



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

A matter regarding KELSON GROUP PROPERTY  
MANAGEMENT and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      ARI-C

### **Introduction**

In their application (Application) the Landlord seeks to impose an additional rent increase under the *Residential Tenancy Act* (the Act) and the *Residential Tenancy Regulation* (the Regulation) for capital expenditure under section 23.1 of the Regulation.

A participatory hearing took place on August 17, 2023, and the matter was adjourned to a written-submission-only hearing on November 4, 2023. This Decision should be read in conjunction with the Interim Decision dated September 13, 2023.

Based on the Landlord's evidence, I am satisfied that the Tenants listed on the front pages of this Decision were served with a copy of Interim Decision dated September 13, 2023, along with the Landlord's written submissions, in accordance with section 88 of the Act.

One Tenant, TP, provided a response to the Landlord's written submissions and based on their evidence, I am satisfied that TP's written submissions were served to an Agent of the Landlord via email.

Though nothing before me indicates the parties had an agreement to serve documents via email, based on the copy of the Landlord's Agent's email acknowledging receipt of TP's written submissions, under section 71(2)(b) of the Act I order that Tenant TP's written submissions were sufficiently served to the Landlord.

### **Issue to be Decided**

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

### Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this Decision.

The Landlord's Agents testified as follows. The residential property (the Property) is a four-storey building containing 54 residential units. The Landlord is seeking to impose an additional rent increase for a capital expenditure incurred as a result of replacing the elevator in the Property (collectively, the Work).

There was an unexpected and catastrophic failure of the only elevator in the Property in May 2021. The hydraulic cylinder in the elevator was found to be leaking and it was ultimately determined the cylinder could not be fixed. The Landlord also attempted to replace the cylinder, but due to the presence of groundwater and gravel beneath the elevator, the installation of a new model of elevator was required. The new elevator was up and running by December 2021.

The Landlord submitted into evidence 76 receipts and invoices for costs associated with the Work totalling \$260,579.15. A letter from the District Manager of the elevator manufacturers providing a technical explanation of the failure of the old elevator, and photographs of the elevator once the Work was complete were also submitted into evidence.

When the cylinder first failed, the Landlord engaged the services of a consultancy company to advise them on how to proceed. A second consultancy firm provided supplemental advice to the Landlord also. The invoice for the second consulting company details services that were provided for decommissioning the shaft.

Soon after the elevator started to display issues, a hydrovac company attempted to excavate material to get the new shaft to fit, which was not successful. The invoices are summarized as follows:

<b>Description</b>	<b>Date</b>	<b>Amount</b>
BC Groundwater Consulting	September 10, 2021	\$3,967.06
Kala Geosciences Ltd	August 29, 2022	\$992.25
Cyclone Hydrovac	August 3, 2021	\$2,664.38
<b>Total</b>		<b>\$7,623.69</b>

After removing the hydraulic cylinder, the hole left behind required filling, and a construction company was employed to do this, along with a concrete pumping company. The invoices for these costs are summarized as follows:

<b>Description</b>	<b>Date</b>	<b>Amount</b>
Filling Costs	July 28, 2022	\$2,816.10
Concrete Pumping	May 6, 2022	\$712.72
Pump rental	May 26, 2022	\$706.86
<b>Total</b>		<b>\$4,235.68</b>

The old elevator needed to be removed and the shaft demolished. The new elevator was billed in installments. These costs are summarized as follows:

<b>Description</b>	<b>Date</b>	<b>Amount</b>
Demolition	June 26, 2022	\$21,911.89
Shaft replacement	September 20, 2021	\$31,730.48
Deposit for elevator	March 16, 2022	\$38,201.62
Elevator second draw	August 15, 2022	\$16,372.12
Elevator third draw	September 14, 2022	\$43,659.00
Elevator testing	October 18, 2022	\$370.51
Elevator holdback	November 8, 2022	\$12,127.50
Elevator final draw	November 8, 2022	\$10,914.75
<b>Total</b>		<b>\$175,287.87</b>

The roof over the elevator shaft required replacement and a roofing company carried out this element of the Work. A new beam for the shaft and access panels was required. The masonry around the doors of the elevator had to be removed when extracting the old elevator which meant the paintwork around the doors on all floors required re-finishing.

New carpet inside the elevator was laid, and a hole had to be bored in the shaft for pipes to be fitted. The flooring at the entrances to the elevator on all four floors of the Property also needed repairs once the new elevator was installed.

