



Date Issued: April 26, 2024
Docket: LR23090
Type: Rental Appeal

INDEXED AS: Cheryl Taylor v. Tenants of 36 & 38 Cheryl Crescent
Order No: LR24-22

BETWEEN:

Cheryl Taylor and Gary Taylor

Appellants

AND:

Tenants of 36 & 38 Cheryl Crescent, Warren Grove, PEI

Respondents

ORDER

Panel Members:

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

Compared and Certified a True Copy

(Sgd.) Michelle Walsh-Doucette

Commission Clerk

Island Regulatory and Appeals Commission

A. INTRODUCTION

1. This appeal was filed with the Commission on October 10, 2023, and appeals Order LD23-448 issued by the Director of Residential Tenancy on September 25, 2023. The Notice of Appeal 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.

B. 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 36 & 38 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
36	\$750.00	\$1,050.00	October 1, 2023
38	\$750.00	\$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 September 8, 2023, the Landlords filed with the Director a Landlord Statement of Income and Expenses (the “Statement”).
5. In Order LD23-448 the Director allowed the Application, in part, and permitted an additional 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
36	\$772.50	October 1, 2023
38	\$772.50	October 1, 2023

6. The Landlords filed an appeal with the Commission on October 10, 2023.
7. At that time, the Commission held that appeal in abeyance while the Commission considered another ongoing appeal (Docket LR23079) filed by the Landlords in respect of an application for an additional rent increase, based on similar grounds. On December 18, 2023, the Commission issued Order LR23-80 in Docket LR23079.
8. On January 8, 2024, the parties to this appeal were advised as to the outcome of Order LR23-80, and that this appeal (Docket LR23090) would move forward with a hearing in

writing, based on the evidence provided by the parties and any written submissions provided by them, per Rule 41 of the Commission's Rules of Practice and Procedure.

9. The Landlords were requested to provide additional information and evidence to assist in determining their appeal and request for additional rent increase, including more detailed information and evidence to support and substantiate the Form 10 Statement of Income and Expenses, and respecting the value of the Landlords' capital investment in the Rental Property. The Commission also requested further information regarding the claimed maintenance expenses. This information was provided to the Commission on January 15, 2024.
10. On January 19, 2024, the Tenants were sent the evidence package and given until January 31, 2024, to review and respond to the Landlord's evidence, and provide written submissions and their own evidence to support their position on appeal. The Tenants of 38 Cheryl Crescent provided a brief written submission in response, and the Landlords then provided a brief reply.

C. DISPOSITION

11. The Commission allows the appeal, in part.
12. In accordance with the reasons of the Commission in Order LR23-80, the Commission varies the maximum allowable rent increase and orders it to be phased in over a period of time, as detailed below.

D. ANALYSIS

A. Evidence and Submissions of the Parties

13. The Landlord appealed Order LD23-448 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 (20) years, they are operating at a substantial loss, and the rent is not at current market value.
14. The Landlords submitted that it is difficult to get mortgages to complete necessary repairs due to the current rental rates, and the resale value of the Rental Property is negatively impacted due to the low rents. The Landlords' evidence discloses that some significant capital expenditures, including new decks and doors, are required. Further, the documentary evidence disclosed that in May 2023, the Landlords' insurance company advised them that the roof of 36 & 38 Cheryl Crescent would need to be replaced by April 2024 in order for the insurance company to renew their insurance policy.
15. 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.
16. It is not disputed by the parties that the Tenants have occupied the rental units for quite some time. Documentary evidence discloses that the Tenant of 36 Cheryl Crescent has

been a tenant since 1991, while the Tenant at 38 Cheryl Crescent has lived there since 2017.

17. The Tenants' position before the Director was generally summarized as understanding that a rent increase is needed, but arguing that the amount requested is a big increase at one time. The Tenants of 38 Cheryl Crescent further provided a submission that they are still waiting for a new back door to replace the one they have that blows open.

B. Jurisdiction and Authority of the Commission

18. As a preliminary comment to the analysis that follows, the Commission wishes to reiterate the remarks made in Order LR23-80.
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. As held in Order LR23-80, the Commission agrees with the conclusion of the Director in Order LD23-448 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 for over twenty years. But, importantly, the parties similarly agree that these Tenants have continuously occupied the rental units since 1991 and 2017. In other words, the last tenant whose rent remained unchanged has not left the rental unit voluntarily and a new tenant has not moved in since the *Residential Tenancy Act* was proclaimed. 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 LD23-448 awarded the Landlords a rent increase of 3%. Paragraph 18 comments that the Director “can only award a rent increase not exceeding 3.0%” pursuant to subsection 50(7). 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. As was outlined in the Commission’s Order LR23-80, 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 LD23-448 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 over twenty years and remains at \$750.00 per month for both 36 and 38 Cheryl Crescent.

G. Clause 50(3)(b)

34. In support of their appeal, and at the request of the Commission, the Landlords completed a Form 10 Landlord Statement of Income and Expenses and provided a spreadsheet of expenses. 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: ¹

- (i) **Sewer charges:** \$1,092.50/year

The Landlord claims this amount for the cost of annual sewer septic maintenance for both 36 and 38 Cheryl Crescent.

- (ii) **Property insurance:** \$1,556.15/year

This amount is increased over the amount paid in 2022, which was claimed as \$403.

- (iii) **Provincial property taxes:** \$4,108.28/year

This amount is increased over the amount paid in 2022, which was claimed as \$2,750.64.

