landlord's evidence shows it did receive a rebate from Fortis BC. As such, I also find that the boiler replacement achieved a reduction in tower's greenhouse gas emissions.

I accept that the cost of the replacement, deducting the rebate received from Fortis BC, totals $116,820.00, as supported by the invoices put into evidence. Finally, I accept that the boiler has a useful life that will exceed 5 years given that the previous boiler was installed some 15 years previously. One would expect the current boiler to last as long.

I find that the Landlord has demonstrated that the boiler replacement for tower 1 is an eligible capital expenditure under s. 23.1 of the Regulation.

Exterior Upgrades

The Landlord seeks the expense associated with preparing the balconies for painting and painting the balconies themselves. It was argued that paint is a major component of the residential property as is forms a part of the exterior membrane of the building.

I do not agree with the Landlord. It bears consideration that the balconies themselves are not part of the exterior membrane of the towers but is rather an appendage to the building for which the individual tenants have access. To be sure, the balconies would be classified as major components of the residential property. However, the paint used to protect the balconies is merely part of what would be considered routine maintenance of the balconies themselves.

As a means of explaining the distinction, had the balconies reached the end of their useful life and needed replacement, it may be an eligible expenditure under s. 23.1 of the Regulation. However, if the balconies failed because they were improperly maintained by, for example, not having been painted in 20 years, then it would be excluded as an expenditure under s. 23.1(5) of the Regulation.

This interpretation is in keeping with the interpretation set out in Policy Guideline #37, which states the following:

> The following is a non-exhaustive list of expenditures that would not be considered an installation, repair, or replacement of a major system or major component that has failed, malfunctioned, is inoperative or is close to the end of its useful life:
>
> - repairing a leaky faucet or pipe under a sink,
> - routine wall painting, and
> - patching dents or holes in drywall.

I accept the guidance in Policy Guideline #37 is with respect to painting an interior wall. However, I also accept that the distinction between painting an interior wall and painting an exterior balcony is not one that bears much consideration.

I find that paint for the exterior balconies is not a major component or system of the residential property. As such, it is not an eligible capital expenditure. This portion of the Landlord's claim is dismissed without leave to reapply.

Addressing the Tenant's Submissions

In their various ways, those tenants who provided submissions argued that s. 23.1 of the Regulation operates unfairly and that these expenses should be a cost of business for the Landlord. Not to diminish the argument advanced by the tenants, but that is not a relevant argument for defeating the Landlord's claim for an additional rent increase for capital expenditures. The only means a tenant may do so, is pursuant to s. 23.1(5) of the Regulation, which permits the disallowance of the claim if the expense was incurred due to inadequate repair or maintenance by landlord, or the landlord has been paid or is entitled to be paid from another source.

The *Act* and Regulation permit the Landlord to seek these expenses, which is why they were granted as explained above. Questions of fairness of the arrangement is one of policy, which is not set by the Residential Tenancy Branch and is instead within the purview of the legislature.

Finally, H.Y. and M.T. argued that they became tenants in July 2022 and that the expenses were incurred prior to their moving into the rental unit. Again, that is not a

relevant consideration as the *Act* and Regulation do not take this into consideration. The cost of a capital expenditure, if it is eligible, is distributed between dwelling units irrespective of when they were occupied or even if they are occupied.

Summary

For tower 1, the Landlord has established total capital expenditures of $664,810.56 ($547,990.56 + $116,820.00). The rent increase permitted for tower 1, based on 102 dwelling units, is $54.31 ($664,810.56 ÷ 102 dwelling units ÷ 120).

For tower 2, the Landlord has established total capital expenditures of $483,521.08. The rent increase permitted for tower 2, based on 90 dwelling units, is $44.77 ($483,521.08 ÷ 90 dwelling units ÷ 120).

The parties may refer to Policy Guideline 37, s. 23.3 of the Regulation, s. 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 Residential Tenancy Branch's website for further guidance regarding how this rent increase may be imposed by the Landlord.

Conclusion

The Landlord has been partially successful in its application. I grant it an additional rent increase for the units in tower 1 of $54.31 and an additional rent increase for the units in tower 2 of $44.77. The Landlord must impose this increase in accordance with the *Act* and Regulation.

I order that the Landlord serve the tenants with a copy of this decision in accordance with any of the methods set out under s. 88 of the *Act*.

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

Dated: May 17, 2023

Residential Tenancy Branch