# How to Refute your Landlord's Application for an Above Guideline Rent Increase

This guide was created by members of the Akelius Tenants Network (the ATN is a group of concerned tenants living in buildings owned by Akelius Canada Ltd.), to help tenants or their legal representatives prepare to argue against their landlord's application for an Above Guideline Rent Increase, at the Landlord and Tenant Board in Ontario Canada.

This document should not be construed as legal advice. Neither the ATN nor the authors shall be held liable for any errors or omissions, nor for the outcome of anyone's hearing(s). This document is for educational purposes only.


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## Overview of this Document

The intent of this document is to prepare someone to refute an Above Guideline Rent Increase (AGRI) application at the various hearings at the landlord and tenant board.

1. In **Part I – The Three Documents that You Need to be Familiar With**, the reader is directed to certain documentation that they need to be familiar with.

2. Next, **Part II – About Arguments**, presents arguments that can be used to refute a landlord's application for an AGRI.

3. Finally, **Part III – Hearings at the Landlord and Tenant Board**, presents strategies and advice regarding hearings at the landlord and tenant board.

This document is intended to grow with time to include additional information and resources as we learn from future AGRIs – suggestions are welcome, and should be directed to the Akelius Tenants Network at this e-mail address: `akelius.tenants.network@gmail.com`.

## Part I – The Three Documents that You Need to be Familiar With

1 – The *Residential Tenancies Act 2006*, (frequently abbreviated to "RTA")

This document contains the actual laws pertaining to landlords and tenants. It is written in "legalese" and is quite lengthy, but you only have to read the short part of it regarding AGRIs, which is Section 126.

The Residential Tenancies Act is available online here:

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https://www.ontario.ca/laws/statute/06r17
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2 – *Ontario Regulation 516/06*, (frequently called "O.Reg 516/06")

In Ontario, in addition to laws there are "regulations". In general, the laws lay out the rules in broad strokes, while the O.Regs fill in the details. The O.Reg that applies to landlords and tenants is O.Reg 516/06, and the text is available online:

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https://www.canlii.org/en/on/laws/regu/o-reg-516-06/latest/o-reg-516-
06.html
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The O.Reg is really more of a reference book, full of legal minutiae and details. The part that you should focus on is Sections 18 – 34. Just like you don't "read" a dictionary, you look things up in it – similarly you should not feel that you have to read these sections of the O.Reg in great detail. Your goal is to skim over the relevant sections so that you are familiar with them, so that you know where to look up details in the O.Reg as necessary.

3 – The Interpretation Guideline

Probably the most enlightening document that you can read about AGRIs is called: "*Applications for Rent Increases Above the Guideline – Interpretation Guideline 14*". This document was created by the landlord and tenant board to assist their adjudicators in making correct and consistent decisions. So, by reading this document you are getting a peek at the decision-making process inside the mind of an adjudicator, which is invaluable! This document describes how the adjudicator is supposed to interpret the sections of the law (the RTA) and the regulations (O.Reg 516/06) that apply to above guideline rent increases, and outlines the facts that an adjudicator is supposed to consider when making their decision.

The interpretation guideline is available online here (or just google its title):

http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/14%20-%20Applications%20for%20Rent%20Increases%20above%20the%20Guideline.html

The interpretation guideline is not a long document – you should read the entire thing. As you read it you will notice references to a number of other documents. References to the "RTA" are referring to the Residential Tenancies Act, references to "O.Reg 516/06" refer to Ontario Regulation 516/06, and the other more cryptic references often starting with "TEL–" or "CanLII" refer to prior cases (discussed next).

These three documents, the Interpretation Guideline, the RTA, and the O.Reg, are easy enough to absorb, and the parts you need to be familiar with are not long. Read them!

**About Prior Cases**

In addition to the three documents listed above that you should be familiar with, the fourth kind of documentation that you will encounter is "prior cases". These documents describe the outcomes resulting from past AGRI cases at the landlord and tenant board, and they can be helpful in three ways: they allow you to use precedence, they can be used to test a particular argument that you might be considering using, and they are a good way to find additional arguments that you may not have thought of.

Basically, **precedence** works like this… if you find a favourable decision pertaining to an AGRI that is similar to yours, then you can say to the adjudicator "look, here's a similar case, and this is how that adjudicator ruled…" which puts pressure on the adjudicator to give you a similar ruling during your AGRI. Arguments that use legal precedence like this are among the strongest formal legal arguments that one can make because adjudicators strive to be consistent between cases.