A temporary canopy over the roof of the shaft was required. A concrete supply company provided grouting and screws for the masonry. Hoardings were required, as a barrier to the shaft was needed for safety purposes in the hallways in the Property while the Work was taking place. The invoices for this section of the Work are summarized as follows:

Description	Date	Amount
Roofing over shaft	June 27, 2022	\$3,360.00
Roofing over shaft	September 14, 2022	\$2,520.00
New Beam	June 23, 2022	\$399.84
Access panel	October 24, 2022	\$207.36
Masonry materials	May 6, 2022	\$694.74
Masonry work	May 25, 2022	\$8,076.60
Masonry scaffolding	June 25, 2022	\$1,201.20
Masonry temporary door	August 24, 2022	\$1,260.00
Masonry door infill	September 1, 2022	\$682.50
Carpet fitting	November 4, 2022	\$262.50
Painting around doors	October 20, 2022	\$630.00
Boring Costs	October 18, 2022	\$341.25
Stone flooring	October 6, 2022	\$882.00
Canopy over shaft	August 11, 2022	\$447.74
Masonry screws, barriers and bags	May 24, 2022	\$380.34
Masonry grout and trowel	August 19, 2022	\$65.41
Masonry grout	October 18, 2022	\$46.66
Hoardings and base	September 12, 2022	\$115.45
Hoardings	September 12, 2022	\$42.29
<b>Total</b>		<b>\$21,615.88</b>

A construction specialist was brought on site as a supervisor when masonry work was completed, and the shafts installed. The new model of elevator meant mechanical cooling and a new refrigeration line was needed to bring the elevator room up to code.

Electrical work was required to upgrade and integrate the new elevator with the fire alarm, shut-off, and lighting systems within the Property. A crane was required to hoist the previous elevator out of the shaft, and to hoist the new elevator in. The invoices from the contractors are summarized as follows:

Description	Date	Amount
Crawford Electric Ltd	September 2, 2022	\$11,783.85
Crawford Electric Ltd	November 14, 2022	\$2,584.81
Refrigeration line	December 22, 2022	\$3,815.70
Supervision	September 16, 2022	\$3,150.00
Mechanical cooling	December 15, 2022	\$525.00
Hoisting - removal	May 9, 2022	\$1,066.63

Hoisting – installation	June 22, 2022	\$717.03
<b>Total</b>		<b>\$23,643.02</b>

Miscellaneous materials from Home Depot and Rona for finishing the Work were required. Materials include drywall, sealant, insulating foam, mortar mix, plywood, siding and lumber. In total, the 12 invoices for the above costs amount to \$4,628.29.

Smaller jobs were carried out by employees of the Landlord. A payroll record indicating two companies within the same group of companies as the Landlord spent \$2,680.00 and \$4,754.00 respectively on hourly wages of employees during the Work.

The Landlord's staff needed specialist equipment to complete the work, such as generators, pumps, and telehandlers. A total of 13 invoices for rental of equipment were submitted into evidence and are summarized as follows:

<b>Description</b>	<b>Date</b>	<b>Amount</b>
Propane refill	April 29, 2022	\$56.70
Telehandler	May 31, 2022	\$4,322.85
Deck, Brace and Fan	June 8, 2022	\$665.28
Telehandler	June 8, 2022	\$6,015.10
Telehandler	June 21, 2022	\$3,136.00
Frame and Brace	June 27, 2022	\$57.01
Deck x 2, Brace and Fan	July 6, 2022	\$752.60
Pump	July 19, 2022	\$14.26
Deck	August 2, 2022	\$22.81
Telehandler	August 16, 2022	\$646.19
Extension Fork	August 19, 2022	\$342.09
Generator	August 19, 2022	\$57.01
Deck	August 30, 2022	\$22.81
<b>Total</b>		<b>\$16,110.71</b>

The Tenant noted that no maintenance records were provided by the Landlord and no information regarding the possibility of an insurance claim on the part of the Landlord was provided.

The Landlord's Agent testified that the Landlord has a maintenance contract with the manufacturer of the elevator whereby inspections are carried out regularly, typically on a monthly basis. The elevator was around 30 years old when it failed so any warranty period had expired.

The maintenance log was not included with the Landlord's Application. The Landlord's Agent argued that as the failure was related to the failure of the cylinder, which was underground so could not be inspected, maintenance was not the issue behind the failure.

### Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. As the Application related to the Landlord's request for an additional rent increase based upon eligible capital expenditures, the Landlord has the onus to prove the required elements of their Application.

Section 43(1)(b) of the Act allows a landlord to impose an additional rent increase in an amount that is greater than the amount set out per sections 22 and 22.1 of the Regulation by making an application for dispute resolution.

Sections 21 and 23.1 of the Regulation sets out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. To be successful in their application, a landlord must prove, on a balance of probabilities:

- that the landlord has not made an application for an additional rent increase against the tenants within the last 18 months;
- the number of specified dwelling units on the residential property;
- the amount of the capital expenditure;
- that the Work was an eligible capital expenditure, specifically that:
  - the Work was to repair, replace, or install a major system or a component of a major system;
  - the Work was undertaken for one of the following reasons:
    - to comply with health, safety, and housing standards;
    - because the system or component was
      - close to the end of its useful life; or
      - because it had failed, was malfunctioning, or was inoperative.
    - to achieve a reduction in energy use or greenhouse gas emissions; or
    - to improve the security of the residential property;
  - the capital expenditure was incurred less than 18 months before the application was made;

- the capital expenditure is not expected to be incurred again within five years.

However, tenants may defeat an application for an additional rent increase for capital expenditure if they can prove on a balance of probabilities that the capital expenditures were incurred either:

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

### *18 Month Requirement*

In this case, there was no evidence before me that the Landlord had made a prior application for an additional rent increase for the work done within the prior 18 months.

### *Number of Specified Dwelling Units*

Based on the evidence before me, I find there are 54 dwelling units in the Property and the evidence supports that all of the dwelling units are eligible.

Though some of the Tenants have been removed from the Application as they have either vacated the Property, as was the case for the Tenants in units 209, 210, 213, 214 and 407, or I found have not been served with the Landlord's Materials (units 208 and 401), the calculation for rent increase must still be based on 54 units.

Policy Guideline 37C confirms a landlord may apply for an additional rent increase against a tenant, even if that tenant moved into the rental unit after an eligible capital expenditure was incurred, though the Landlord has chosen not to in this case.

### *Amount of Capital Expenditure*

The Landlord submitted invoices for all claimed expenditures. There were 76 invoices in total which were discussed in the previous section of this Decision.

### *Eligibility of the Capital Expenditure*

I find that the capital expenditures were incurred for the replacement of the elevator of the Property, which is a major system or component, as defined in Policy Guideline 37C.

Considering the evidence of the Landlord, I find the reason the capital expenses were incurred was because the elevator suddenly failed after approaching 30 years of use. Given that Policy Guideline 40 - Useful Life of Building Elements states that the useful life of an elevator is 20 years I find on a balance of probabilities that the elevator was past its useful life at the time of failure.

I also find the letter from the Regional Manager of the elevator manufacturer details the reason for the Work was the complete failure of the elevator. Given this, I find the Work was undertaken for a valid reason as set out in section 23.1(4)(a)(ii) of the Regulation.

The Application was made on April 21, 2023 which means that to be eligible, an expenditure would need to be incurred after October 21, 2021.

The consulting fees incurred on September 10, 2021 for \$3,967.06 and the hydrovac costs incurred on August 3, 2021 for \$2,664.38, were incurred before 18 months before the Application was made. Additionally, the first payment towards the replacement elevator and shaft was incurred on September 20, 2021.

As confirmed in Policy Guideline 37C, the date on which a capital expenditure is considered to be incurred is the date the final payment related to the capital expenditure was made. The Policy Guideline also confirms that the capital expenditure will still be eligible for an additional rent increase as long as the final payment for the project was incurred in the 18-month period.

Given that the Policy Guideline uses the term “project” and acknowledges a capital expenditure can take more than 18 months to complete, I find that taking a broad approach to the Work as a whole is required and that considering each discrete expense as falling on the date of the individual invoice is not appropriate. Given this, I find the consulting fees and first elevator draw fall within the 18 month requirement, as the final payment for the Work was made on November 8, 2022.

Policy Guideline 37C and section 21.1(2)(b) confirm a landlord cannot claim an amount for their own labour. I find there is no restriction imposed on the definition of “landlord”



so this definition includes landlords who are individuals and corporate entities, as is the case here. Given this, I find the amounts of \$2,680.00 and \$4,754.00 claimed as hourly rates for employees of the Landlord to be ineligible as this is effectively the Landlord's own labour.

