Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

The landlord's application filed on February 16, 2022, is seeking a rent increase pursuant to sections 43(1)(b) and 43(3) of the Residential Tenancy Act (Act) and section 23.1 of the Residential Tenancy Regulation, B.C. Reg. 477/2003. Residential Tenancy Policy Guideline 37: Rent Increases.

On December 22, 2022, a decision was made. The tenants filed a petition to Supreme Court and the Supreme Court determined that this matter should be returned to the Residential Tenancy Branch for a new hearing.

This matter was originally scheduled for a participatory hearing to be held on January 22, 2024; however, a tenant requested that this hearing proceed by written submissions, which the Director determined appropriate. The January 22, 2024, hearing was cancelled.

On December 21, 2023, to accommodate the Directors order, I made an interim decision, which should be read in conjunction with this Decision. The interim decision was sent by the Residential Tenancy Branch to all parties either by email or regular mail, on December 21, 2023. I note that unit 401, returned the documents to the Residential Tenancy Branch marked "refused' and unit 418, was returned as moved.

The tenants as outlined in clause 18 of the tenants' written submission show they have appointed D.V to represent them at the hearing.

The tenants in their written submission at clause 19 confirm they received the landlord written submissions and evidence for the rehearing of the matter on January 16, 2024. The landlord also submitted in evidence a proof of service for the service of the documents.

The landlord has also provided proof of service that on January 25, 2024, the landlord served the tenants with page 7 of the Elevator Modernization Proposal. I am satisfied the tenants had previously received the document as they refer to page 7 in their 2024 written submission, which was filed on January 23, 2024.

The tenants in their written submission submit the landlord's legal counsel was served with the tenants' evidence and submission by email on January 23, 2024, as mutually agreed. The tenants submitted in evidence a proof of service of documents.

Based on the above, I find that both parties have been served with the other parties' written submissions and all evidence.

Issue 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 written submission of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims, and my findings are set out below.

The building was constructed in 1973, which is comprised of 73 rental units.

The landlord is seeking to impose an additional rent increase for a capital expenditure (ARI-C) incurred to pay for a work done to the residential property.

Item	Description	Amount
a.	Elevator modernization	$73,098.05
		Total $ $73,098.05

The landlord's written submission

I have reviewed the landlord's written submission; however, I have only reproduced portions of their argument to capture their submission as seen below.

14. In August of 2020, at the Landlord's request, Thyssen provided the Elevator Evaluation Document. Thyssen's assessment found that the Elevator System had been manufactured and installed in approximately 1973. The power unit had been upgraded by Thyssen in approximately 2010, but the remaining major components had surpassed the generally recognized life cycle of 25 to 30 years

15. Thyssen reported it may have been possible to continue maintaining the Elevator System for a few more years, but it was prudent to budget for future upgrades. Unless action was taken, it was predicted that performance and reliability would suffer as older components wore and became obsolete. This could result in surprise expenditures and lengthy down times **[Document 7.1 at p. 209]**.

16. Thyssen's evaluation found the existing Dover controller was in suspect condition. The solid state cards for the controller were still supported, but they were no longer in production, were being depleted and would eventually become unavailable. Thyssen was advising owners to budget for proactive controller upgrades as soon as practicable **[Document 7.1 at pp. 209-210]**.

17. The door operator and safety edge were both in poor condition; with respect to the latter item, multi-beam detectors were strongly recommended to prevent passengers from being struck by a closing door. The resistors for the door operator were no longer in production and noted to be a potential fire hazard, with an upgrade being recommended for both reliability and safety **[Document 7.1 at pp. 209-210]**.

18. Thyssen believed the cylinder had likely been installed unprotected, as PVC liners were not mandatory in Canada until 1992. The Landlord was therefore advised to budget for a potential cylinder replacement in the event of a potential breach **[Document 7.1 at p. 210]**.

19. On or about October 27, 2020, at the Landlord's request, WCES provided the Proposal Document. Upon review of the Elevator System, WCES found that its components, some of which were in excess of 45 years old, were "well worn having

operated past its life expectancy, with the only option to be that of a Full Modernization of the elevator equipment" **[Document 7.2 at p. 2]**

20. The purpose of the modernization of the Elevator System, according to WCES, was:
    a. to bring an end to the "ongoing and continuous breakdowns";
    b. to reduce the Landlord's potential liability;
    c. to improve safety and reliability; and
    d. to better provide for the needs of elderly passengers and those with mobility issues **[Document 7.2 at p. 213]**.

21. WCES proposed the following work to effect the modernization, *inter alia*:
    a. upgrading to a new micro-processor-based control system which complied with the current CSA B44-07 Code, manufactured by GAL Manufacturing Corporation (the **"GAL"**);
    b. retaining and reutilizing the existing Hydraulic Power Tank Assembly (includingthe hydraulic pump, motor, and control valve components);
    c. installation of the GAL control system, seismic equipment (as required by Code),
    and replacement of all electrical wiring;
    d. installation of new GAL Controller Landing Gear Equipment, GAL Top of Car
    Control System, water resistant/fire retarding Travel Cables, Pit Switch(es), and
    Hoistway Switch(es);
    e. installation of a new "GAL MOVER II" Electronic Door Operator Assembly, Car
    and Hall Door Equipment & Linkages, Car Door Restrictive Clutch, Drop Key
    Access Devices, Hall Door Fire Safety Retainers, Hall Door Interlocks, and Hall
    Door Spirator Closing Devices; and
    f. installation of a new full-length Car Station Operating Panel, Hands-Free Emergency Telephone Unit, Emergency Light Display Unit, Digital Display In-Car
    Position Indicator Unit, and Hall Pushbutton Fixtures **[Document 7.2 at pp. 214,**
    215].

