



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding LOCARNO LEGACY CORPORATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Code ARI-C

Introduction

This hearing dealt with the Landlord's application pursuant to sections 43(1)(b) and 43(3) of the Residential Tenancy Act (the Act) and section 23.1 of the Residential Tenancy Regulation (the Regulation) for an additional rent increase for capital expenditure.

The parties listed on the coverage page attended the hearing on September 10, 2024.

The parties confirmed service of Notice of Dispute Resolution Proceeding and documentary evidence from the Landlord. The Landlord submitted a completed Proof of Service form signed by the building manager as witness that the Notice of Hearing and copies of the Landlord's evidence was provided to each Tenant. I find the Tenants were served with the required materials in accordance with the Act.

Tenant K.M. submitted evidence for the hearing but stated he had not served the Landlord. Rule of Procedure 3.15 provides that the respondent's evidence must be received by the other party and the RTB not less than seven days before the hearing. Accordingly, Tenant K.M. was advised the evidence he submitted was untimely and further, as it had not been served to the Landlord, would not be admitted although he could testify as to the contents of the evidence.

Tenant J.M. obtained an order for substituted service of his evidence to the Landlord by email. The Landlord confirmed receipt of Tenant J.M.'s evidence by email on July 26, 2024.

Issue for Decision

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

Background and Evidence

I have considered the submission of the parties, the documentary evidence as well as the testimony of the participants attending the hearing. However, not all details of the respective submissions are reproduced in this Decision. Only that relevant and material evidence related to the Landlord's application and necessary to my findings are set forth in my analysis.

The subject rental property is a four-storey building constructed in 1991 and consists of commercial units located on the main (street) level and 25 residential rental units located on the upper three stories of the building. Landlord representative A.L. testified (based upon internal business records) the building totals 25,047 square feet; the rental units consisting of 18,589 square feet. Landlord representative B.M. stated the commercial units are leased on a triple-net basis and the subject capital expenditure would be allocated to each commercial tenant on that basis (pro-rata based on the commercial tenant's leased square footage).

The Landlord's application requests an additional rent increase from the Tenants as a result of a capital expenditure it made for replacement of the roof and skylights in the total amount of \$478,051.12. Landlord representative B.M. testified the roof was original to the building and at more than 30 years old, was beyond its useful life. Some of the skylights were also cracked and/or leaking. The Landlord submitted photographs of the roof from June 11, 2015 to establish the deteriorating roof condition as of that date. The Landlord's representative B.M. testified the prior property manager had encountered difficulty in finding a contractor willing to undertake the roof and skylight replacement. (The current property management company assumed the role in December 2021.)

The Landlord also submitted documentation from its lender dated September 1, 2021, with a schedule of lender-required repairs as a condition for financing. The roof replacement was listed as an item in the lender's schedule.

The Landlord submitted correspondence from the project manager outlining the scope of the Work. The project manager/contractor states a visual inspection of the roof indicated it was "in dire need of replacement." The inspection, occurring in August and September 2022, revealed that the roof membrane was cracking and "other failure points across the roof were evident." The project manager's letter explains that the roof replacement:

...was highly complex relative to a conventional roof due to there being 26 custom skylights, 4 different roof levels separated by parapets, 13 different arched metal features, irregular flashing sections, replacement of many hardware accessories like drains, scuppers and goosenecks, and the coordination and work around of [sic] cellular tower equipment and other mechanical equipment located on the roof.

The Landlord's representative B.M. stated that ultimately only 24 of the 26 skylights were replaced as two skylights could not be replaced. For these two skylights that were not replaced, Landlord representative B.M. testified they were instead re-sealed. Five of the skylights (four of which were replaced) are located over the fourth-floor hallway and thus provide additional light for residents and occupants using the hallway. Representative B.M. stated the replacement roof consisted of two layers, and was a torch-on roof system. He further testified that approximately 1,000 custom pieces of metal were cut for the roof replacement. A report with photographs of the Work during the replacement process indicates that cranes were required for the temporary removal of cellular equipment to perform the Work. Representative B.M. testified the interior unit finishing work, such as sanding, painting, and the like, were not included in the cost for the Work, this work being done by the property management company itself.

