Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding HORIZON TOWERS HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Introduction

On July 10, 2024 (the "Application date"), the Landlord filed an application pursuant to s. 43 of the *Residential Tenancy Act* (the "*Act*") for an additional rent increase for capital expenditures pursuant to s. 23.1 of the *Residential Tenancy Regulation* (the "*Regulation*").

The Landlord attended the hearing at the scheduled hearing time. A few Tenants from the rental unit property were present at the hearing on October 3, 2024.

Preliminary Issue – service and disclosure of evidence

The Landlord provided a September 10 affidavit that set out their service of the hearing material packing containing the Notice of Dispute Resolution Proceedings to all tenants at the rental property. This was on July 26, 2024, by posting the material to the door of individual units. The Landlord provided evidence to all tenants via download portal, and confirmed that a number of tenants had downloaded that material.

I find the Landlord served each tenant at the rental unit property in accordance with the *Act*. Those tenants present in the hearing did not raise an issue with the timelines or service of the evidence in the Landlord's possession.

Three tenants provided evidence to the Residential Tenancy Branch. One tenant provided material to the Residential Tenancy Branch but did not separately provide that material to the Landlord; for this reason, I am not reviewing the material.

I reviewed the separate evidence packages with the Landlord in the hearing. The Landlord confirmed they received evidence from one tenant on the day prior to the scheduled hearing.

The Landlord also affirmed the comprehensiveness of their provided evidence, in response to requests from tenants for more material based on past records that may not exist or are not in the Landlord's possession. I find the Landlord completed disclosure in this matter as required.

I cannot compel the Landlord to produce records that do not exist, nor can I compel the Landlord to produce records that deal with any subject of maintenance or repair in the entire lifespan of the rental unit property.

Issue to be Decided

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

Background and Evidence

The rental unit property consists of a single building with 138 rental units. As shown in the BC Assessment document presented by the Landlord in their evidence, the rental unit property was constructed in 1971. The Landlord acquired ownership/management of the rental unit property in 2018.

The Landlord provided a written submission dated July 10, 2024. This was with an affidavit of the rental unit property management.

In the October 3 hearing, the Landlord presented each of the two capital expenditures, which they submit are related to major systems of major components of the rental unit property, as follows:

	Description	date completed	paid
1.	elevator remediation/modernization	Aug 7/23	$551,583.99
2.	energy efficient lighting upgrade	Nov 28/23	$11,491.20
		Total	**$563,075.19**

For each item, the Landlord presented written submissions, evidence in the form of professional reports, and invoices. In the hearing, an agent for the Landlord attested to the need for each capital expenditure.

1. elevator replacement - $551,583.99

The Landlord described this elevator as being one of two in place in the rental unit property. A specialist review report in the Landlord's evidence identified an issue with the elevator; in the firm's opinion, the elevators in place were last modernized in 1997, with some equipment original to the building.[1]

[1] Landlord's evidence package page 52

The Landlord also provided a property condition assessment report which evaluated the elevators as being original to the property's construction "circa 1970" – this represents an end to the elevators' useful life cycle, with the recommendation being modernization.

As per the *Act* and the *Regulation*, the Landlord submits this work will not recur for at least 5 years.

The Landlord retained 5 firms to undertake the modernization of the elevators, and the elevators were remediated "between 2019 and 2023." Payments over this timespan were as follows:

- $28,164,42 to a firm between February 15, 2019 and March 31, 2022
- $465,280.30 to another firm (essentially the same firm as a result of an acquisition) between May 4, 2021 and April 8, 2022
- $5,969.25 to a third firm for remediation activities
- $52,170.02 for activities between 2021 and 2022

The Landlord provided their final payment for this total project work on August 7, 2023, as shown in the invoice that appears in their evidence. Given this date, the Landlord submits they incurred this capital expenditure within 18 months of the Application date.

With respect to the legislation in relation to this capital expenditure, the Landlord submits:

- the elevators reached the end of their useful life, with the Residential Tenancy Branch policy guideline specifying the useful life cycle of elevators as being 20 years, and these installed elevators being 50 years old
- this was not an issue of inadequate repair or maintenance – the Landlord provided the name of the long-standing service provider for these elevators
- a capital expenditure refers to the entire project of installation/repair/replacement of a major system/component – this can take more than 18 months to complete --- therefore, this capital expenditure is eligible because the Landlord incurred the final payment within the 18-month period prior to the Application date

- in other terminology, interim invoices/payments are “not to be viewed in isolation or severed from the totality of all invoices related to a major system or major component.”