22. WCES quoted $63,800.00 plus GST as the estimated cost for the required work and

estimated that it would require approximately three weeks to complete **[Document 7.2 at p. 216]**.

23. After receiving the Proposal Document, the Landlord engaged WCES to conduct the work required to modernize the Elevator System. The Landlord initiated the work to repair, replace, and install a major system and/or major components of a major system (i.e., the Elevator System) for the following reasons:

a. to comply with safety and housing standards;
b. because the Elevator System was close to the end of its useful life;
c. because the Elevator System had failed and was malfunctioning; and
d. to improve the security of the residential property.

24. On or about April of 2021, WCES requested that Friske Electric conduct the necessary electrical work. Friske Electric and WCES then performed the work necessary to effect the modernization of the Elevator System (the **"Work"**).

25. The Work was completed on April 26, 2021. Many of the Elevator System's components were replaced as part of this modernization, including the installation of the GAL Controller **[see Document 4.7 at p. 175]**. The Hydraulic Power Tank Assembly, on the other hand, had only been installed in 2010 and was in suitable condition. It was therefore retained and reutilized **[see Document 4.6 at p. 174]**.1

26. On or about April 26, 2021, Friske Electric sent an invoice to the Landlord in the amount of $6,427.05, which was subsequently paid by the Landlord **[Document 6.1 at p. 201]**.

27. On April 27, 2021, after the Work was completed, Mr. Sutherland of WCES sent an email to Mr. Denux attaching the Technical Safety BC (**"TSBC")** Certificate of Inspection, and informing him that the Elevator System had passed inspection and was returned to service on April 23, 2021. The Certificate of Inspection stated that the Elevator System had "Conditional Passed", with a direction to "Add or relocate stop switch to immediate car top/hoistway entrance area" **[Document 5.1 at p. 198]**.

28. On or about May 3, 2021, WCES sent an invoice to the Landlord for the amount of $6,380.00, that is, 10% of the total amount of the contract (not including GST), which the Landlord subsequently paid **[Document 6.3 at p. 206]**.

29. On or about July 5, 2021, WCES sent an invoice to the Landlord in the amount of

$60,291.00, that is, the remaining 90% of the total amount of the contract (including GST), which the Landlord subsequently paid **[Document 6.2 at p. 204]**

31. The TSBC Operating Permit for the Elevator System is listed as “Active” status **[Document 4.2 at p. 165]**.

32. The Landlord initially filed the Original Application on February 16, 2022. The Landlord had not made an application for an ARI against any of the occupants of the Property within 18 months prior to that date.

33. There are 73 specified dwelling units at the Property. According to the Residential Building Information Report dated November 21, 2023, there are now 51 specified dwelling units of which the occupants are the same tenants as at the time of filing the Original Application (the **“Respondents”**) **[Document 2.1 at p. 56]**.

34. The earliest of the Capital Expenditures was incurred in April of 2021, which is less than 18 months prior to the making of the Original Application.

35. The Landlord does not expect the Capital Expenditures to be incurred again within five years.

36. The Work was not required because of inadequate repair or maintenance on the part of the Landlord

37. The Landlord has not been paid, and is not entitled to be paid, from another source for the Capital Expenditures

48. The Elevator Evaluation Document advised that the following would be necessary for the Elevator System to be Code compliant:

a. installation of new fixtures and a compatible door operator in conjunction with the
control system;
b. installation of a door restrictor as part of a door operator upgrade; and
c. installation of a hand free autodialer telephone as part of a fixture upgrade **[Document 7.1 at p. 210]**.

49. The Proposal Document recommended extensive upgrades to ensure compliance with the current B44 Elevator Safety Code Requirements. The controller upgrade and

Hands-Free mEmergency Telephone Unit, in particular, were necessary to ensure Code compliance **[Document 7.2 at pp. 214, 215]**.

50. The Elevator System is a major system of the Property, or alternatively, a major component of a major system of the Property. The Work was conducted to maintain the Elevator System in a state of repair that complies with the health, safety and housing standards required by law in accordance with s. 32(1)(a) of the *Act*.

51. The requirements of s. 23.1(4)(a)(i) of the *Regulation* have been met. This is sufficient to meet the requirements of s. 23.1(4)(a), as only one of (i), (ii) and (iii) must be met.

52. However, Residential Tenancy Policy Guideline 40: Useful Life of Building Elements, provides that an Elevator has a useful life of 20 years. Thyssen found the Elevator System (with the exception of the power unit) had been manufactured and installed inexcess of 45 years old **[Document 7.2 at p. 213]**. The Elevator System was past the end of its useful life.

53. As noted in the emails from 2017 to 2020 **[Documents 3.1, 3.2, and 3.3 at pp. 154, 160,162]**, the Elevator Evaluation Document **[Document 7.1 at p. 208]**, and the Proposal Document **[Document 7.2 at p. 212]**, the Elevator System had failed on multiple occasions and was often malfunctioning.

54. The requirements of s. 23.1(4)(a)(ii) have therefore also been met.

55. Part of the problem with the Elevator System was door malfunctioning, and Thyssen identified this as a risk of injury for the tenants **[Documents 3.1, 3.2 and 3.3 at pp.154, 160, 162]**. The Landlord was also concerned there was a risk that tenants would become trapped in the elevator cab. The upgrade of the Elevator System was therefore an improvement in the security of the Property. This meets the requirements of s. 23.1(4)(a)(iii).