The Landlord's representative confirmed the capital expenditures were incurred in relation to the projects within 18 months preceding their application and they are not expected to recur for at least five years. Documentation of invoices and a letter from the project manager for the Work confirming roof and skylight replacement were completed February 28, 2023 and final payment was made by the Landlord in May 2023 (pursuant to the final invoice submitted in April 2023) were provided in evidence. It was noted during the hearing, pursuant to Tenant L.Y.'s inquiry, that the roof replacement was done by a sub-contractor.

The Landlord's representative testified the capital expenditure concerning the roof and skylights were incurred by the Landlord to repair or replace a major system or a major component of a major system that had failed, was malfunctioning or inoperative, or was close to the end of its useful life.

The Landlord's representative confirmed the Landlord has not previously applied for an additional rent increase within the past 18 months for capital expenditure as required by 23.1(2) of the Regulations for the residential rental property. The Landlord's representative further confirmed the Landlord was not entitled to be paid from another source for any of the work subject to this application.

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 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.

1. Statutory Framework

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. 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 successfully applied for an additional rent increase against these tenants within the last 18 months (s. 23.1(2));
- the number of specified dwelling units on the residential property (s. 23.2(2));
- the amount of the capital expenditure (s. 23.2(2));
- 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 (S. 23.1(4));
 - the Work was undertaken for one of the following reasons:
 - to comply with health, safety, and housing standards (s. 23.1(4)(a)(i));
 - because the system or component:
 - was close to the end of its useful life (s. 23.1(4)(a)(ii)); or
 - had failed, was malfunctioning, or was inoperative (s. 23.1(4)(a)(ii));
 - to achieve a reduction in energy use or greenhouse gas emissions (s. 23.1(4)(a)(iii)(A)); or
 - to improve the security of the residential property (s. 23.1(4)(a)(iii)(B));
 - the capital expenditure was incurred less than 18 months prior to the making of the application (s. 23.1(4)(b)); and
 - the capital expenditure is not expected to be incurred again within five years (s. 23.1(4)(c)).

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 (s. 23.1(5)(a)); or
- for which the landlord has been paid, or is entitled to be paid, from another source (s. 23.1(5)(a)).

If a landlord discharges their evidentiary burden and the tenant fails to establish 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.

2. Prior Application for Additional Rent Increase

In this matter, the Landlord's representative testified there have been no prior applications for an additional rent increase within the last 18 months before the present application was filed. (It was noted during the hearing that the Landlord had made an earlier application for this capital expenditure which was withdrawn by the Landlord without Tenant objection at the time of the scheduled hearing. The arbitration file number for that proceeding appears on the cover page to this Decision.)

3. Number of Specified Dwelling Units

Section 23.1(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;

[...]

"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.

There are 25 specified dwelling units to be used for calculation of the additional rent increase.

4. Amount of Capital Expenditure

The Landlord is claiming the total amount of \$478,015.12 as set forth in the invoices and confirmation of payment for the capital expenditure.

However, the rental property consists of both the rental units as well as commercial units that are leased on a triple-net basis and Landlord representative B.M. testified the commercial tenants will be assessed their pro-rata portion of the cost of the roof replacement. Landlord's representative A.L. testified the residential rental unit square footage is 18,589 of a total building size of 25,047 square feet, resulting in 6,458 square feet attributable to commercial space. I find it is appropriate to reduce the cost of the roof replacement attributable to the residential rental units from \$478,051.12 proportionately based upon square footage to \$354,792.68 for this application.

5. Is the Work an *Eligible* Capital Expenditure?

As stated above, 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
 - 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.

Section 21.1 of the Regulation defines “major system” and “major component”:

"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;

"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;

RTB Policy Guideline 37 provides examples of major systems and major components:

Examples of major systems or major components include, but are not limited to, the foundation; load bearing elements such as walls, beams and columns; the roof; siding; entry doors; windows; primary flooring in common areas; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security systems, including things like cameras or gates to prevent unauthorized entry; and elevators.