Using prior cases to **test** legal arguments works like this – if you have an argument in mind but you are not sure whether it will be convincing to the adjudicator, you can search for other cases wherein someone tried that argument, and see what happened in those cases.

And lastly, if you can **find** a case that describes an application similar to yours that had a favourable outcome, then you can see the arguments that those tenants successfully used, which is a great way to find effective arguments.

Using prior cases for precedence at your hearing at the landlord and tenant board (LTB) is easy – all you have to do is print three copies of the case document to bring to the hearing (one for yourself, one for the landlord, and one for the LTB) and at the hearing, point out the part of the document that pertains to your situation.

There are five easy ways to find relevant cases:

1 – The Interpretation Guideline lists many prior cases, and it includes HTML links directly to the case documents, which makes it easy to track them down.

2 – This document! Below we list a number of arguments that you can use, including references to the relevant legal documentation.

3 – Ask! The members of the ATN, the advisors at the FMTA, and the tenant duty counsel at the landlord and tenant board, all may be able to point out applicable cases to you. But don't leave this to the last minute, you need to give people the necessary time to do their searches and respond to you.

4 – Google!

5 – CanLII (`https://www.canlii.org/en`) is a specialised database of prior cases. Their search facility is a little primitive, and search results may contain cases from other provinces, or tribunals other than the landlord and tenant board, but with a little effort you can find cases this way. Most of the cases listed in this document were found this way. (And if you find any good cases not listed below, then please inform us so that this document can be updated.)

Once you are familiar with the requisite documentation, you are ready to prepare your arguments. Arguments are the tools that you will use to attack the landlord's case and get your AGRI reduced.

## Part II – About Arguments

If you were to bump into a friend in the street and tell them about the above guideline rent increase (AGRI) that your building is facing, you would undoubtedly use two kinds of arguments to describe why the AGRI is unreasonable: **Strictly Formal Legal Arguments** would be things like… the landlord did not provide notice of the AGRI within the legally required 90 day period of time, or, the landlord has not provided all of the receipts documenting the renovation costs, etc., both of which have to do with the landlord not following various rules stipulated by the law. For arguments like this there are specific sections of the relevant legal documentation (the RTA and the O.Reg) that pertain to the situation. On the other hand, **Casual Arguments** would be things like… the landlord does not maintain or clean the building very well, or they fired our superintendent, or the renovations were very poorly done, etc., so why do they deserve to raise the rents? These arguments aren't about breaking the rules, they are about unfairness. Both kinds of argument will be useful to you when you have your hearing(s) at the landlord and tenant board, and there are strategies regarding how best to use both kinds of argument (discussed below). But, it is important to be clear about the difference between these two kinds of argument.

Casual arguments are easy to find – just ask the tenants what they were promised before the renovations began, what they remember about living through the renovations, what they think about the management of the contractors during the renovations, what they think about the quality of the workmanship, and whether the work was even necessary in the first place. A tenant meeting may be helpful in eliciting this sort of information – often one person's complaint will remind others of their own complaints. Listen to their stories, take notes, and ask for corroborating evidence (notices, photographs, e-mails from the landlord, etc.).

Legal arguments are harder to find because they must refer to specific sections of the various legal statutes. To simplify your search, several common legal arguments are listed below.

In either case, though, the strength of each argument depends to a large degree upon the evidence that you have to substantiate it. So as you compile your list of arguments, make sure to also collect pertinent documents, take photos, solicit pertinent old photos, collect e–mails, etc. Obviously, the kind of evidence you require will depend upon the specific nature of each argument. Photographs are great for proving that renovations did not need to be done, or that the repairs were of a low quality. Documents prove exactly what a building inspector or engineer said needed to be repaired. (And conversely, the lack of mention of a specific repair in an engineering report suggests that the

renovation did not need to be done.) Audio and video recordings of tenant meetings with the landlord's staff are great for proving what the tenants were promised, and that the tenants were not kept informed regarding the nature or progress of the renovations. And it is not unheard-of to find experts who are willing to refute outlandish claims that the landlord may make regarding the necessity or costs of certain capital projects. Use your imagination. Don't forget that you must bring three copies of all evidence to the hearing (one for you, one for the landlord, and one for the landlord and tenant board). There is a section of this document with more details regarding evidence (see below), the objective of this paragraph is just to get you thinking about how you can strengthen your arguments with evidence.