56. As already stated, the useful life of the Elevator System is 20 years. The Landlord does not expect the Capital Expenditures to reoccur within five years. The requirements of s.23.1(4)(c) have therefore been met.

57. All the requirements in s. 23.1(4) of the *Regulation* have been met. The Director must grantthe ARI to the Landlord, unless one of the conditions listed in s. 23.1(5) applies.

58. There is no evidence the Work was required due to inadequate repair or maintenance on the part of the Landlord.

59. The Landlord has submitted 15 invoices from Thyssen for maintenance of the Elevator System, from November 1, 2017 to February 1, 2021. These show that maintenance has been conducted on a regular quarterly basis for the period preceding the Work **[Document 4.8 at p. 176]**. The Landlord has also submitted the maintenance contract between Thyssen and the Landlord **[Document 4.9 at p. 191]**.

60. S.23.1 (5)(a) does not apply.

61. S. 21.1(1) of the *Regulation* defines “another source” as including “a grant scheme or similar scheme, an insurance plan and a settlement of a claim”.

62. Residential Policy Guideline 37C: Additional Rent Increase for Capital Expenditures elaborates on this provision, stating that it also includes rebates and subsidies. This guideline explicitly excludes tax credits and deduction schemes to reduce taxable income for capital expenditures from the ambit of “another source”, including the capital cost allowance.

63. Residential Policy Guideline 37C was released by the RTB in June of 2023 and was therefore not available for the Arbitrator Edwards’ consideration. However, this is not an appeal of Arbitrator Edwards’ decision; this is a rehearing.

64. Furthermore, Justice Saunders has stated that to interpret s. 21.1 as including capital cost allowance would produce an “absurd result”. Most if not all capital expenditures made by a business are tax deductible, either as a capital cost allowance or otherwise. To disallow an ARI on the basis that the Capital Expenditures may be eligible for a tax deduction or credit would defeat the purpose of the legislative scheme.

65. S. 23.1(5)(b) of the *Regulation* does not apply. The Director must grant the Landlord’s Application for an ARI.

66. The amount of the ARI is determined by s. 23.2 of the *Regulation*, which reads:

> **Determination of amount of additional rent increase for eligible capital expenditures**
> **23.2** (1) If the director grants an application under section 23.1, the amount of the additional rent increase that the landlord may impose for the eligible capital

expenditures is determined in accordance with this section.

(2) The director must

(a) divide the amount of the eligible capital expenditures incurred by the number of

specified dwelling units, and

(b) divide the amount calculated under paragraph (a) by 120.

(3) The landlord must multiply the sum of the rent payable in the year in which the additional increase is to be imposed and the annual rent increase permitted to be imposed under section 43 (1) (a) of the Act in that year by 3%.

(4) The landlord may only impose whichever is the lower amount of the 2 amounts calculated under subsection (2) or (3).

67. The Capital Expenditures amount to a total of $73,098.05. The number of specified dwelling units is 73.

68. The total amount calculated pursuant to s. 23.2(2) is: $73,098.05 ÷ 73 ÷ 120 = $8.34.

69. None of the specified dwelling units are subject to a monthly rent of such an amount, combined with the annual rent increase permitted under s. 43(1)(a) of the *Act*, of which $8.34 would be greater than 3%. Therefore the rent increase will be as calculated under s.23.2(2) and not 23.2(3).

The landlord filed in evidence a Proposal for the Modernization/Upgrade of the Elevator System (Proposal), by West Coast Elevator Services Ltd, dated October 27, 2020. The Proposal reads.

> Upon review of the elevator at the above location, West Coast Elevator recommends that extensive upgrades be performed to enhance the performance of the elevator and to comply with the current B44 Elevator Safety Code Requirements. The ongoing and continuous breakdowns of the elevator will be a thing of the past as well as the potential costly repairs of the existing elevator equipment. The existing elevator equipment at this location is well worn having operated past its life expectancy, with the only improvement option to be that of a Full Modernization of the elevator equipment.
>
> The elevator system in this building is typical of this era, in excess of 45 years old and reaching the end of its' effective life cycle. Extensive Upgrades are now being carried out in many similar elevator systems located in buildings throughout the Vancouver Lower Mainland and Island Areas. Safety Codes have changed during the past several years; by upgrading the elevator equipment the owners' liability should be reduced, as well their equity in the building should increase. As the elevator equipment ages in its' present condition, failures will occur more frequently causing continuous shutdowns that will require repairs / upgrades.
>
> Our proposal is fundamentally a total replacement of wearing equipment with the utilization of existing non-wearing components. The new GAL Elevator Control System will bring the elevator operation up to the top of line of today's standards for Quality and Elevator Service. All of the new elevator equipment to be supplied is proven in the industry and is completely non-proprietary. This intends that any qualified elevator contractor can maintain the equipment and receive support from the vendors. This is especially important for the control equipment.
>
> Attached are the modernization details and upon approval of this proposed upgrade a minimum lead time of eight (8) weeks is required for the new materials to manufactured & delivered to site. Our proposed work schedule for this Elevator Modernization/Upgrade would be approximately three (3) weeks.
>
> All inspections, fees and permits necessary for this Modernization will be the responsibility of West Coast Elevator. We will include for the TSBC required "Major Alteration" submission complete with Professional Engineer seal. Prior to completion West Coast Elevator will arrange for a qualified TSBC Elevator Inspector to perform a full Final Acceptance inspection of the new elevator system to ensure that all code requirements are met.
>
> West Coast Elevator has recently performed similar elevator modernizations at various locations throughout the Vancouver Lower Mainland and Island Areas and would be pleased to show you a finished and performing new elevator system.

