



Date Issued: December 18, 2023
Docket: LR23079
Type: Rental Appeal

INDEXED AS: Cheryl Taylor v. Tenants of 12 & 14 Cheryl Crescent, Warren Grove, PEI
Order No: LR23-80

BETWEEN:

Cheryl Taylor and Gary Taylor

Appellant

AND:

Tenants of 12 & 14 Cheryl Crescent, Warren Grove, PEI

Respondents

ORDER

Panel Members:

J. Scott MacKenzie, Chair and CEO
Kerri Carpenter, Commissioner
Murray MacPherson, Commissioner

1. INTRODUCTION

1. This appeal was heard by the Commission on October 17, 2023, and asks the Commission to determine whether the Residential Tenancy Office (the “Rental Office” or “Director”) erred in determining the Landlords’ request for an additional rent increase.

2. BACKGROUND

2. On July 12, 2023, Cheryl and Gary Taylor (the “Landlords”) filed with the Rental Office an Application to Request Additional Rent Increase (the “Application”) for a side-by-side duplex located at 12 & 14 Cheryl Crescent, Warren Grove, PEI (the “Rental Property”). The Application indicated the current rents, proposed rents and effective dates for the rental units as follows:

Unit	Current Rent	Proposed Rent	Effective Date
12	\$650.00	\$1,050.00	October 1, 2023
14	\$650.00	\$1,050.00	October 1, 2023

3. The Application requested a proposed rent increase that would exceed the allowable percentage established by section 49(4) of the *Residential Tenancy Act*, RSPEI 1988, c. R-13.11 (the “Act”) for 2023, which was 0%.
4. On August 21, 2023, the Landlords filed with the Director a Landlord Statement of Income and Expenses (the “Statement”).
5. In Order LD23-423 the Director allowed the Application, in part, and permitted a greater than allowable rent increase of 3.0%, with the Director finding this was the maximum amount permitted pursuant to subsection 50(7) of the Act. The maximum allowable rent for the Premises was ordered as follows:

Unit	Rent	Effective Date
12	\$669.50	October 1, 2023
14	\$669.50	October 1, 2023

6. The Landlords filed an appeal with the Commission on September 20, 2023.
7. The Commission heard the appeal on October 17, 2023, by way of telephone conference call. The Landlords both participated in the hearing. The Tenants, Joan and Harvey Leyte and Linda Tourout, all participated.
8. On November 10, 2023, the Commission requested additional information and evidence from the Landlords to assist in determining their appeal and request for additional rent increase. The Commission requested more detailed information and evidence respecting the value of the Landlords’ capital investment in the property, as the documents filed before the Director and the Commission claimed a value which seemed to be low. The

Commission also requested further information regarding the claimed maintenance expenses.

9. The Landlords provided this information on November 17, 2023. The Tenants were sent the information and given until December 1, 2023, to comment. No further submissions were received from the Tenants.

3. DISPOSITION

10. The Commission allows the appeal, in part.
11. As will be discussed in greater detail below, the Commission agrees with the finding of the Director with respect to the application of subsection 50(5) to this Application. However, the Commission finds that the Director failed to consider the application of clause 50(6)(c) and the Director's discretion to phase in an additional rent increase over a period of time. The Commission has considered clause 50(6)(c) in its analysis and varies the maximum allowable rent increase and orders it to be phased in over a period of time, as detailed below.

4. ANALYSIS

A. Evidence and Submissions of the Parties

12. The Landlord appealed Order LD23-423 relying on subsection 50(5) of the *Residential Tenancy Act*. Their primary grounds of appeal were that rents for these units have not increased in over twenty-three (23) years, they are operating a substantial loss, and the rent is not at current market value.
13. At the hearing, the Landlords testified that the Rental Property that they inherited from an Estate require significant maintenance and repair work. They testified that some updates have already been completed by them, including some new appliances and new smoke alarms and other fire safety upgrades. The Rental Property has also needed some plumbing and heating maintenance. The Landlords testified that in the very near future the Rental Property will need new a roof, windows and oil tanks, and that the decks and weeping tiles will need to be replaced. This is not an exhaustive list of the repairs and maintenance required.
14. The Landlords' position is that the 3% rent increase granted by the Rental Office was not reasonable. They inherited this Rental Property and are operating them at a loss because of the maintenance and repair costs they have incurred and will need to incur into the future.
15. The Landlords testified that they sought financing to undertake the required work on the Rental Property and that they have been refused bank financing because of the low rents and because the rental business is operating at a loss. They expressed that they do not want to sell the Rental Property, but that without a rent increase they may have to, as they can not continue to operate the Rental Property at a loss and are unable to get financing to do the necessary repairs.