The process for finding and using formal legal arguments is not difficult. All you really have to do is read the arguments listed below and select the arguments that are relevant. Get organised – compile a list of your arguments coupled with any evidence that you have, so that they will be easy to find during the hearing. At the hearing you simply have to cite the section numbers of the relevant legal documents (which are provided below – so take note of them), and have at least 3 hardcopies of any photos, documents, or prior cases that you intend to use, so that you can hand them out as you go.

**Getting Started on the "Supporting Documentation"**

The landlord's supporting documentation consists of all of the receipts, quotes, reports, etc., that they plan to use to justify their AGRI application. The landlord is required to submit all of this paperwork to the landlord and tenant board when they file their application for the AGRI, and they are required by law to make this documentation available to the tenants. You can request a copy of the supporting documentation either from your landlord (contact your property manager), from their paralegal (if you know who that is), or directly from the landlord and tenant board. Some novice property managers may not know what it is that you are requesting – just be clear that it is their legal obligation to provide you with a copy of the official supporting documentation for the AGRI, or their AGRI application will be thrown out at the landlord and tenant board due to a lack of "disclosure", and you can cite section 126 (4) of the RTA, which stipulates that the landlord must give you a copy. The landlord will usually provide you with a copy of the supporting documentation for free, although they are allowed to charge a modest photocopying fee of a few dollars, and these days the evidence is usually provided in a digital format (such as a .pdf document, for example).

The easiest way to get started is to perform a little "pre-processing" of the supporting documentation, which will get you familiar with it, and will make

your life easier as you search through the list of arguments provided below. The first things you should check are described next.

**Read The Schedules** – the supporting documents always begin with some forms that the landlord (or their legal representative) has completed. In order, these forms are: the "L5 – Application for Rent Increase Above the Guideline", then Schedule 1 (which provides details regarding extraordinary increases in municipal taxes – if the landlord intends to make such a claim), and then Schedule 2 (which provides details regarding capital expenses, again, only if the landlord intends to make such a claim). If either of these schedules are blank, then that means that the landlord is NOT making that kind of claim. Following Schedule 2 you will find details concerning the tenants and the individual rents that they pay, and then a large collection of receipts.

It is important to note the kinds of costs the landlord is basing their application upon – increased municipal taxes, or capital expenses, or both…

**Schedule 1** – Extraordinary Increases in Municipal Taxes – If the AGRI application is based on "extraordinary increases" in the cost of municipal taxes, then look for documentation that proves that the landlord actually incurred this kind of increase. Also, check that their math is correct, the year–over–year increase in taxes must exceed 1.5 times the "guideline" rent increase amount. (For example, if the guideline rent increase amount is 1.8%, then the increase in taxes must be greater than 2.7%, because 1.8% × 1.5 = 2.7%.) Google to find the guideline rent increase amount for the year in which the application was filed, and check their math.

If the landlord's numbers do not conform to the requirements, then they are in contravention of O.Reg 516/06 section 28 (see that part of the O.Reg for the details).

**Schedule 2** – Capital Expenses – If your AGRI application is based on capital expenses, then schedule 2 will provide details concerning the justification that the landlord is using to validate their claims. Look for explanations like "to comply with section *X*" which refers to section *X* of the RTA, "to comply with the municipal code" which refers to the building code, or "as per City Inspector's Order" or "as per engineering report".

One will often hear landlords arguing that their renovations were required by engineers, or building inspectors, or mandated by city inspectors. This is an important part of their case because capital expenses can only be included in an AGRI if they were actually **necessary**, and a great way to show that an expense was necessary is to have an expert say so. And so, identifying missing

or incomplete documentation of this kind is a great way to find strong arguments that undermine the landlord's claims. So, search the rest of the supporting documentation to see if the documentation they mentioned in schedule 2 (orders from the city, engineering reports, maintenance logs, or whatever) has been included within the supporting documentation. Additionally, keep an eye open for whether these sorts of documents are mentioned in any of the receipts or invoices ("services rendered as per engineering report"). If the landlord fails to provide the original reports (signed by an engineer, etc.) then you can argue that the necessity of that specific renovation remains unproven, and thus that the relevant capital expense is ineligible. More will be said about all of this shortly, but the first step is to read every page of the supporting documentation to verify whether any such documents have (or have not) been included.