The details of description of work new equipment to be installed in the Proposal is as follows:.

1) **Controller Upgrade:**

West Coast Elevator will supply and install a new microprocessor-based control system that is specially designed for Hydraulic Elevator Systems. The controller, manufactured by GAL Manufacturing Corporation (GAL), is a **non-proprietary** product that complies with the current CSA B44-07 Code. GAL Control Systems are highly respected by Elevator Consultants and Building Owners throughout North America. GAL products are very commonly specified by Elevator Consultants to satisfy high performance and non-proprietary requirements.

The new GAL Programmable Logic Control System will provide superior performance for Hydraulic Elevator Systems, using velocity feedback and digital/analog technology. Microprocessor-based controls maximize flexibility while the electronic solid-state starter provides smooth elevator operation. On-board diagnostics are standard. Floor levelling will be accurate to within 1/8" with smooth step-less acceleration and deceleration to floor levels. The Controller will have certain features built in for future use and building upgrade requirements.

2) **Hydraulic Power Tank Refurbishment:**

West Coast Elevator will retain & reutilize the existing Hydraulic Power Tank Assembly of the elevator at this location. The hydraulic pump, motor, and control valve components of the existing Hydraulic Power Tank Assembly are all in fair condition and would be suitable to be retained and reutilized to suit the new elevator equipment installed as part of this modernization.

3) **Machine Room Equipment:**

- Installation of new GAL Control System
- Installation of Code required Seismic Equipment
- All Electrical Wiring to be replaced with new

4) **Hoistway Equipment:**

- Installation of new GAL Controller Landing Gear Equipment
- Installation of new GAL Top of Car Control System
- Installation of new water resistant / fire retarding Travel Cables
- Installation of new Pit Switch(es)
- Installation of new Hoistway Switch(es)
- All Electrical Wiring to be replaced with new
- Installation of Code required Seismic Equipment
- Installation of Top of Car Guard Rail Device, if required
- Installation of Apron (Toe) Guard Device, if required

5) Door Operator Assembly Upgrade:

West Coast Elevator will supply & install a new "GAL MOVFR II" Electronic Door Operator Assembly. The "GAL MOVFR II" Door Operator is an industry standard product that has been proven to provide reliable door operation for many years.

All new Car and Hall Door Equipment & Linkages will be provided. As per code requirements a new Car Door Restrictive Clutch, Drop Key Access Devices, and Hall Door Fire Safety Retainers & Keels will be installed.

All new Hall Door Interlocks will be installed to replace the existing original interlocks.

New Hall Door Spirator Closing Devices will be installed to enhance the door closing force.

As part of this upgrade, the existing car door protective device of the elevator will be upgraded with a new "Formula Systems Safescreen" Electronic Door Detector Edge Unit. The new Electronic Door Detector Edge Unit will improve the safety and reliability of the Elevator Door Protection; as well it will provide a greater degree of safety for the building owner(s) as it will not allow the elevator car door to close until the door's path is clear. This upgrade will be very beneficial when considering the needs of the elderly and passengers with mobility issues.

6) Operating Pushbutton and Signal Fixture Upgrade:

Car Pushbutton Panel – A new full-length Car Station Operating Panel will be installed complete with all new pushbuttons & key switch requirements conforming to Elevator Safety Code and Handicap requirements. West Coast Elevator recommends for the installation of new vandal resistant pushbuttons manufactured by "Dupar Canada". We propose to install Dupar "US91" model pushbuttons that will include all new braille tags & engraving as required by code.

A new Hands-Free Emergency Telephone Unit will be provided as required by code.

A new Emergency Light Display Unit will be provided as required by code.

A new Digital Display In-Car Position Indicator Unit will be installed in the new Car Operating Panel that will be provided as part of this modernization.

West Coast Elevator will supply samples and drawings of the proposed Car Pushbutton and Signal Fixtures for your review/approval.

Hall Pushbutton Fixtures – New Hall Station Pushbutton fixtures will be installed to replace all existing hall pushbutton fixtures, of which again will utilize the "Dupar US91" model of pushbuttons.

** West Coast Elevator will provide new Digital Display Position Indicator(s) to replace all existing units. Additionally, if not already existing, West Coast Elevator will provide a new Digital Display Position Indicator Unit(s) in the hall station fixture provided at the main lobby level of the building.

7) Technical Safety British Columbia (TSBC):

Our proposal includes for all necessary government submission and inspections required for this "Major Alteration". The Technical Safety BC (TSBC) requires registration of submission forms and site acceptance testing in the presence of an Elevator Inspector. An "Elevating Devices Certificate of Inspection" will be granted ensuring that the Elevator System complies with the latest CSA B44-2016 Safety Code and the "B.C. Safety Standards Act".

8) Price:

Our Price to perform the Elevator Modernization/Upgrade as detailed in the fore-mentioned scope of work is: **$63,800.00 Plus GST**

The above price is valid for sixty (60) days from submission date.

** Warranty for new Elevator Equipment to be the Industry Standard One (1) Year **

Filed in evidence is a Letter of Transmittal which reads in part,

> As you are aware, West Coast Elevator completed an elevator modernization at "Sand Dollar Manor" which reached completion on April 26, 2021. The building address is 450 Stewart Avenue, Nanaimo.
>
> As part of the elevator modernization scope, we upgraded all existing elevator parts that were in a poor and worn condition. This included a new elevator controller, pushbutton fixtures, door operator system and cab interior finishes.
>
> Please note that the existing hydraulic power tank unit was retained and reutilized as part of the elevator modernization. The existing hydraulic power tank unit was installed new (by others) back in 2010. It was in suitable condition to be retained as part of the elevator modernization.
>
> Since completion of the elevator modernization, West Coast Elevator has continued to provide maintenance services for this elevator on a regular basis. The existing hydraulic power tank unit is still in place, since it was installed in 2010 (by others).

