



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Housing

A matter regarding BARCLAY PROPERTIES LTD.  
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes      ARI-C

### Introduction

This hearing dealt with the Landlord's application under the *Residential Tenancy Act* ("Act") and the *Residential Tenancy Act Regulation* ("Regulation"), for an additional rent increase for capital expenditure of **\$793,503.22** under section 23.1 of the Regulation.

Agents of the Landlord, J.T, E.N., N.S., S.G., and L.N. ("Agents"), attended the three hearings. Eight Tenants, J.B., B.P., C.L., O.P., D.K., M.B., C.N., and J.M., attended the hearings, as well.

The Landlord's Agents testified that the expenditure consisted of:

Extensive work in the underground parking garage, due to the age of the building. Basically, it was removing concrete soffits, replacing rebar, repouring concrete, sanding.... We did this for the soffits and the floors, as well. We installed the membrane on the concrete, except where the slab was on grade.

Repairs of storm drains had to be installed, like the lead removed from the paint, because the membrane goes up four to six inches up the wall, so we had to have lead removed from the paint at the bottom of the wall. The work when it starts - the engineers do the work - then other things happen, like removal of some of the duct work. (collectively, the "**Work**")

### Issue(s) 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 testimony 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 Agents said that the building has 109 rental unit in it. However, they only served 79 of these units, because they thought the rent increase would not apply to any new tenants. As noted below, the definition of a specified dwelling unit is based on the rental unit, not the status of the respective tenants. Any rent increase is based on the number of specified dwelling units; however, the Landlord is free to apply any authorized rent increase to whomever they wish.

The Agents testified that the Landlord has not applied for an additional rent increase for capital expenditure against any of the tenants prior to this Application.

The Agents testified that the Landlord seeks to impose an additional rent increase for a capital expenditure incurred to pay for the Work done to the residential property's parkade.

The Agents testified the Work was done due to the age of the building. They said:

There's been an ongoing problem with leakage in underground parking. Many attempts were made to resolve it. In 2020, we brought in an engineer to take a look, and then the report suggested some repairs, and we moved forward with those repairs.

The engineers' evaluation was submitted into evidence, and the introductory remarks include:

At the request of [the Landlord], [the engineering company ("Engineers")] has completed a condition evaluation of the underground parking levels at [residential property address]. The scope of services was performed as outlined in our proposal dated July 03, 2020. The scope of services does not include review of the top surface of the plaza slab.

We understand [the Landlord's] intent is to undertake repairs at this structure. The purpose of this evaluation is to capture a recommended scope of work to be completed. Based on this, design documents may be prepared such that bids on a consistent scope of work may be solicited from qualified contractors.

The Tenant, A.F., submitted documentary evidence, which included the following:

While I believe some rent increase is likely justified based on the need for repairs to this building, I will argue that the claim made by [the Landlord] is excessive due to the maintenance practices followed over the years. A study conducted 30 years ago covering 62 similar structures shows significantly lower repair costs, and evidence-based results on actions to minimize long term costs.

. . .

The basic conclusion is that these structures require regular inspections by owners, along with periodic evaluations by experienced professionals, and prompt repair of any problems. An important observation was that after several years of deterioration the process can accelerate, and produce repaid changes that can even affect the safety of the structure. Effective management, and proper minor repairs done promptly can prevent this. .

[emphasis added]

The Tenant submitted and highlighted key points in this study or report. He noted that the report was produced in part by the Canadian Mortgage and Housing Corporation ("CMHC") is 311 pages long, and was published in 1991 ("Report"). A.F. states: "It produced robust results that are reflected in methods and standards in use today, with continued improvement in materials and knowledge."

The Abstract of the Report includes:

This report provides information aiming to assist engineers and owners to formulate the repair strategy and maintenance practices of existing garages built without adequate corrosion protection.... Section 1 is the main part of the report in which the problem of deterioration of parking garages is described. . . .

In the hearing, A.F. noted the Report, and he said:

Again, the [Report] was from 30 years ago – the majority of those structures had waterproofing at that time already. They say here there was no waterproofing protection on the concrete – that waterproofing slows the deterioration.

The Tenant noted the Engineers' report when he said:

[The Engineers] appear to have significant experience evaluating and

supervising the restoration of similar structures across Canada. Two of their associates are on the CSA Technical Committee on Parking Structures [2014], and associates publish in trade journals as well as conducting research.