I find the roof including the skylights are a major component of the building. I find the Work was done to increase safety (from the elements) and reliability as the roof and skylights were original to the building and while still operational were at or nearing its useful lifespan. I find this is sufficient to satisfy the requirements of the Regulation. I find the roof and skylight replacement was required because the system had exceeded its

expected serviceable life as permitted by 23(1)(4)(a)(ii) of the regulations. Policy Guideline 40 provides that the useful life for a flat roof is 20 years.

Residential Tenancy Branch Policy Guideline 37 states:

A capital expenditure is considered “incurred” when payment for it is made.

I accept the Landlord’s evidence from the project manager confirming the final payment for the Work was made in May 2023, pursuant to the last submitted invoice to the Landlord in April 2023 for the Work, and within 18 months of the Landlord making this application on May 29, 2024.

The Landlord provided the invoices and confirmation of payment in the amount of \$478,051.12 for the capital expenditure, and I find the final payment was incurred less than 18 months prior to making the application. I further find based upon the nature and scope of the Work it is reasonable to conclude this capital expenditure will not be expected to incur again within five years.

Tenants’ Objections

Several Tenants attended the hearing during which each was provided an opportunity to state their objections and concerns, if any, to the Landlord’s application for the additional rent increase resulting from the capital expenditure for the roof and skylight replacement. A few Tenants raised issues pertinent to their individual units which may require Landlord inspection and repair, which will not be set forth herein.

Tenant advocate D.G. raised an issue that the Landlord may be entitled to a federal tax capital cost deduction or credit for the Work, resulting in the Landlord recouping the cost of the Work through this/these federal tax deductions and/or credits. The Landlord’s representative confirmed D.G.’s additional inquiry that there were no additional sources of payment (such as rebates or insurance coverage). Tenant’s advocate D.G. also stated the invoices provided by the contractor/project manager were inadequate as lacking in detail.

Tenant advocate D.G. also noted that the Landlord had not provided maintenance records. The Landlord’s representative B.M. stated that the Landlord did not have maintenance records extending back 31 years but did submit the repair invoices that demonstrated work done on the roof between June, 2016 and March 24, 2022. He stated regular maintenance work on the roof would consist of clearing the drains, sweeping the roof of debris and that previous caulking and sealing work was done. It is noted that some of the invoices from the repair company do provide statements of maintenance work undertaken together with any repair. For instance, an invoice dated July 2016 notes all roof drains were checked and cleaned as needed.

Tenant D.C. raised the sufficiency of the evidence provided by the Landlord to establish payment for the Work. It was noted by undersigned that a third party confirmed payment in full by the Landlord in a written, signed letter and that there appeared no basis to doubt the credibility of the statement. Tenant D.C. also noted the Landlord had not submitted bid(s) it received for the Work as part of its evidence to establish the cost for the Work as such evidence may demonstrate the reasonableness of the cost actually incurred for the Work. The Landlord's representative B.M. stated the contractor/project manager provided the best bid for the Work given the complexity of the project. Tenant D.C. also stated the invoices did not provide sufficient detail as to the work completed for which the invoice was submitted. Landlord representative B.M. noted that property management changed hands in December 2021, they were only made informed the prior management company had experienced difficulty in finding a contractor to undertake the Work. Undersigned noted a lack of authority to exercise discretion under the Regulations to evaluate business judgments made by the Landlord in selecting a particular contractor to perform the Work and the cost associated therewith.

Tenant J.K. inquired whether the building had sold and whether there was owner negligence underlying the necessity for the roof replacement. Landlord representative B.M. stated the owner has remained the same (although the owner's corporate name underwent a change) and the former property manager who held the role for the prior 15 years was unable to secure a satisfactory bid for the Work. Representative B.M. also testified that he was not of the position that the prior management company's inability to find a contractor to conduct the Work (of the same scope) resulted in increased damage to the roof and skylights. Representative B.M. stated that two other quotes for the Work were obtained but the contract was entered into with the selected contractor based upon the pre-work inspections conducted by the selected contractor, evident knowledge and expertise. Tenant J.K. also questioned whether the Work was postponed for purposes of filing the application. Representative A.L. stated that at the time of the tender of bids, the additional rent increase for capital expenditures was not available that thus the Landlord was motivated to accept the lowest bid for the scope of Work.