16. The Commission notes that the Landlords claimed that they are asking for special consideration under the *Act* in unique circumstances. They say they want to maintain these properties but they need rent increases in order to do that.
17. The Tenants' submissions and testimony can generally be summarized as acknowledging that some rent increase is warranted, but that the requested increase of \$400 is too much and will be a hardship. They testified that they all moved in on the same weekend in August 2000, and have lived in the properties since that time without any rent increases – a period of twenty-three years. Both sets of Tenants submitted that they have provided some general upkeep and maintenance work to the properties over the years.

B. Jurisdiction and Authority of the Commission

18. As a preliminary comment to the analysis that follows, the Commission wishes to reiterate some remarks we made at the hearing.
19. The *Residential Tenancy Act* is legislation developed by Government policy-makers and passed by the Legislative Assembly of Prince Edward Island. Both the Commission and the Rental Office are administrative bodies created by statute and authorized by the *Residential Tenancy Act* to carry out certain functions. Therefore, when the Rental Office and then the Commission are asked to decide an application for an additional rent increase, that decision must be made in accordance with the provisions of the legislation approved by the law-makers of the province. The Commission, as an administrative tribunal, has neither the authority nor discretion to change the *Act* or suspend its application to certain applicants on the basis of extenuating circumstances.
20. While the Commission understands and appreciates the position of the Landlords and the circumstances they find themselves in, a legislative amendment would be required in order to allow the exact relief requested by the Appellant Landlords and that is beyond the jurisdiction of the Commission to grant.
21. With that in mind, the Commission makes the following findings.

C. Application of Subsection 50(5)

22. The Commission agrees with the conclusion of the Director in Order LD23-423 that subsection 50(5) does not apply to this matter because the Tenants have not voluntarily left the rental units.
23. Subsection 50(5) states:

Increases not applied in previous years

- (5) The Director may approve a rent increase that incorporates annual increases that were not applied to the rent charged for a rental unit where the landlord provides proof satisfactory to the Director that
 - (a) the rent remained unchanged for the specified years; and
 - (b) that the last tenant whose rent remained unchanged during the specified years left the rental unit voluntarily.

24. The *Act* is clear that the Director may incorporate annual permitted increases that were not applied to a rental unit where two conditions exist: (1) the rent remained unchanged for the specified years; **and** (2) the last tenant whose rent remained unchanged left the rental unit voluntarily. The ‘and’ in this list is conjunctive, meaning both conditions must be present in order for subsection 50(5) to be engaged.
25. In this case, the Commission is satisfied that the rent for these units has not increased since the Tenants moved in in August 2000. This is not disputed by either party. But, importantly, the parties similarly agree that these Tenants have continuously occupied the rental units since August 2000. In other words, the last tenant whose rent remained unchanged has not left the rental unit voluntarily. Therefore, subsection 50(5) is not engaged on these facts and the Commission cannot consider whether past annual increases can be incorporated into a rent increase.

D. Phased-in Rent Increases – Clause 50(6)(c) and Subsection 50(7)

26. Order LD23-423 awarded the Landlords a rent increase of 3%. Paragraph 16 comments that the Appellants requested an increase “far above the 3.0% cap” but that the Director would continue the analysis based on the maximum amount permitted. However, the Director did not consider the application of clause 50(6)(c) of the *Residential Tenancy Act* and its interplay with subsection 50(7) and whether an increase in excess of 3% could be granted and phased in over time.
27. On the Commission’s review, subsections 50(1), 50(3), 50(6) and 50(7) are all engaged when determining a request for additional rent increase greater than the annual allowable.
28. In particular, clause 50(6)(c) provides that, when considering an application for an additional increase, the Director may order an increase be phased in over a period of time. Subsection 50(7) goes on to clarify that where the Director orders an increase be phased in over a period of time, the amount of increase in rent in a calendar year shall not exceed 3% in addition to the allowable rent increase in that year.
29. Therefore, the Director has been granted discretion to allow an additional rent increase of more than 3%, so long as it is phased in over a period of time and each “phase” is not more than 3% per calendar year (in addition to the allowable rent increase in that year).
30. As noted above, Order LD23-423 makes no mention of whether the Landlords’ application was assessed with this in mind. In the Commission’s view, this was an error. Therefore, the paragraphs that follow will consider whether the Landlords are entitled to an increase greater than 3% that can be phased in over a period of time.