Filed in evidence are receipts for the work completed by the West Coast Elevator Services Ltd. The first receipt statement date is April 30, 2021, from the elevator company $6,380.00 . The final receipt from West Coast Elevator Services Ltd dated June 30, 2021, in the amount of $60,291.00. The electrician receipt is dated April 26, 2021, in the amount of $6,427.05. These are within 18 months of the landlord filing their application.

Tenants Rebuttal

I have reviewed the entire tenants' written submissions marked 2024 Submission from Organized Tenants; however, I have only reproduced portions of their argument to capture their submission, as seen below.

The impossibility of knowing what work was done on the hydraulic power unit and its related cost

39. At page 2 of their assessment/proposal, Thyssen Krupp says that they installed an upgraded hydraulic power unit in 2010, and that the power unit is in "good" condition (Landlord's evidence, page 209).
40. At page 3 of their own assessment/proposal, West Coast identifies the hydraulic pump, motor, and control valve of the power unit as being in "fair" condition and in need of "refurbishment" (Landlord's evidence, page 214).

41. The power unit is a complex piece of equipment containing many moving and non-moving parts, as indicated in the following split diagram of a single power unit.

42. The petitioners said at paragraph 42 of Written Argument of the Petitioners that they did not know what 'refurbishment' meant, due to the term not appearing in the ASME A17.1/CSA B44 Safety Code for Elevators and Escalators ("ASME Safety Code").
44. The petitioners said at paragraph 42 of Written Argument of the Petitioners that if refurbishment involved routine repairs or maintenance, such work would not be eligible for an ARI-C, according to Policy Guideline 37 ("PG37").

within five years.

47. The Landlord has served a letter from West Coast dated November 2, 2023 (Landlord's evidence, page 174) affirming only that the hydraulic power unit was not replaced in 2021 and was instead retained and reutilized.
48. Specifically, this letter does not define what the refurbishment of the power unit entailed, and it does not identify whether any of the refurbishment work exceeded maintenance, or minor repairs that would be expected to be needed again within five years, thereby becoming work that could be eligible for an ARI-C.
49. The Landlord bears the burden of identifying the work that has been completed, and identifying that the capital expenditures for such work were incurred for the installation, repair or replacement of a major system or major component that would not be expected to be incurred again for at least five years.
50. **The Organized Tenants submit that the Landlord has not discharged his burden to identify the work done on the power unit; and that he has not identified the capital expenditures related to this work; and that he has not proved that the capital expenditures are not expected to be incurred again within five years; and that the capital expenditures related to refurbishment of the power unit are therefore not eligible for an ARI-C.**
51. The Organized Tenants acknowledge that due to the failure of the Landlord to provide any documentation indicating specific units of work completed and dollar values assigned to such units, the Organized Tenants are unable to identify the dollar amount of capital expenditures related to the refurbishment.
52. **The Organized Tenants submit that due to the impossibility of identifying the dollar amount of the capital expenditures that should not be considered eligible for an ARI-C, it is logically impossible for them, or for anyone else, to identify the remaining dollar amount of the capital expenditures that could be considered eligible for an ARI-C. As a result, the Landlord's application for the ARI-C**

The cylinder and overspeed valve

60. The Organized Tenants see that West Coast has effectively dismissed their statement about replacing all wearing equipment, now saying in a letter dated November 2, 2023 (Landlord's evidence, page 174) that they "upgraded all existing elevator parts that were in a poor and worn condition" (emphasis added).
61. West Coast listed in the same letter all the elevator parts that they upgraded in 2021 – "[t]his included a new elevator controller, pushbutton fixtures, door operator system and cab interior finishes."
62. The Organized Tenants see that West Coast has not included the cylinder and overspeed valve in that list.
63. **The Organized Tenants submit that it is possible that West Coast's list of upgraded equipment is not exclusionary and that more upgrades may have been completed than those appearing in the list, but no facts in this regard have been established.**

The impossibility of knowing what work was done on machine room and hoistway equipment

64. West Coast describes, at page 3 of their assessment/proposal, an extensive list of machine room and hoistway equipment that they say they will install (Landlord's evidence, page 214).

Machine Room Equipment:

- Installation of new GAL Control System
- Installation of Code required Seismic Equipment
- All Electrical Wiring to be replaced with new

Hoistway Equipment:

- Installation of new GAL Controller Landing Gear Equipment
- Installation of new GAL Top of Car Control System
- Installation of new water resistant/fire retarding Travel Cables
- Installation of new Pit Switch(es)
- Installation of new Hoistway Switch(es)
- All Electrical Wiring to be replaced with new
- Installation of Code required Seismic Equipment
- Installation of Top of Car Guard Rail Device, if required
- Installation of Apron (Toe) Guard Device, if required

65. Apart from a new controller (also known as a control system), the list in West Coast's letter of November 2, 2023 (paragraph 61 above) does not show that West Coast installed any other upgraded machine room or hoistway equipment.

66. In order to know whether the full list of machine room and hoistway equipment was installed, the Organized Tenants would need to see conclusive documentary evidence of the completion of such work, or they would need to have had access to the machine room and hoistway area to have an expert conduct an on-site inspection.

67. The Landlord has not provided conclusive documentary evidence that upgraded machine room and hoistway equipment was installed.