One Tenant who attended the hearing prepared documentation to show that the Landlord’s payments fall outside the 18-month qualification period, adding that some payments were part of a holdback scheme the Landlord chose to utilize during this project. Their prepared chart shows only three payments out of twenty-eight were paid within the 18-month period.

Regarding a “holdback”, one Tenant submitted that payments for a holdback were issued too long after the project had completed. This was their rationale for asking the Landlord for the certificate of project completion, which they submit should trigger the start of a 55-day holdback period. They stressed that a holdback is not a final payment, not released until the very end of the project. The Tenant sent an excerpt of legislation that defines this scheme, as well as a rationale that provides: “. . . the time when the hold back funds are paid is when they are paid into the fund and not when they are later released.”

In response to this, the Landlord cited the associated policy guideline[2] as being the authority for an entire project subject to the final payment related to the capital expenditure. They also cited a previous rent increase authorization in a separate dispute resolution proceeding wherein an arbitrator granted a holdback system was part of an incurred payment to a contractor.

Another Tenant questioned the inclusion of an invoice for “camera star base & converter” that the Landlord apparently included in their applied total.

2. <u>energy efficient lighting upgrade - $11,491.20</u>

In their written submission, the Landlord set out that they obtained a quote for the project they dubbed the “hallway lighting replacement”, for the installation of energy-efficient LED lighting. A firm, as shown in the Landlord’s evidence with invoices, replaced the building corridor lighting with this “efficient lighting”.

It is the Landlord’s position that this project, in addition to being energy efficient, also enhances tenant safety and security when in this area. The Landlord cited BC Hydro as attesting to the efficiency of this form of lighting, being “at least 75% more energy efficient than incandescent bulbs.”

[2] Residential Tenancy Policy Guideline 37C: Additional Rent Increase for Capital Expenditures

The Landlord's final payment for this lighting was on November 28, 2023. The Landlord submits this type of lightning will have an operating life of 50,000 hours; therefore, no other replacement for this expenditure for at least 5 years.

One Tenant present in the hearing questioned the viability of the Landlord's opinion that a change as such in lighting would enhance security. Another Tenant questioned the Landlord's lack of proof of actual energy efficiency, which the Landlord stated was impossible to provide from an electricity service provider's regular invoices.

Analysis

The *Residential Tenancy Regulation* (the "*Regulation*"), s. 23.1 sets out the framework for determining if a landlord can impose an additional rent increase. This is exclusively focused on eligible capital expenditures.

Statutory Framework

In my determination on eligibility, I must consider the following:

- whether a landlord made an application for an additional rent increase within the previous 18 months;
- the number of specified dwelling units in the residential property;
- the amount of capital expenditure;
- whether the work was an *eligible* capital expenditure, specifically:
    - to repair, replace, or install a major system or a component of a major system; and
    - undertaken:
        - to comply with health, safety, and housing standards;
        - because the system/component was either:
            - close to the end of its' useful life, or
            - failed, malfunctioning, or inoperative

- to achieve either:
  - a reduction in energy use or greenhouse gas emissions; or
  - an improvement in security at the residential property

and

- the capital expenditure was incurred less than 18 months prior to the making of the landlord's application for an additional rent increase

and

- the capital expenditure is not expected to be incurred again within 5 years.

The Tenant bears the onus to show that capital expenditures are not eligible, for either:

- repairs or replacement required because of inadequate repair or maintenance on the part of the landlord;

or

- the landlord was paid, or entitled to be paid, from another source.

Prior Application for Additional Rent Increase

In this case, there was no indication that the Landlord made a prior application, for any of their capital expenditures, for an additional rent increase within the previous 18 months.

Number of specified dwelling units

For the determination of the final amount of an additional rent increase, the *Regulation* s. 21.1(1) defines:

> "dwelling unit" means:
>
> (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.

I find there are 138 rental units, of which are 138 are eligible in the calculation of percentage rent increase. This is as set out on page 12 of the associated policy guideline. The focus of the legislation for this is a "specified dwelling unit" affected by an installation made, or repairs/replacement carried out in the property where the dwelling unit is located.

Eligibility and Amounts

For each of the Landlord's submitted expenditures listed above, I address whether each expenditure was *eligible*, and each expenditure *amount*. I also make findings on whether each expenditure will be incurred again within 5 years.

1. elevator replacement - $551,583.99

I find this was work undertaken to replace a major system, as defined in the *Regulation* s. 21.1(1).