A.F. said the Engineers state that they are: "...not aware of any past parkade evaluations". The Tenant said that over the telephone and in a meeting, the Landlord's Agent was asked if any evaluation or maintenance records were available, as well as how this was managed. A.F. said:

She stated that they had no records, and inspections amounted to the building manager or [the Agent], herself, walking the parkade. Regarding the importance of record keeping, I have been here three years and the current building manager is the third one in that time. To maintain knowledge of a building's condition over time demands recordkeeping.

I note that surface sealers, already being recommended in 1991, had never been applied according to [the Engineers]. .

[emphasis added]

I asked the Agent in the hearing about the Landlord's evidence of maintenance records for the parkade, and she said much the same as A.F. has pointed out from his same enquiries. The Agent said:

Yes, at the last hearing, Tenants brought up the lack of maintenance. I was tasked with finding maintenance records, but the only thing I could do was go to accounting to see what work had been done in the meantime. I phoned several property management companies – large and reputable – and I asked what kinds of maintenance records they had for underground parking. They had maintenance records kept for elevators, mechanical, electrical, but no maintenance records per say for underground parking. So, we do inspections.

I dug out these and filed a couple reports uploaded to site and served the Tenants. Then we called a meeting with Tenants, because we wanted to make the proceedings easier. There were a lot of questions about the [V.] invoice. I had a meeting to go over that invoice, and the evidence served for the maintenance on underground parking at the time.

There are no records of underground inspections – it's done on weekly walk-throughs done by different people. When you see problems, you call experts. I'm

not saying that there's no maintenance, but no records. And everyone is doing the same thing.

I asked the Agent about the life expectancy of the new storm drain installed and she said: "I'm not even sure the Engineers said anything about that. I don't know. Not for another 25 years, but I'm no expert."

In the Engineers' report it said:

A traffic deck coating system includes a base waterproofing layer, protected by a wear course layer. Installation histories indicate that a properly installed and well maintained traffic deck coating system can have an effective life span in excess of 15 years.

This report also said:

Currently the suspended structure is not protected by a moisture protection system, it is our expectation that if the installation of a membrane is left unaddressed, the extent of deterioration may continue to progress to the point of affecting the integrity of the suspended structure. As such, we recommend the structures' concrete delaminations be repaired and a traffic deck coating be installed to mitigate leakage and to slow the deterioration of other areas.

The Agent said that the suspended structure is on top of the underground parking. It is exterior, but is part of the structure of the building, she said.

Another Tenant, C.L., said the following in the hearing:

I understand that we've discussed this ongoing issue with leaking in the parkade going on for quite some time. I'm confused – the papers we got were more invoices. Great, but there's a difference between maintenance records and repair records. If it's been going on for quite some time, were there not professional inspections carried on, never investigated beyond 'I see a leak'? It strikes me with a building this expensive – I'm not seeing any of those - not just we fixed this. I see landscape removal and some labour quotes and some general repairs, but these are all fairly recent. How could there be no inspections for years, since 1970 – or paperwork lost?

A.F. stated:

I submitted the Report, because we're going back and forth on what the issue is. We speak about maintenance, and this Report shows how to optimally manage these over the years, so you don't get a large expense as we have here. Structural concrete was an issue longer than 50 years ago. But they need maintenance - there's rebar rusting, concrete falling - by the 1980s, research was done and this Report came out in 1991. If you search for the title, you bring up a link to it – a 300-page Report. I want to understand how these structures deteriorate, and give us a better idea if the application is an excessive amount of money the Tenants shouldn't have to pay.

A.F. went on to talk about how the Report addresses the need for continuous maintenance between the major repairs. He said it allows structure owners to have an optimum garage and lower lifecycle costs. He also said that the Report recommends owners keep a log book of maintenance actions taken by engineers – a record of performance.

Further, A.F. said the Report states that owners should retain a long-term basis of consulting engineers to recommend appropriate courses of action to eliminate visual or instrumental surveys – more than a superficial walk-through, basically.