**Checking the Addition** – the supporting documentation contains a large number of receipts and "summary pages" that itemise and total the cost of the receipts. Go through the documentation and check the addition. The supporting documents typically consist of a couple hundred pages of receipts, so the thought of going through it verifying the numbers can be daunting, but the truth is, if you honestly work at it, you can complete this in an hour or two. Also, if any of your neighbours happens to be a bookkeeper or accountant, then they could probably complete this task pretty quickly (and they'll already be practiced at finding inconsistencies, duplicates, and errors).

In particular look for addition errors and upward–rounding of numbers (like adding $13.00 instead of $12.96). The landlord's application is supposed to be accurate, and if there is any rounding upwards then you should argue that their numbers are not valid, and when they try to brush–off your concerns (because the difference is small – it's only pennies-worth of rounding errors after all) you should keep pushing them. If they have rounding errors throughout their application, then tell them that you'd like to see the entire application thrown out because of systematic inaccuracies throughout their documentation. That won't happen – the whole thing will not get tossed out for such a minor error, but the idea is to use this fact as a psychological gambit – you can cast this issue as evidence of carelessness and systematic ill-treatment demonstrating that the landlord will do anything to unfairly inflate the costs, so as to jack up the rent.

Also look for duplicates, sometimes the same receipt will "accidentally" be included twice (or it might just be added twice to one of the subtotals). There is no specific statute to cite pertaining to this complaint – errors are errors, and you should point them out and argue that the associated expenses should be removed from the AGRI. Although these expenses will not likely be dropped from the AGRI (again, we aren't really expecting expenses to be removed just because of arithmetic errors) these sorts of problems do show carelessness on

the part of the landlord, which will make the landlord nervous and thus is to your advantage during the negotiations. Once you've made a suitable fuss, you should insist that new totals be calculated that incorporate the appropriate corrections.

Watch out for missing or incomplete accounting information – for example, if an invoice does not describe what it is for, then it should be removed from the application. Similarly, if an invoice is for "Purchase Order #42", then a copy of that purchase order had better be included in the supporting documentation, or you can argue that the expense has not been proven to have anything to do with the renovations.

Lastly, keep your eyes open for inconsistencies like a "second" invoice from a contractor being paid before the "first" invoice. This might be evidence that there was a problem with the project that caused the landlord to withhold their payment – demand an explanation, and if anything sounds fishy, argue that they did a poor job of managing the renovations, which is evidence that the quality of the renovations does not match the cost they are asking you to pay.

**Catalogue of Legal Arguments**

The idea here is to read the following list of potential legal arguments, and compare them against each of the claims that the landlord declared in Schedules 1 and 2 of their supporting documentation. It's easier than it sounds – just read the arguments below and decide which of the arguments apply to your situation. The arguments below include references to the appropriate laws, regulations, and prior cases. Scan the list looking for arguments that seem to apply, and then look up the reference to confirm that the argument applies to your situation. Also, consider what evidence could strengthen the argument, and obtain suitable evidence if possible.

You should aim to have at least one argument to counter each of the landlord's claims, but the more arguments that you have the better.

**Timing and Filing Requirements** – Most AGRI applications are based on capital expenses, which are the costs of performing certain renovations. Check the supporting documents to verify that each capital project was completed within the required timeframe – the AGRI application must have been filed with the LTB at least 90 days before the first tenant in your building receives their AGRI-affected rent increase. And, all of the renovations must have been completed and paid for within the preceding 18 months, before those 90 days.

For example, assume that the AGRI is being sought in the year 2018, and let's say that the earliest that any of your neighbours receives their annual rent increase is in February every year. This means that the AGRI documentation must have been filed with the landlord and tenant board earlier than November 1st 2017. And all of the renovations must have been completed or paid for in the 18 months before that, so in other words, they must have been completed between June 1st 2016, and October 31st to 2017.

Note also that there are no stipulations regarding the beginning of a renovation project. So if, for example, your balconies took three years to complete, so the very first balcony to have been renovated was finished two and a half years ago, then the expense is still eligible so long as the last balcony, or the final payment for the balcony project, occurred within those preceding 18 months.