Tenant J.M. stated he had resided in his rental unit for approximately 20 years. He submitted documents (photographs and emails with the building manager) regarding leaks in his window that the Landlord had not yet repaired. He stated the purpose of this evidence was to establish a pattern of negligence by the Landlord in maintaining the rental property, including the roof and skylights. Tenant J.M. stated the Landlord's photographs from 2015 as to the condition of the roof substantiated his position the Landlord's lack of maintenance was negligent and contributed to the necessity of the roof and skylight replacement. Tenant L.Y. noted that he too had experienced water leaking into his unit, but also stated that since the roof replacement, the leaks had abated. Tenants J.K and K.M. similarly testified they each had water infiltration in his unit in the past. Tenant L.Y. stated this was part of a pattern of neglect by the Landlord in maintaining the rental property.

Tenant S.T. expressed concern as to the amount of the additional rent increase as provided on the application and how it is calculated for purposes of a monthly payment and the duration thereof. It was noted that any additional rent increase, if approved, is subject to a maximum allowable of 3 percent of an individual tenant's rent obligation, in addition to any prescribed rent increase a landlord may impose consistent with the Act and regulations.

As stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditure. In addition to presenting evidence to contradict the elements the landlord must prove (set out above), the tenant may defeat an application for an additional rent increase if they can prove that:

- the capital expenditures were incurred because the repairs or replacement were required 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.

I do find the Tenants have not provided sufficient evidence to establish the roof was not properly maintained or the Landlord's maintenance was negligent and contributed to requiring the roof and skylight replacement. The roof and skylights were original to the building constructed in 1991. The Landlord provided copies of invoices for repairs and some maintenance that was done between 2016 and 2022. It is noted that Policy Guideline 40 provides that a flat roof has a useful life of 20 years. Although the roof was showing significant deterioration as of June 2015, the Landlord's representative explained the prior management company was unable to find a contractor willing to undertake the work at a reasonable cost.

The remaining arguments raised by the Tenants are insufficient under the Regulations to defeat the Landlord's application. While Tenant D.R.'s advocate D.G. raised the issue of whether federal income tax deductions may affect the Landlord's actual out-of-pocket expenses, I find there is no basis under the Regulation to account for federal business tax deductions, credits or the effect of depreciation on the cost of the Work for purposes of determining an additional rent increase. The Regulation is written in terms of payments from third-party sources, such as insurance proceeds, government rebate programs (typically provided to consumers to promote installation and upgrade to energy efficient systems) or manufacturer rebates. Tax deductions, credits and depreciated capital expenditures are not considered a payment to the taxpayer but rather federal legislative decisions for determining taxable income.

Therefore, I find the Landlord completed necessary repairs for a major system of the rental property, was required to pay for such repairs without resort to third-party reimbursement or rebate, and is bound only by the statutory framework in seeking the capital expenditures, rather than the arguments described above.

I find the Tenants have failed to defeat an application for an additional rent increase for capital expenditure.

Based on the above, I find the Landlord is entitled to recover for the roof and skylight replacement in the amount of **\$354,792.68**.

Summary

The Landlord has been successful with its application. The Landlord has provided evidence sufficient to establish, on a balance of probabilities, the elements required to impose an additional rent increase for total capital expenditures of **\$354,792.68**, for the major component as described herein.

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 25 specified dwelling unit and that the total amount of the eligible capital expenditures is the amount of **\$354,792.68**.

I find the Landlord has established the basis for an additional rent increase for capital expenditures of **\$118.26** ($354,792.68 \div 25 \div 120 = 118.26$). If this amount exceeds 3% of a tenant's monthly rent, the Landlord may not be permitted to impose a rent increase for the entire amount in a single year.

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

Conclusion

The Landlord has been successful. I grant the application for an additional rent increase for capital expenditures totaling **\$354,792.68**. The Landlord must impose this increase in accordance with the Act and the Regulation.

I order the Landlord serve each Tenant with a copy of this decision in accordance with section 88 of the Act.

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

Dated: September 13, 2024

Residential Tenancy Branch