I note that the Engineers said that they did a:

...chain drag survey by dragging a heavy chain across the slab surface to locate areas of delamination. When delaminated concrete is encountered, the pitch of the sound changes and a 'hollow' sound is heard. Field investigators use judgment to determine the extent of concrete delamination from corroded reinforcing.

The chain drag survey was performed on approximately 50% of the suspended parking slab surfaces with approximately 1,100 square feet of delaminated concrete detected. Based on the distribution of delaminated areas, we estimate approximately 2,200 square feet of delaminations throughout the entire suspended parking slab.

The Landlord did not provide any such maintenance records. Rather, the Agent said that the (ever-rotating) building managers who have limited, if any engineering training, do weekly walk-throughs.

Cost of Work from the Landlord's invoices:

Description	Date#	Amount
Main contractor labour and materials	November 29, 2021	\$637,600.16
Demotion of redundant duct work	June 15, 2021	\$ 1,182.14
Supply/install penthouse duct	June 15, 2021	\$ 4,293.45
Hazardous building materials assess.	April 28, 2021	\$ 1,125.00
180 ft storm drain	June 15, 2021	\$ 9,334.50
Engineers	July 30, 2021	\$ 83,500.00
Install new deck membrane...	October 25, <b>2016</b>	\$ 7,224.00
Epoxy pressure injection	May15, 2022	\$ 4,116.00
Landscape removal over parkade	January 31, 2013	\$ 14,279.14
Roof slab waterproofing	December 31, <b>2014</b>	\$ 12,357.92
	<b>Total</b>	<b>\$737,035.25</b>

However, this is \$56,467.97 less than the Landlord has requested in their Application.

Tenants disputed the cost of the Work, noting that “The Nov. 1 dollar amounts claimed were roughly \$50,000.00 more than what the invoices provided on March 25, after the interim decision was made, supported”.

Further, in describing the Report, A.F. stated:

If we look at the study from [the Report], on page 4 the repair costs for 40 garages are given. The average cost of repair was \$287,000.00 in 1990 dollars. These garages were approximately 3.7 times the size of [the residential property] garage and plaza surface area. Adjusting for this size difference and inflation we get a cost of \$155,000.00 for a [residential property] size.

The average cost to repair the 40 garages was about \$6 per square foot [converting the \$33.46 per meter and inflation adjusting]. Applying this amount to [the residential property] produces an estimate of \$237,000.00. These are approximate numbers to avoid going into the minutia of the data tables.

The cost to repair [the residential property], based on the numbers provided on June 16 was \$739,000.00.

The parkades study is 13 year old. [The residential property] is 50 years old. But note Figure 4 on page 20 of the [Report], and the conclusions drawn from the study. Deterioration begins slowly, but then accelerates unless it is stopped, generally by inexpensive repairs along with protective waterproofing. If a structure is kept in good repair, it can stay close to that upper line, avoiding the critical limit, and thus costly repairs at 10 or 15 year intervals. The net effect being lower overall cost, and a safer building.

The structures studied were mostly in Eastern Canada, and exposed to greater temperature extremes and salts than [the residential property], producing greater potential for deterioration.

[The Landlord's] parkade is lightly used, half the parking stalls are empty, and this is the most walkable area in Canada, with bike routes nearby.

[The residential property] is a smaller and less challenging structure to maintain.

...

In this case, the extent of the repairs, cost, safety issues, and the lack of any records of past evaluations and maintenance suggest that a high enough standard of care was not followed. I believe a substantial reduction in the rent increase, of the order suggested by the [Report] is called for.

In the Executive Summary of the Report, it states:

... The present study was initiated by the private sector, the Canadian Institute of Public Real Estate Company (CIPREC), in 1987 to collect information that will be useful to engineers and owners in the selection repair strategy most appropriate for a given garage under consideration.

Canada Mortgage and Housing Corporation, Ministry of Housing of the Province of Ontario, National Research Council of Canada, Public Works Canada joined the project at the invitation of CIPREC and provided technical and financial assistance.

The parties agreed that the Landlord has not imposed an additional rent increase pursuant to sections 23 or 23.1 of the Regulations in the last 18 months.



## Analysis

### 1. Statutory Framework

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.

## 2. Prior Application for Additional Rent Increase

This is the first additional rent increase applied for by the Landlord for this residential property.

## 3. Number of Specified Dwelling Units

Section 23.1(1) of the Act 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.