As stated above, the useful life for elevators typically stands at 20 years. The previous elevator, which was made by the same manufacturer as the new elevator, was operational for almost 30 years. There is nothing in evidence which would suggest that the life expectancy of the elevator replaced would deviate from the standard useful life expectancy of building elements set out at RTB Policy Guideline 40.

Given the above, I find that the life expectancy of the new elevator will exceed five years and that the capital expenditure to replace them cannot reasonably be expected to reoccur within five years.

#### *Inadequate Maintenance or Payment From Another Source*

In their Application, the Landlord did not submit into evidence a record of maintenance, though when the matter was adjourned to written submissions, the Landlord provided a master coverage agreement entered into with the manufacturer of the elevator and maintenance records. Per the Interim Decision, the Landlord was ordered to conduct a diligent search for maintenance records and provided the above mentioned documents.

Having considered the Landlord's submissions, both written and oral, I find on a balance of probabilities that there was an agreement in place between the Landlord and the manufacturer of the elevator, whereby the elevator was inspected regularly. Per the work order reports, it appears a mechanic completed regular inspections and maintenance. I note inspections of the cylinder were also mentioned in the work order reports.

In their written submissions, Tenant TP noted the documentation goes back to 2018 at the earliest and questioned if the amount of time recorded in work orders were accurate. The Tenant also made reference to the records noting the "pit is full of oil" and that "cylinder corrosion" was mentioned in the work done section.

The Tenant also raised concerns that the maintenance work done in the Property was mostly reactive in nature, rather than proactive. I find the Tenant raises a lot of questions in their written submissions regarding the quality and substance of the maintenance which were not responded to by the Landlord.

Though there was no response from the Landlord, I do not see this in and of itself an indication of inadequate repair or maintenance on their part. I accept that records pre-dating 2018 may be difficult to locate and that a lot of the Tenant's questions are technical in nature, which the Landlord may not be best placed to respond to themselves.

I find there is a significant degree of speculation in the Tenant's written submissions, though there is no tangible link between the maintenance records and any clear inadequacies or shortcomings on the Landlord's part.

To take the example of the pit noted as being full of oil, as mentioned above, the Tenant has inferred from this that a change was needed and that recommendations were required. I find it is possible that, for example, the pit was indented to be full of oil for the elevator to function and that no changes or recommendations were needed. In the absence of any credible source to the contrary, I am not prepared to infer from the Tenant's speculation alone that the elevator was, on a balance of probabilities, inadequately maintained.

No arguments were advanced by the Tenants in respect of the Landlord receiving or being entitled to receive payments from another source to cover the additional expenditure.

Given the above, I find on a balance of probabilities, the Tenants have not established that the capital expenses were required because of inadequate maintenance or repair on the part of the Landlord, or that the Landlord has or was entitled to be paid from another source. Therefore, I can not dismiss the Application under section 23.1(5) of the Regulation.

### *Outcome*

I find the Landlord has submitted sufficient evidence to support on a balance of probabilities their claim for capital expenditures of \$253,145.14.

For this reason, I grant the Landlord's Application for the additional rent increase, in part, based on eligible capital expenditures of \$253,145.14, per section 43(1(b) of the Act and 23.1(4) of the Regulation.

Section 23.2 of the Regulation provides the formula for calculating 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 54 specified dwelling units and that the amount of the eligible capital expenditure is \$253,145.14 in total.

Therefore, I find the Landlord has established the basis for an additional rent increase for capital expenditures of \$39.06 per affected tenancy ( $\$253,145.14 \div 54 \div 120$ ). This amount may not exceed 3% of a Tenant's monthly rent, and if so, the Landlord may not be permitted to impose a rent increase for the entire amount in a single year.

The Landlord is directed to Policy Guideline 37, page 16 to properly calculate the rent increase in accordance with the Regulation, as this is the Landlord's responsibility.

### Conclusion

The Landlord's Application for an additional rent increase for eligible capital expenditures is granted, in part, for a total of \$39.06 per affected tenancy.

The Landlord is directed to serve this Decision on each affected Tenant, individually, within two weeks of this Decision in accordance with section 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 Act.

Dated: November 29, 2023

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Residential Tenancy Branch