The 90 day filing requirement appears in RTA section 126 (3). The 18 month project completion requirement appears in O. Reg. 516/06, section 26 (2).

**"Necessary" Capital Expenditures** – A strong counter-argument that applies to all repairs is that they were not necessary. The Residential Tenancies Act, Section 126 (8) states that "A capital expenditure to replace a system or thing is not an eligible capital expenditure … if the system or thing that was replaced did not require major repair or replacement". You can use this to counter many of their claims. As the landlord presents their expenses, you should repeatedly demand evidence that each was necessary. Remember, if they say a repair was performed in order to "bring something up to code", then demand to know which section of which code, and demand to see the actual text. It is unlikely that they will actually bring a copy of the building code to the hearing, which means that you can criticise them for failing to bring the supporting documentation. It is up to them to justify their expenses, so you just have to undermine their arguments and cast doubt. (Relevant case: TSL–62594–15 (Re), 2016 CanLII 71626 (ON LTB), railings were disallowed because of lack of proper documentation justifying the necessity of their replacement.)

You may find it useful to be proactive. If the landlord's schedule 2 indicates that a particular claim was made due to the municipal code or building code, it may be worth looking these up (google them) and see if you can find anything in the relevant codes that you can use as a counter–argument. For example, if your railings were to be replaced because the code required narrower gaps between the railings, then you can argue that the railings did not need to be replaced to bring them "up to code", instead, additional railings could have been welded between (in addition to) the existing ones, to reduce the gaps between them, which (1) would have been cheaper, and (2) means that the original railings did not actually need to be replaced.

Also, check your family photos, and ask your neighbours to check theirs – if you can find photos showing, for example, that the brickwork looked fine before the renovations, then you can argue that the expense is ineligible, and the photos would constitute your evidence.

**"Eligible" Capital Expenditures** – You should read through the regulations in sections 126 (7) and 126 (8) of the RTA, and Section 18 of O.Reg 516/06, that place various limitations on the eligibility of capital expenses, and then go through the expenses listed in the landlord's supporting documentation to confirm that they meet the requirements. To be eligible a renovation must have the following properties:

- It must be necessary – the renovated item needed to be repaired.
- The renovation must preserve the physical integrity of the building in a state of good repair (and in accordance with health, safety, and maintenance standards, etc.), and this includes the heating, mechanical, electrical, and ventilation systems.
- The expected benefit of the repair must be at least five years (O.Reg 516/06, section 18(1)).

Some renovations are NOT eligible:

- Renovations are not eligible if the system or thing that was repaired did not require major repair or replacement.
- Routine maintenance work is not eligible.
- Renovations that are substantially cosmetic are also not eligible.

So, in short, if the capital expense pertains to a repair that you can argue is trivial, or is a part of routine maintenance, or only improves the aesthetic appearance of some aspect of the building, then those repairs are not eligible. For example, if you already had a functioning version of something (locks, radiators, vents, just about anything), and they were replaced with a new version of the same thing, then you can argue that that repair was not necessary.

**Benefit to the Tenants** – Watch out for things that do not benefit the tenants – advertising signage, extra keys, new parking spaces for the landlord's staff or contractors, the creation of new offices, or retail spaces, etc., do not benefit the tenants and can be argued against. (Relevant cases: TSL–52521–14, 2015 CanLII 34313 (ON LTB), shed disallowed because of lack of benefit to tenants. Also TSL–62594–15 (Re), 2016 CanLII 71626 (ON LTB), although moving the landlord's office and moving the laundry room improved both, both were disallowed as the moves were unnecessary. Also note O.Reg 516/06 section 18 (1) which defines a capital expenditure as meaning: "an expenditure … the

expected benefit of which extends for at least five years". If the renovation does not constitute a benefit for the tenants, then the expense contravenes the requirement of having an expected benefit lasting for at least five years.)

**Renovations of an Aesthetic or Cosmetic Nature** – Section 18 of O. Reg. 516/06 requires that a capital expenditure cannot include "work that is substantially cosmetic in nature or is designed to enhance the level of prestige or luxury offered by a unit or residential complex" – things like new carpets or painting, or new lobby decorations, etc., can be countered by claiming that these are substantially cosmetic repairs.