E. Application for Additional Rent Increase – Factors to Consider

31. Subsection 50(3) of the *Residential Tenancy Act* provides a list of factors the Director must consider in deciding whether to approve an application for an additional rent increase. Those factors are:

- (a) the rent history for the affected rental unit in the three years preceding the date of the application;

- (b) a change in operating expenses and capital expenditures in the three years preceding the date of the application that the Director considers relevant and reasonable;
- (c) the expectation of the landlord to have a reasonable return on the landlord's capital investment;
- (d) the expectation of the tenant that rent increases will remain within the annual guideline.

32. We note that subsection 50(4) also provides the Director with discretion to consider any other relevant factor and any factor prescribed by the regulations. Currently, the only factor prescribed in the regulations is one which permits the Director to consider that the purchase of a residential property should not require a rent increase within the first year in order to achieve a reasonable return on investment. The Commission has not considered this factor because this property was not purchased, but was devised by way of testamentary disposition.

F. Clause 50(3)(a)

33. As stated above, the rent for the affected rental units has not been increased for twenty-three years and remains at \$650.00 per month per unit.

G. Clause 50(3)(b)

34. In support of their Application and appeal, the Landlords completed a Form 10 Landlord Statement of Income and Expenses.¹ At the request of the Commission after the appeal hearing, the Landlords also provided to the Commission some more detailed information and evidence to support their operating expenses and value of investment in the property.

35. The Commission accepts the Landlords have incurred the following expenses for 2023 as submitted on their Form 10:

- (i) **Sewer charges:** \$2,185/year

The Landlord claims this amount for the cost of annual sewer septic maintenance for both 12 and 14 Cheryle Crescent.

- (ii) **Property insurance:** \$897.75/year

This amount is slightly increased over the amount paid in 2022, which was claimed as \$488.

- (iii) **Provincial property taxes:** \$4680.22/year

This amount is increased over the amount paid in 2022, which was claimed as \$3,410.52.

¹ We note that the Landlords provided an updated Form 10 to the Commission to support their appeal of Director's Order LD23-423. Some of the expenses claimed differ from those submitted to the Rental Office. In this Order, we will refer to the income and expenses claimed by the Landlords on the updated Form 10 and in response to the request for additional information by the Commission.

(iv) **Maintenance expenses:** \$3,965.58

Subsection 1(b) of the *Residential Tenancy Act Regulations* defines maintenance as including repairs to plumbing, electrical or heating systems, appliances and minor structural repairs. The Commission accepts that over the last year the Landlords have incurred maintenance expenses for plumbing and heating repairs, appliance servicing, and other minor repairs in the amounts submitted by the Landlords.

(v) **Capital expenditures:** \$383.41

The Commission largely agrees with the findings of the Director with respect to capital expenditures, but slightly varies the accepted amount.

Subsection 5(a) of the *Residential Tenancy Act Regulations* defines capital expenditures as those expenditures for replacement of plumbing, electrical or heating systems or appliances, and major structural repairs.

The Commission agrees with the Director that the definition does not contemplate upcoming or potential, quoted expenditures and, therefore, the Commission has similarly disallowed the capital expenditures claimed for repairs that have not yet been carried out, including replacing the roofs, decks, weeping tiles, and other major repairs.

On this basis, the Commission accepts that the Landlords have incurred capital expenditures of \$3,834.10 to replace some appliances.

The Commission further agrees it is reasonable that the expense of capital expenditures should be, in effect, financed over a reasonable period of time in relation to the life expectancy of the item. The Commission accepts that 10 years is a reasonable life expectancy for kitchen appliances.

Based on the above, the Commission accepts that the Landlords have actually incurred capital expenditures of \$3,834.10. When divided by the expected life of 10 years, the annual capital expenditure expense becomes \$383.41.

36. Based on these amounts, the Commission accepts that there has been a modest increase in operating expenses/costs and capital expenditures over the three years preceding the date of the application. The Commission finds that the annual operating expenses therefore total \$12,111.96.

37. The Commission also notes that the Landlords have testified that many capital repairs are needed to the Premises. The Tenants corroborated much of this testimony. The annual expenses of \$12,111.96 do not account for prospective future capital repairs and it is noted that at such time as such expenses are incurred and appropriately amortized, there will be an increase in annual operating expenses, however, this Commission does not take such expenses into account in this Order.