- (iv) **Maintenance expenses:** \$4,448.84

¹ We note that some of the expenses and capital expenditures claimed on the Form 10 differ from those listed in the spreadsheet. Where those amounts differed, the Commission preferred the evidence as listed on the spreadsheet as it was substantiated by specific dates, transactions, and descriptions.

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 repairs, minor repairs in bathrooms, heating/cooling maintenance, fire safety improvements, and other minor repairs in the amounts submitted by the Landlords.

(v) **Capital expenditures:** \$1,136.90

The Commission largely agrees with the findings of the Director with respect to capital expenditures, but 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 disallows capital expenditures claimed for repairs that have not yet been carried out.

On this basis, the Commission accepts that the Landlords have incurred capital expenditures to:

- replace a door = \$793.50;
- replace decking = \$4,576.42; and
- replace the roof = \$11,683.52.

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 15 years is a reasonable life expectancy for both storm doors and decks. The Commission further accepts 15 years is a reasonable life expectancy for new roofing.

Based on the above, the Commission accepts that the Landlords have actually incurred capital expenditures of \$17,053.44. When divided by the expected life of 15 years, the annual capital expenditure expense becomes \$1,136.90.

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 \$12,342.67.

37. The Commission also notes that the annual expenses 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 \$61,395.68, on the basis of the Landlords' evidence as to the "transfer value of the capital gains from the inheritance and the capital expenditures completed on the Residential Property." The evidence before the Commission does not disclose how this number was arrived at, nor does the Director's Order include a clear explanation.
40. In the Commission's view, it was an error for the Director to accept the value of the investment as \$61,395.68. 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, as outlined above, the Commission specifically requested information from the Landlords regarding the value of the capital investment.
42. 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 \$242,200. 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 \$242,200. 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. With respect to the value of the Landlords' capital investment, the Commission adds to the fair market value (\$242,200) the total amount of capital expenditures made on the property in 2023 (\$17,053.44) to more accurately reflect the value of the Landlords' investment.
44. Based on this, the Landlords' current return on their investment is:

Value of Landlord's Capital Investment: \$259,253

Net Income: $\$18,000^2 - \$12,342.67^3 = \$5,657.33$

Current Annual Return: **2.2%**

45. 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.

46. The Landlord has requested an increase to \$1,050 per month for both 36 and 38 Cheryl Crescent. Such an increase amounts to a 5.0% Return on Investment (“ROI”) calculated as follows:

Annual rent (($\$1,050 \times 2$) x 12 months):	\$25,200.00
Less Operating Expenses:	<u>(\$12,342.67)</u>
Net Income:	\$12,857.33
Return on Investment (($\$12,857.33/\$259,253$) x 100):	5.0%

47. 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 gains 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.

48. The Landlords’ current ROI is only 2.2% and they have requested a rent increase that would yield a 5.0% ROI. The Commission agrees that the Landlord’s request is reasonable.

I. Clause 50(3)(d)

49. 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 is 3%.

50. In this case, the evidence is that the rent for these units has not increased in over twenty years and the Tenants acknowledged that some rent increase is warranted, but submitted 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 \$750.00 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.

51. 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

52. Based on the above, the Commission agrees with the Director in Order LD23-448 that an additional rent increase, above the annual guideline, is warranted in this case.
53. 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.
54. 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 years and the Tenants continue to pay \$750.00 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 2.2%, much lower than the 4% to 7% guideline which the Commission has determined as reasonable. This calculation does not account for other capital improvements disclosed in the evidence, 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%.
55. In the Commission's opinion, the factors in this case weigh heavily in favour of the Landlords' position. The Landlords should receive the requested additional rent increases, being: \$300 for both 36 and 38 Cheryl Crescent. However, due to the limits on rent increases set out in the *Act*, the additional increase must be phased in over time, such that in any given year, the additional rent increase shall be no more than 3% of the previous years' rent (subsection 50(7)). The increases granted to the Landlords by this Order do not include the "allowable" increase, which is set by the Director each year (subsection 49(1)). The Landlords are entitled to the annual allowable increase in addition to the additional increase granted by this Order.
56. 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.

57. 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 Tenants, 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.

58. 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 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.

E. CONCLUSION

59. The Commission allows the appeal, in part. The Commission agrees with the Director in Order LD23-448 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	2024 Rent	Future Years	Note regarding end date
36	\$750.00	\$750.00 + 3% (annual allowable increase) and 3% (additional increase) (for a total of 6%) = \$795.00	previous year’s rent + % (annual allowable increase) and 3% (additional increase)	The Landlords may implement a 3% additional rent increase each year until the additional rent increases total \$300 per month, after which they may not implement more additional rent increases without a

				further Order of the Director.
38	\$750.00	<p>\$750.00 + 3% (annual allowable increase) and 3% (additional increase) (for a total of 6%) = \$795.00</p>	<p>previous year's rent + % (annual allowable increase) and 3% (additional increase)</p>	<p>The Landlords may implement a 3% additional rent increase each year until the additional rent increases total \$300 per month, after which they may not implement more additional rent increases without a further Order of the Director..</p>

DATED at Charlottetown, Prince Edward Island, April 26, 2024.

BY THE COMMISSION:

(sgd. J. Scott MacKenzie)

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

(sgd. Kerri Carpenter)

Kerri Carpenter, 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.