**Related Expenses** – Keep your eyes open for expenses that do not directly have to do with the renovations, such as "licensing" costs, "specifications and tender" costs, "construction review services", etc. You can argue that these are not part of the construction and hence should be disallowed, or that they were unnecessary. (RTA Section 126 (7), repairs must be necessary.)

**"Common Sense" Unnecessary** – Watch out for waste expenses arising from poor organisation or poor management. For example, they replaced the main hallway carpet, but then it got ruined during the plumbing retrofit, and so the main carpet was replaced a second time. The first replacement of the carpet was clearly unnecessary. This sort of unnecessary wastage often happens with exterior landscaping and lawn resodding too – they redid the gardens, then tore them all up during the balcony reconstruction, and then redid the gardens again – the first instance of landscaping was unnecessary. Or they paid to move the fire alarm panel, only to replace the panel entirely – why not just install the new one in the new location? The prior relocation of the old panel was unnecessary. These are all examples of common sense unnecessary expenses. (RTA Section 126 (7), repairs must be necessary.)

**Demand All Documentation** – Be prepared for the landlord's legal representation to push back on arguments concerning eligibility. Eligibility represents the single largest weakness in every landlord's AGRI case, and so they will be prepared with many justifications, such as… that the repairs were required to bring something "up to code" (referring to the Ontario Building Code), or that the engineer's report says that the repairs were necessary, or that a city inspector or a building inspector ordered them to perform certain repairs. In all cases, demand to see the relevant documentation. Typically, to some degree, claims such as these are ruses designed to sound official and unassailable, and their weakness lies in their lack of documentation. Does the landlord really have a copy of the engineering report, and although it may recommend certain repairs, does it recommend all of the repairs that the

landlord is claiming? Landlords are typically reticent to show these sorts of reports because of what they lack – any renovation not explicitly listed in the report provides the tenants with an ineligibility argument. (Relevant case: TSL–62594–15 (Re), 2016 CanLII 71626 (ON LTB), railings were disallowed because of lack of proper documentation.)

**Combining Ineligible and Eligible Expenses** – Watch for the landlord to combine lesser-important or even ineligible repair costs with other valid costs, to increase the apparent validity of the less-justified expenses. For example, repairs to the "weather envelope" of the building are specifically mentioned in the O.Reg (see O.Reg 516/06 18 (1)) and hence are difficult for tenants to refute (if those repairs were in fact needed), but the repairs may be described as "exterior masonry and sealant, and railings". Well, the masonry and sealant comprise the weather envelope of the building, but the railings actually have nothing to do with this, and are only being combined with the other two items in an attempt to make the railing expenses seem more valid than they actually are. Another common example of this pertains to installing new "roof anchors" as a part of balcony or masonry repairs – the roof anchors themselves are not eligible if the old roof anchors did not need to be replaced, and roof anchors are not part of the building's weather envelope.

**Conservation, Accessibility, and Security** – Note that there are some important but limited exceptions to these eligibility rules – check section 126 (8) of the RTA and note that there are special provisions relating to persons living with disabilities, energy or water conservation, and building security. Keep your eyes open for combinations that attempt to make mundane expenses sound like they are part of a safety or conservation renovation, and beware of claims described in schedule 2 as being for "safety" that are poorly described or undocumented, or that have nothing to do with safety. Some examples are: emergency lights are eligible as a safety item, but replacing the batteries and bulbs for those lights? – ineligible, because replacing batteries and bulbs is routine maintenance. New intercom system – eligible, but fancy wooden moulded trim frame around the new intercom – ineligible because it is cosmetic and has nothing to do with safety. The old carpet was a safety hazard, and so the replacement carpet is a safety item? – nice try but no, carpets are aesthetic.

Also, safety items must still be necessary – unnecessary renovations are ineligible even if they have to do with a safety issue. (Relevant case: TNL–64931–14 (Re), 2016 CanLII 52821 (ON LTB), smoke and CO2 detector replacement disallowed because the replacement was unnecessary.)

**Affected Apartments** – Capital projects that have to do with structural elements of the building or sealing the interior of the building from the

elements (the so called “water envelope” of the building), including: roof repairs, foundation repairs, exterior brickwork, balcony slab repairs, and repairs to load-bearing internal structures, are generally deemed to be equally beneficial to all of the apartments in a building. This is regardless of the distance between the location of the repair and the position of any particular apartment within the building. So, if the roof gets replaced, all of the apartments are liable, not just the apartments on the top floor. Similarly, if the underground parking garage is renovated, then, as this is a structural element responsible for bearing the weight of the building, all apartments are considered to benefit from that renovation, not just the apartments whose tenants use the parking garage.