According to the Landlord's representative, there are 109 rental units in this building, all of which I find are affected by the capital expenditures. I find that there are 109 specified dwelling units in the residential property. The Landlord has proposed that only 79 of these units are specified dwelling units, because the respective tenants were new and not due for a rent increase yet. However, the type of unit is determined by its use, and not by how long the respective tenant has lived there.

4. Amount of Capital Expenditure

The Landlord applied for an additional rent increase based on a capital expenditure of \$793,503.22. However, the invoices provided by the Agents add up to \$749,606.09 or \$43,897.13 less than the amount requested. The Landlord did not provide a monetary order worksheet adding up the totals, which I find contributed to this confusion.

5. 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 a number of factors, which I will address consecutively:

a. Type of Capital Expenditure

The Work amounted to upgrades to the buildings' parkade and the Agents referred to it as a common area that serves all tenants, as does a roof of a building. I find I agree that this is a common area. I find that a parkade of a multistory structure such as this amounts to a significant component, as defined by the Regulation.

b. Reason for Capital Expenditure

In the hearing, the Agent explained the reason for the capital expenditure was because of ongoing problems with leakage, despite "many attempts to resolve it". I also conclude from the Tenants' evidence in the Report and the Agent's testimony, that the garage was close to the end of its useful life, as indicated by its ongoing leakage and inadequate or non-existent waterproofing membrane.

c. Timing of Capital Expenditure

I accept the Landlord's uncontroverted evidence that the first payment for the work was incurred in mid-February 2021, and the final payment was incurred in November 2021. Both of these dates are within 18 months of the Landlord making this application in October 2021.

d. Life expectancy of the Capital Expenditure

The Agent said that she did not know the answer to this, although in the Landlord's Engineers' report it said it should be in excess of 15 years, if well maintained. The evidence before me indicates that the Landlord had no maintenance records for this structure and relied on building managers to investigate the structure for signs of

damage. There was no indication that regular maintenance, such as chain dragging to locate areas of delamination were done in the structure's 50 year history, until the Engineer was brought in. As such, I infer that the Landlord is not concerned about ongoing maintenance beyond non-professionals doing weekly walk-throughs.

While I find it more likely than not that the Work will have a life expectancy of the components replaced and repaired exceeding five years, there is no evidence before me from which to conclude that it will be as much as 15 years, given the Landlord's means of inspection and maintenance.

However, for the above-stated reasons, I find that the capital expenditure incurred to undertake the Work is an eligible capital expenditure, as defined by the Regulation.

#### 6. Tenants' Rebuttals

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.

The Tenants addressed the Landlord's maintenance practices, or lack thereof, and I find that the absence of any maintenance records, which were requested of the Landlord, indicates that the Tenants are correct in questioning this aspect of the Landlord's Application. Further, the Agent said: "There are no records of underground inspections – it's done on weekly walk-throughs done by different people".

#### 7. Outcome

The Landlord unsuccessful. While the Landlord proved the elements required in order to be able to impose an additional rent increase for capital expenditure. I find that the Tenants have provided sufficient evidence to prove on a balance of probabilities that the Landlord has failed to maintain the structure sufficiently in order to keep maintenance costs down. I find that the Tenants should not be responsible for paying for an excessive repair cost, when it was more likely than not the Landlord's deficient maintenance practices that contributed to the state of the structure. Despite a detailed, well researched Report that was made available to owners of buildings with parking

garages, the structure did not even have a waterproofing membrane when the Work was started.

Accordingly, I dismiss the Landlord's Application for an additional rent increase for capital expenditures, without leave to reapply.

### **Conclusion**

The Landlord is unsuccessful in their Application, because the Tenants discharged their evidentiary burden to prove that the cost of the Work was due to the Landlord's insufficient inspections and maintenance on an ongoing basis.

I **Order** the Landlord to serve the respondent Tenants with a copy of this Decision in accordance with section 88 of the Act.

Although this Decision has been rendered more than 30 days after the conclusion of the proceedings, section 77 (2) of the Act states that the Director does not lose authority in a dispute resolution proceeding, nor is the validity of a Decision affected, if a Decision is given after the 30-day period set out in subsection (1)(d).

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

Dated: April 28, 2023

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Residential Tenancy Branch