H. Clause 50(3)(c)

38. Clause 50(3)(c) requires a consideration of the expectation of the landlord to have a reasonable return on the landlord's capital investment.
39. The Director accepted that the value of the Landlords' investment was \$64,976, on the basis of the Landlords' evidence as to the "value of the capital gains from the inheritance." The evidence before the Commission does not disclose how this number was arrived at, nor does the Director's Order include a clear explanation. The Form 10 the Landlords submitted to the Commission on the appeal stated the capital values of the capital investment in the property at \$58,695.
40. In the Commission's view, it was an error for the Director to accept the value of the investment as \$64,796. Given the size and age of the duplex, this number is clearly too low to appropriately reflect the value of the Rental Property.
41. Therefore, following the hearing the Commission requested further information from the Landlords regarding the value of the capital investment, and received more information and evidence from the Landlords as to the value of their capital investment.
42. As noted above, the Landlords inherited the properties from an Estate. The Landlords provided evidence from a Realtor who assessed the property as having a fair market value of \$261,800. The Realtor's assessment was based on recent MLS statistics, accounting for current deficiencies of the property. The Assessment was done for the purposes of setting the value of the deemed disposition from the Estate of the Landlord Cheryl Taylor's brother (the "Estate"), which conveyed the property to the Landlords. The value was accepted by Canada Revenue Agency as the value and capital gains taxes were assessed to the Estate accordingly under the *Income Tax Act (Canada)*. This means that going forward, for CRA purposes, the Taylors' adjusted cost base is \$261,800. As this value was accepted by Canada Revenue Agency for income tax purposes, the Commission accepts this assessment of the fair market value of the Rental Property and therefore the value of the capital investment.
43. Based on this, the Landlords' current return on their investment is:

Equity:	\$261,800
Net Income:	$\$15,600^2 - \$12,111.96^3 = \$3,488.04$
Current Annual Return:	1.3%

44. In previous orders of the Commission respecting additional rent increases under the former *Rental of Residential Property Act*, we used a guideline for a reasonable return on investment of between 4% and 7%, depending on the circumstances.

² Rental Income at current rents.

³ Operating Costs/Expenses and Capital Expenditures accepted in section G.

45. The Landlord has requested an increase to \$1,050 per month per unit. Such an increase amounts to a 5% Return on Investment (“ROI”) calculated as follows:

Annual rent (2 units x \$1,050 per month x 12 months):	\$25,200.00
Less Operating Expenses:	<u>(\$12,111.96)</u>
Net Income:	\$13,088.04
Return on Investment ($\$13,088.04/\$261,800 \times 100$):	5.00%

46. In previous Orders, the Commission has considered reasonable return on investment rates and has found them to be, in recent years, in the range of 4% to 7%. The Commission has used 7% as an appropriate ROI where the Landlord is relying on a recent actual purchase price or on the tax assessed value. A lower rate of 4% has been used when the Landlord is using a blend of the tax assessed value and an appraisal done for the Landlord’s benefit. In the present case, the Landlord has submitted an appraised value which was done for the Estate of the party that conveyed the property to the Landlord, and which was accepted for income tax capital gain purposes by Canada Revenue Agency. The Commission finds that this type of valuation is substantially equivalent to a recent purchase price and therefore finds that a ROI of up to 7% is reasonable.

47. The Landlords’ current ROI is only 1.3% and they have requested a rent increase that would yield a 5% ROI. The Commission agrees that the Landlord’s request is reasonable.

I. Clause 50(3)(d)

48. The new *RTA* requires a consideration of the expectation of the tenant(s) that rent increases will remain within the annual guideline. In 2023, the annual guideline increase was 0%⁴. In 2024, the annual guideline increase will be 3%.

49. In this case, the Tenants as acknowledged that the rent has not been increased for twenty-three years and that some rent increase is warranted, but that the increase requested by the Landlord is too much and will be a hardship. The Commission takes note that the current rent rate of \$650.00 per month for a half-duplex unit, with private driveways for each unit and significant greenspace (front, back and side yards), being located a short distance from Charlottetown, is certainly very low based upon other matters that have come before the Commission. The Landlords seek a rent rate of \$1,050 per month which, given the characteristics of the property, is still very reasonable.

50. While clause 50(3)(d) must be considered, in the circumstances, the Commission finds, in the context of this matter, that it does not outweigh the other factors to be considered when determining an appropriate rent increase.

⁴ *Residential Tenancy Act*, s. 49(4).