According to section 126 of the RTA, the landlord cannot apply for an AGRI for one building when the work was done at a different building. And, other than the repairs listed in the previous paragraph, the calculation of the rent increase amount ensures that the landlord can only apply for an AGRI for apartments that were actually affected by the renovations. See O.Reg 516.06, section 26 (6) 1, which describes how the rent increase of each apartment is to be calculated. The first step is to “determine which capital expenditures affect the unit”. The effect of this passage is to place a limit on the liability of tenants to pay for renovations that they do not generate a benefit from. So for example, installing a new radiator in one apartment does not justify seeking an AGRI in another apartment. (Relevant case: TNL–64931–14 (Re), 2016 CanLII 52821 (ON LTB), porch disallowed because it only benefits one tenant who was not a party to the AGRI.)

Note that the landlord can pick-and-choose which apartments they want to list on their AGRI application at their whim – they do not have to include all of the apartments that were affected by (or that received a benefit from) a capital expense or municipal tax increase. This is a means by which landlords like to play favourites with their tenants – hitting less desirable tenants with an AGRI, while sparing their favourite (higher rent paying) tenants the rent increase. Strategically it makes sense for a landlord to do this – if they can get the tenants fighting amongst themselves then that reduces the likelihood that the tenants will mount a capable defence against the AGRI. However, in terms of the calculation used to figure-out the size of the rent increase, it does not matter how many apartments are included in the AGRI application – see O.Reg 516.06, section 26 (6) 2. So for example, assume that some hypothetical building is facing an AGRI that would cause the all of the tenants to face a 5% rent increase. If half of the tenants are removed from the application, the remaining half of the tenants would still face only a 5% rent increase, NOT a 10% increase. So it doesn't actually matter that some tenants are exempted from the AGRI, because it doesn't cost the other tenants anything, and every tenant who is exempt represents dollars coming out of the landlord's budget instead of a hard-working tenant's pocket. So do not go in there arguing that the AGRI should apply to everyone “fairly”, because all you might accomplish is

getting the same rent increase applied to everyone instead of only a subset of the tenants – it will not get anyone removed from the AGRI, and it will not reduce the amount of the rent increase.

**Missing Deductions** – The costs that the landlord incurs must be reduced if they received any government assistance, insurance, or proceeds from resale or salvage remunerations. If no information has been provided regarding these things, and if you have evidence to suggest that there possibly was, or should have been, any of these kinds of savings, then you can make an argument that the expenses listed in the AGRI should be reduced.

For example, if the building's railings were replaced, but they were in relatively good condition, then the landlord should have sold the old railings as scrap metal, and reaped a reduction in their costs. The tenants should not be required to pay for the landlord's failure to take reasonable steps to reduce their costs. See O. Reg. 516/06 sections 22(1) 2i, and 24(1) (d). This argument can be quite strong if you have, for example, photographic evidence of the contractors carefully stacking and carting away used building materials such as copper piping or balcony railings - you can bet that somebody sold that metal for scrap.

**Heritage or Architectural Style** – Your landlord may argue that they "had to" purchase more expensive building materials to match the style of the existing building, or even that the Heritage Department intervened and ordered them to do so. There are two arguments that you can use here. First, you should demand to see proof – if the Heritage Department actually ordered them to do something, then there should be written documentation. If the landlord cannot produce the documentation, then argue that their heritage argument is unfounded. If they do produce the documentation, then read it carefully to see what exactly they were required to do. The second argument you can make is that heritage concerns pertain solely to an aesthetic aspect of the building, and so any costs to do with preserving the heritage or style of the building run afoul of section 18 of O. Reg. 516/06, which requires that capital expenditures must not include "work that is substantially cosmetic in nature or is designed to enhance the level of prestige or luxury offered by a unit or residential complex".

**Serious Breach of Health and Safety During Hearings** – Can you find any ongoing maintenance issues that you could argue are a serious health or safety concern? If you can find a problem like this then you can possibly argue to get the entire AGRI tossed out using RTA section 126 (12) "If the Board finds that the landlord has not completed items in work orders … related to a serious breach of health, safety, housing or maintenance standard … or is in serious breach of the landlord's obligations under subsection 20 (1) or section 161".