I find the reason for the work was the replacement of a major system in order to maintain the residential property in a state of repair that complies with the health, safety, and housing standards. Additionally, this was a replacement of a major system that was past the end of its useful life. This is in line with the *Regulation* s. 21.1(4)(a)(i) and (ii).

The *Regulation* s. 23.1(4)(b) sets out that I must grant an application for the portion in question in which the Landlord establishes that "the capital expenditures were incurred in the 18-month period preceding the date on which the landlord makes the application."

The associated policy guideline addresses the 18-month requirement:

> A "capital expenditure" refers to the entire project of installing, repairing, or replacing a major system or major component as required or permitted . . . As such, 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.

Though payments began preceding the 18-month timeline, the legislation provides for recovery of capital expenditures in this way, and the timeline was driven by the logistics of the length and engineering-driven detailed project completion.

For clarity on the issue of timing, the guideline provides the following:

> A capital expenditure can take more than 18 months to complete. As a result, costs associated with the project may be paid outside the 18-month period before the application date. For clarity, the capital expenditure will still be eligible for an additional rent increase in these situations as long as the final payment for the project was incurred in the 18-month period.

I find as fact that the Landlord made ongoing payments for this project, in advance of the 18-month period. This is clearly set out in the legislation and refined in meaning in the associated policy guideline. I grant full recoup of the capital expenditures associated with the elevator replacement for this reason. The interpretation of the 18-month period as reflective of the final project payment is established in the legislation and common knowledge in this type of scenario.

I find that a release of any funds from a holdback constitutes a payment from the Landlord to the contractor. The Tenant did not present convincing evidence otherwise. This does not constitute a funding for the Landlord through any other source. How a landlord budgets for these expenditures is not a consideration within the scope of the *Regulation*.

Given the nature of the work involved, I find this work will not reoccur, and there will be no expenditure incurred again within 5 years. This is with regard to the system itself, commonly given a useful life of 20 years.

In conclusion, I grant this portion of the Landlord's Application for the capital expenditure of $551,583.99.

2. <u>energy efficient lighting upgrade - $11,491.20</u>

The *Regulation* provides for "major system" installation/repairs/replacements – this is an electrical system, mechanical system, structural system, or similar system that is integral to the residential property or to providing services to tenants and occupants. These are "essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property."[3]

Moreover, installations/repairs/replacements will qualify for additional rent increase if the system has failed, malfunctioning, or inoperative, or close to or past its useful life.

[3] Policy Guideline 37C page 5

The Landlord made submissions on the replacement of lights with LEDs. The Landlord did not show with sufficient evidence or convincing submissions that these renovations quality because of failure to an existing system, or components thereof that were past their useful life.

I find the increased electrical efficiency, and proposed increase in security are marginal in scope, and do not stand as qualifying factors in this type of expenditure by the Landlord.

For these reasons, I dismiss this piece of the Landlord's Application for rent increase associated with this capital expenditure, without leave to reapply.

Outcome

The Landlord has proven all the necessary elements for the elevator replacement.

The Tenant did not meet the onus to establish, on a balance of probabilities, that this capital expenditures was ineligible, showing neither inadequate repair/maintenance on the Landlord's part, or that the Landlord was paid from some other source.

I grant the Landlord's Application for the additional rent increase, based on the eligible capital expenditure outlined above:

1. $551,583.99 for elevator replacement/modernization

This is pursuant to s.43(1)(b) of the *Act*, and s. 23.1(4) of the *Regulation* referred to above.

The *Regulation* s. 23.2 sets out the formula to be applied when calculating the amount of the additional rent increase as the amount of the eligible capital expenditures, divided by the number of dwelling units, divided by 120. In this case, I found there are 138 specified dwelling units, and that the amount of the eligible capital expenditure is $551,583.99.

Therefore, the Landlord has established the basis for an additional rent increase for capital expenditures of $33.31 ($551,583.99 ÷ 138 ÷ 120) per month, per affected tenancy. This is as per s. 23.2 of the *Regulation*. Note this amount may not exceed 3% of any 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.

Conclusion

I grant the Landlord's Application for an additional rent increase for the capital expenditure of $551,583.99.

I order the Landlord to serve all tenants with this Decision, in accordance with s. 88 of the *Act*. This must occur within two weeks of this Decision. I authorize the Landlord to serve each tenant by any means appropriate.

I make this decision on the authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: November 2, 2024

Residential Tenancy Branch