75. Due to West Coast's omission of most machine room equipment and hoistway equipment from their list of upgraded equipment, and due to West Coast's wrongful inclusion of cab interior finishes in their list of upgraded equipment, and due to the failure of the Landlord to provide <u>any</u> reliable documentation related to work completed and associated capital expenditures, the Landlord has not discharged his evidentiary burden arising from section 23.1 of the *RTR*, and his application for an ARI-C should therefore be dismissed in its entirety.

The end of the useful life of the elevator

92. The Organized Tenants submit that the Arbitrator should exercise their discretion to not follow PG40 due to its unreliability in relation to the useful life of elevators, particularly those that have been restored through major alteration. Arbitrators are not bound by Policy Guidelines when making their decisions. The BC Supreme Court has repeatedly affirmed that Policy Guidelines of the Residential Tenancy Branch do not have the force of regulation or are not otherwise binding (see *Powell v British Columbia (Residential Tenancy Branch)*, 2016 BCSC 1835 at paras 32-33).

93. The Organized Tenants further submit that the Landlord has not met the requirements of s.23.1(4)(a)(ii) of the *Regulation,* in relation to the capital expenditures being incurred because the elevator was close to the end of its useful life.

Two assessments and proposals

118. The Organized Tenants submit that the Landlord has provided no reliable evidence that the elevator had failed or was inoperable.

119. The Organized Tenants further submit that the Landlord has not established that the occasional malfunction described in paragraph 99 above, could not be remedied through maintenance and that the full modernization work that was completed was required and was not elective.

120. The Organized Tenants submit that the Landlord has failed to meet the requirements of s.23.1(4)(a)(ii) of the *Regulation,* in relation to capital expenditures being incurred for work that was required because of failure, malfunction or inoperability of the elevator.

Health, safety and housing standards required by law

121. At page 2 of their assessment/proposal, West Coast says that by upgrading the elevator, the owners' overall liability "should be" reduced (Landlord's evidence, page 213). At page 4, West Coast specifies that if the door detector is upgraded, the safety of residents will be improved and so will the "safety for the building owner(s)."

122. Thyssen Krupp warns at page 3 of their own assessment/proposal that the existing door operator "can create a fire hazard" in the controller, while a new door detector would reduce the "potential for injury" of passengers, and also reduce "the owner's liability exposure due to needless injuries" (Landlord's evidence, page 210).

123. At paragraph 23 of his new written submissions, the Landlord states that he initiated the work to comply with safety and housing standards.

124. At paragraph 47 of his new written submissions, the Landlord references s.32(1)(a) of the *Act*, where it requires the Landlord to provide and maintain the property in a state of decoration and repair that complies with the health, safety and housing standards required by law.

125. At paragraphs 48 and 49 of his new written submissions, the Landlord says that he was advised that new fixtures, a new door operator, a new door restrictor, and a hand free auto-dialer telephone would be required, in conjunction with a new control system, in order "to ensure compliance with the current B44 Elevator Safety Code Requirements" (emphasis added).

128. The ASME Safety Code that is used throughout all of North America expects elevators to be in compliance with the Safety Code edition that was in effect at the time of the original installation of the elevator, or that was in effect at the time of the most recent major alteration (see sections 8.91 and 8.7.1.1, at page 1 of Excerpts from Safety Codes).
129. It is not expected that elevators must, throughout their lives, be continually modified in order to meet the changed requirements of the ASME Safety Code when they occur.
130. There is no evidence that the elevator was out of compliance with the Safety Code edition that was in effect at the time of the 2010 major alteration, and no evidence that the elevator was out of compliance with health, safety and housing standards required by law in accordance with s.32(1)(a) of the *Act*.
131. The ASME Safety Code is one safety standard to be met, and there is no evidence that this is an inadequate standard.

136. The Organized Tenants submit that the 'expert' assessments and proposals from Thyssen Krupp and West Coast fall short of actual expertise due to West Coast's lack of grounds for asserting knowledge of breakdowns, due to Thyssen Krupp's internal contradictions about equipment obsolescence, and due to improper conclusions about elevator safety on the part of both companies.
137. The Organized Tenants submit that the expertise of these two companies is also marred by a distinct descent into fear-based marketing techniques.
138. The Organized Tenants submit that the Landlord has not met the requirements of s.23.1(4)(a)(i) of the *Regulation,* in relation to the capital expenditures being incurred to comply with health, safety and housing standards required by law.

The security of the property

139. The Landlord says in his one-page submission that the work on the elevator was required because "the components were threatening the security of the property (tenants could have become trapped inside)." The Landlord thereby conflates the safety of tenants with the security of the property (Landlord's evidence, page 222).
140. At paragraph 55 of his new written submissions, the Landlord makes the same conflation. He claims that the elevator door was "malfunctioning," creating "a risk that tenants would become trapped in the elevator cab. The upgrade of the Elevator System was therefore an improvement in the security of the Property. This meets the requirements of s.23.1(4)(a)(111)."
141. The Organized Tenants submit that if any tenants, at any time, at any place, were ever to become trapped in an elevator, it is their own security that would be compromised, not the security of the property.
142. The *RTR* recognizes that the safety of tenants is not synonymous with the security of the property, insofar as the *Regulation* describes these concerns in separate parts of section 23.1 and accords the two concerns two different rationales.
143. The safety of tenants or other elevator users is considered at section 23.1(4)(a)(i), where it is reasoned that the landlord must meet the health, safety and housing standards required by law in accordance with s.32(1)(a) the *Act*.
144. The security of the residential property is considered at section 23.1(4)(a)(iii)(B) of the *Regulation*. The rationale behind the concern for security of the residential property can be understood from the examples of security-related installations, replacements or repairs that are provided in PG37C:
    - installing CCTV cameras
    - replacing a keyed entry with a FOB system, and
    - installing or repairing the lighting in the parking garage.