J. Weighing of the Factors and Approved Additional Rent Increase

51. Based on the above, the Commission agrees with the Director in Order LD23-423 that an additional rent increase, above the annual guideline, is warranted in this case.
52. In coming to this conclusion, the Commission is mindful that some information was presented by the Tenants which has been considered in support of not awarding the amount of increase requested. In particular, the Tenants state that the increase requested will cause a significant hardship and they will not be able to afford the rent rates.
53. The Commission has determined that there are numerous factors and evidence that weigh significantly in favour of the requested increase. In particular:
- i. There has been no rent increase to these rental units in over twenty-three years and the Tenants continue to pay \$650.00 per month for a side-by-side one level duplex unit with greenspace, and parking;
 - ii. The Landlords have demonstrated an increase in operating expenses/costs and capital expenditures in the last year, as well as the need for more capital investments in upcoming years;
 - iii. The Landlords are not able to get bank financing to undertake maintenance and repairs and capital improvements to the rental units, as they are obligated to do under the *Act*, due to the low rents;
 - iv. The current rent rates in comparison to operating expenses yield a return on investment of only 1.3%, much lower than the 4% to 7% guideline which the Commission has determined as reasonable. This calculation does not account for necessary capital improvements testified to by both the Landlords and the Tenants and if the Landlord proceeds to complete the necessary capital improvements without a rent increase, they will almost certainly be operating at a loss, even if the capital improvements are appropriately amortized; and
 - v. Even with the Director's allowable increase for 2024, and potential allowable increases in future years, it will be many years before the Landlords could possibly reach a reasonable return on investment of between 4% and 7%.
54. In the Commission's opinion, the factors in this case weigh heavily in favour of the Landlords' position. The Landlords should receive the requested rent increase of \$400.00 per month. However, due to the limits on rent increases set out in the *Act*, that increase must be phased in such that in any given year, the increase shall be no more than 3% of the previous years' rent (subsection 50(7)), not including the "allowable" increase as ordered by the Director from year to year (subsection 49(1)), which the Landlord is entitled to in addition to the "greater than allowable" increase awarded by this Order.
55. The Commission notes that Landlords are restricted to a maximum of one rent increase per year under the *Act*. As such, if the Landlord intends to implement the 3% increase permitted by the Director for 2024 (or any portion thereof), as well as the increase permitted under this Order, the Landlord must ensure the appropriate notice under

subsection 48(2) of the Act is given to the Tenants regarding the intention to implement the Director's allowable increase.

56. The Commission acknowledges that the rent increase Ordered herein is significant and as such will impact the Tenants. In arriving at this decision, the Commission has carefully weighed the interests of both the Landlord and the Tenant, and as set out in all of the foregoing, in this particular case, the factors simply weigh much more heavily in favour of the requested increase being necessary. If the Commission does not permit necessary increases which are justified, there is a genuine risk of a decline in the inventory of rental properties in this province.

57. The facts in this case bring to light significant shortcomings with the hard limits on the annual rent increases permissible under the Act. There are no provisions in the Act to allow the Director the discretion to consider special circumstances, such as this case where rents have not been increased for twenty-three years and the Landlords are unable to get financing from a bank because the rental business is considered not viable. This could result in Landlords not being able to carry out required maintenance and puts these rentals at risk of being taken off the market. The result is untenable. Obviously, this is not the goal of the Act. More, not less, rental units are desirable. The Commission recommends that Government review the Act and consider amendments to remedy these types of problems.

5. CONCLUSION

58. The Commission allows the appeal, in part. The Commission agrees with the Director in Order LD23-423 that an additional rent increase, above the annual guideline, is warranted in this case, but varies the maximum allowable rent increase and orders it to be phased in over a period of time, as detailed below.

IT IS ORDERED THAT

1. **The appeal is allowed, in part.**
2. **The maximum allowable monthly rent for the Residential Property is as follows:**

Unit	Current Rent	Future Years	Note regarding end date
12	\$650.00	previous year's rent + 3% of previous rent	When annual increases under this Order total \$400 per month, the Landlords may not implement more increases without a further Order of the Director.
14	\$650.00	+ increase per annual allowable guideline	

DATED at Charlottetown, Prince Edward Island, Monday, December 18, 2023.

BY THE COMMISSION:

(sgd. J. Scott MacKenzie)

J. Scott MacKenzie, K.C., Chair and CEO

(sgd. Kerri Carpenter)

Kerri Carpenter, Commissioner

(sgd. Murray MacPherson)

Murray MacPherson, Commissioner

NOTICE

Subsections 89 (9), (10) and (11) of the *Residential Tenancy Act* provides as follows:

89. (9) A landlord or tenant may, within 15 days of the decision of the Commission, appeal to the Court of Appeal in accordance with the *Island Regulatory and Appeals Commission Act* R.S.P.E.I. 1988, Cap. I-11, on a question of law only.

(10) Where the Commission has confirmed, reversed or varied an order of the Director, the landlord or tenant may file the order with the Supreme Court.

(11) Where an order is filed under subsection (10), it may be enforced as if it were an order of the Supreme Court.