    PG37 understands that landlords need to, for example, monitor their property, regulate entry to the property, or illuminate areas of the property, presumably so that the property can be monitored. There is no reference made to the safety of persons in this section of the *Regulation*.
145. **The Organized Tenants submit that the Landlord has not met the requirements of s.23.1(4)(a)(iii)(B) of the *Regulation*, in relation to the capital expenditures being incurred to**

Inadequate repair or maintenance

146. The Organized Tenants submit that there is no evidence that the Landlord has performed adequate repair or maintenance of the elevator in the past.
147. The Landlord has failed to provide maintenance records for the elevator, even though the Organized Tenants have repeatedly asked for these.
    - The Organized Tenants first asked for maintenance records for the elevator at the preliminary hearing in advance of the first arbitration.
    - They next asked at page 5 of Initial Submission from the Organized Tenants, noting that they did not get them after first asking and that the Arbitrator had not ordered their production.

- They also noted that they had not been provided such records at page 6 of Corrections, Objection and Rebuttal.
- At paragraph 47 of Written Argument of the Petitioners, the petitioners replied to the Landlord's assertion that they had not raised the possibility of inadequate repair or maintenance by reciting the many efforts they had made to obtain maintenance records.

148. On January 7, 2024, the Organized Tenants made a new request that the Landlord provide maintenance records and documentation related to the elevator (Request for elevator records and reply, page 2).
149. The Landlord responded by providing copies of quarterly invoices from Thyssen Krupp for monthly maintenance fees, for the period November 1, 2017 – April 30, 2021 (Landlord's evidence, pages 176-190).
150. These quarterly invoices do not describe any specific maintenance that was performed in that period of time.
151. The Landlord also provided a copy of a three-year maintenance service agreement with Thyssen Krupp beginning May 1, 2020 (Landlord's evidence, pages 191-197), which the Landlord said ended "on April 1 2021 when West Coast Elevator took over the elevator to perform the modernization" (Request for elevator records and reply, page 1).
152. The Organized Tenants submit that identification in the service agreement of maintenance tasks that should have been performed between May 1, 2020 and April 1, 2021 (Landlord's evidence, pages 191-192) is insufficient to prove that the tasks were performed between May 1, 2020 and April 1, 2021.
153. The ASME Safety Code distinguishes the need to list maintenance tasks from the need to complete the tasks. Sections 8.6.1.4 and 8.6.1.4.1 of the code require that Maintenance Control Program Records list relevant maintenance tasks, and that the records also document completion of these tasks. Records must also document the completion of repairs, replacements, and testing. All such records must be kept for at least five years. (See sections 8.6.1.4 and 8.6.1.4.1 of the ASME Safety Code at page 3 of Excerpts from Safety Codes).
154. The Landlord asserts that he bought the building on May 1, 2015, that "no documents were provided by the previous owner," and that the documents he provided to the Organized Tenants are "the only documents in the Landlord's possession" that relate to their request for records and documentation (Request for elevator records and reply, page 1).

155. The Landlord has provided no evidence that the elevator was adequately maintained or repaired at any time after the first major restoration in 2010, including from the date of his purchase, May 1, 2015, to the date of the first record for monthly maintenance fees, November 1, 2017, being a period of 30 months.
156. The Landlord has provided no evidence that the elevator was adequately maintained or repaired during the five years prior to the latest restoration in 2021, for which maintenance and repair records had to be kept.
157. **The Organized Tenants submit that due to the Landlord's failure to prove that adequate maintenance or repair was completed at any time after the restoration of 2010, up to the time of the restoration of 2021, inadequate repair or maintenance can and should be inferred by the Arbitrator.**

158. **The Organized Tenants further submit that without adequate repair and maintenance, the performance of <u>any</u> mechanical system, whether bicycle, elevator, jet fighter aircraft or anything in between, will inevitably and predictably decline, and that the capital expenditures incurred in 2021 for elevator modernization were incurred because of inadequate repair or maintenance of the elevator system, and that s.23.1(5)(a) of the *Regulation* therefore applies.**

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 dispute is related to the landlord's application for an additional rent increase based upon eligible capital expenditures, the landlord has the onus to support 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 calculated under the Regulations by making an application for dispute resolution

<u>Statutory Framework</u>

Sections 21 and 23.1 of the Regulations sets out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. I will not reproduce the sections here but to summarize, the landlord must prove the following, on a balance of probabilities:

- the landlord has not made an application for an additional rent increase against these 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 prior to the making of the application
    - the capital expenditure is not expected to be incurred again within five years.

The 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:

- 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.

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.

In this matter, there have been no prior applications for an additional rent increase within the last 18 months before the application was filed. There are 73 specified dwelling units to be used for calculation of the additional rent increase. The landlord is claiming the total amount of **$73,098.05** as outlined in the above table for capital expenditures.

Is the Work an *Eligible* Capital Expenditure?

As stated above, in order for the Work to be considered an eligible capital expenditure, the landlord must prove the following:

- 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 prior to the making of the application;
    - the capital expenditure is not expected to be incurred again within five years.

I find that the elevator is a major system of the building, and the Work was competed to replace or install components of a major system. While the landlord has claimed the Work was undertaken for all the above reasons, with the exception of to achieve a reduction in energy use or green house gas emission. However, I only have to be satisfied that the Work was undertaken **for one of the reasons outlined above, not all of them.**

The landlord provided two different proposals for the elevator. The first was completed in August 2020 by Thyssen Krupp, which shows the elevator system had been manufactured and installed in 1973 and the power unit had been upgraded by their company in 2010, and the remaining major components have surpassed the useful life cycle of 25 to 30 years.

The second Proposal of West Coast Elevator Services Ltd completed in October 27, 2020, shows the elevator system in this building is in excess of 45 years and is reaching end of its effective life cycle.

The tenants submit in their written submission that the verb “is reaching” implies that the elevator had still not reached the end of its useful life prior to elevator modernization. The tenants submit that the elevator was not at or past the end of its useful life.

In this case, the Regulations permit major components to be replaced close to the end of their useful life. I accept that both of the expert proposals indicated the major components have surpassed the useful life span or reaching the end of its effective life cycle. The Regulations specifically use the word “close” to the end of their useful life, not that it must be “at” or “past”, and I find it would be unreasonable to wait for the major system, such as an elevator to become inoperative or wait for parts to become unreplaceable.

The tenants submit the Arbitrator is not bound to apply the Residential Tenancy Branch Policy Guideline (PG 40) to determine the useful life of 20 years for an elevator. I accept I have the discretion not to follow the PG, as the guideline is for my consideration and

to assist parties. However, if I deviate from the PG40, I must state why. I simply cannot just ignore them.

I agree that there can be a variance between the industries. However, PG 40 has determined 20 years is the acceptable period of use, for an elevator under normal circumstance. Simply because the industry may use different wording or have a difference of opinion is not sufficient for me to disregard PG 40, and in my opinion, PG 40 provides that 20 years is an acceptable period of use for an elevator and I see no rationale for me to deviate from PG 40.

Furthermore, I have two qualified companies, who are experts in their field, and both state the components are past or nearing the end of the useful life span, which I find is reasonable given the elevator was in stalled in 1973, with only the power unit was replaced in 2010.

While I accept that in 2010 the elevator was upgraded and the landlord, the current owner, does not have any information on the Work that was completed. However, in the Elevator Evaluation and Capital budget report, dated August 2020, by Thyssen Krupp shows the power unit was upgraded by them in 2010 and was found to be in good condition when inspected in 2020. While I accept West Coast Elevator Services Ltd used the heading " Hydraulic Power Tank Refurbishment", it is clear that the details in the proposal of October 27, 2020, and their letter of dated November 2, 2023, that it was retained and reutilized.

Based on the above, I find that the "major components" of the elevator were past their useful life span as set out in PG 40 and close to the end of its effective life according to the experts in the field. I find this is sufficient to satisfy the requirement of the Regulation and I find it reasonable that the major components will not be expected to be replaced within five years of replacement.

I do not need to consider either parties submission on whether or not the components had failed, or was malfunctioning, or was inoperative, or to comply with health, safety, and housing standards or to improve the security of the residential property. I am satisfied they were past or near their useful life span and that is sufficient.

Furthermore, I reject the tenants' submission that it is impossible to identify items of completed work and their related costs, and knowing what work was done in machine room and hoistway equipment. While I accept the invoice provided little detail, the

details of the scope of Work were clearly outlined in the proposal of West Coast Elevator Services Ltd. for the amount of $63,800.00, plus GST for a total of $66,990.00.

While I accept the invoices provided by the landlord from West Coast, shows the landlord actually paid the amount of $66,671.00. This is the difference of $229.00 from the original pricing. This does not mean the work proposed, in the proposal was not done. This simply could have been an adjustment on a price of a component or even an error in billing. However, either way this was to the advantage of the tenants as Capital Expenditure was slightly lower than expected.

Furthermore, I do not understand why the tenants are concerned with the cab interior finishes as they indicated they were not installed by West Coast Elevator Services Ltd. I accept that West Coast Elevator Services Ltd gave the landlord an optional pricing of $13,400.00, plus gst, which would be an additional charge to the $66,990.00. The invoices from West Coast Elevator Services Ltd does not show that the landlord was charged for the cab interior.

I reject the tenants' submission that the landlord has failed to prove adequate records of maintenance and repairs. The landlord purchased the property in May of 2015, the landlord cannot provide documents to which they do not have in their possession. The landlord did provided copies of quarterly invoices from Thyssen Krupp for monthly maintenance fees, for the period November 1, 2017 – April 30, 2021.

Furthermore, PG 37C provides examples of Inadequate Repairs or Replacement such as a roof leaking, but the leak was not promptly or adequately fix, as a result, structural damage had to be repaired. The PG provides that t**he roof expenditure would be eligible for the capital expenditure as at the end of its serviceable life;** however, the landlords claim for structural damage may not be granted because of inadequate repairs to the roof. This means regardless of what maintenance or repairs were done during the life span of the elevator is not relevant because the components were clearly past there useful lifespan or nearing the end of serviceable life.

The tenants abandoned their position that the landlord was entitled to be paid from another source.

In light of the above, I find the tenants failed to prove the additional rent increase should not be imposed due to 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.

Therefore, I find the landlord is entitled to recover the amount of **$**73,098.05**.**

Outcome

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 73 specified dwelling unit and that the amount of the eligible capital expenditures total the amount of $73,098.05.

I find the landlord has established the basis for an additional rent increase for capital expenditures of **$8.34 ($73,098.05 ÷ 73 ÷ 120=$8.34).**

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

The landlord has been successful. I grant the application for an additional rent increase for capital expenditure of **$73,098.05.** The landlord must impose this increase in accordance with the Act and the Regulation.

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*.

Date: March 20, 2024

Residential Tenancy Branch