Also the following section, RTA section 126 (12.1), applies the same limitation to elevators (if your building has them). You need to have a pretty serious health or safety concern, and you need good evidence – for example, e-mails documenting that the landlord has known about the problem but failed to act, and photos of the problem. You can make this argument particularly solid by filing a complaint with your local Public Health Department so that they can issue an order to the landlord – but you don't have to do this, "a breach of the landlord's obligations…" is phrased quite widely, and can apply to a number of things. There is a nice description of this loophole in the *Interpretation Guideline* in the section titled "Responding to an AGI Application" near the end of the document. This argument is super–powerful if you have a maintenance problem that enables you to use it, because it does provide a means to get the entire AGRI thrown out.

Many of the arguments listed above can be made by simply pointing out the facts and citing the relevant cases or sections of the RTA or O.Reg. However, some arguments (for example, the argument that a particular renovation was unnecessary) are best made by presenting your own evidence, so that will be discussed next.

**Evidence**

Remember that evidence makes all arguments more convincing, and this cuts both ways: do not let the landlord get away with just saying things that they have not brought evidence to prove – always demand solid documentary evidence from them, and make a big fuss if they have not brought evidence with them to the hearing – argue that their statements are unfounded and possibly inaccurate, and that unsubstantiated expense claims are invalid. The converse of this, however, is that you should bring as much solid evidence as you can to justify your arguments, lest the same criticisms be levelled at you. Examples of evidence to inspire you:

- Hopefully you or one of your neighbours saved all of the notices from your landlord – these notices are dated, and hence can be used to document the dates, times, and durations over which particular renovations occurred. They may also prove certain points – for example if you can find a notice stating that "the front driveway will be unavailable for parking starting next week" that is dated after the notice informing you of the landscaping and lawn resodding, then together they constitute proof in the landlord's own words that that is what happened. These facts can be used to document the timeline and establish that, for example, the driveway paving (during which the landlord's contractors

ruined the lawn by parking on it) happened after the lawn was freshly resodded.

- Photographs are a strong form of documentary evidence – ask around to see who among your neighbours has photos that show how things were before, during, and after the renovations. You may also be able to find useful photographs of your building on Google Earth (or "street view") documenting how your building used to look, which can be useful in arguing that a renovation was not necessary.

- E-mails from your property manager or property administrator can also be used as evidence to document the timeline, the progress, complaints about breeches in security or quality of work, and tenant concerns before, during, and after, the renovations.

Also, remember to bring at least 3 copies of all documents to the hearing, one for yourself, one for the landlord, and one for the adjudicator or mediator.

Now that we have some arguments in mind, we turn our focus to the hearings themselves.

## Part III – Hearings at the Landlord and Tenant Board

A landlord's application for an Above Guideline Rent Increase is typically resolved during one or more hearings (face-to-face meetings) at the landlord and tenant board. There are two types of hearing: **Case Management Hearings** (CMHs), and **Merits Hearings** (MHs). The difference between them is this – the Case Management Hearing happens first, and is an attempt to mediate or negotiate between the landlord and the tenants to get both sides to agree to the size and terms of the rent increase. The landlord and tenant board provides specially trained mediators who impartially try to help both sides find a compromise. If the Case Management Hearing fails (if the two sides cannot agree on the terms, or if either side refuses to negotiate) then both sides meet again at a later date for a Merits Hearing, which adheres to a more court-room-like paradigm, during which an adjudicator from the landlord and tenant board evaluates the landlord's evidence, and taking consideration of the formal legal arguments presented by the tenants, imposes a decision upon the landlord and tenants.

Note that the hearings take completely different approaches to the problem of evaluating the landlord's AGRI application (mediation versus binding arbitration), and that there are different participants at the two kinds of hearing (the only participants in a CMH are the landlord and the tenants, aided by a mediator; at a MH, an adjudicator presides over the hearing in a court-room-like process). And consequently, the strategy you should use will depend upon which kind of hearing you are attending. You have a lot more leeway in the arguments and evidence that you can use at a CMH because the CMH is a negotiation; you have much less flexibility at a MH because the adjudicator is required to evaluate the landlord's expenses under a strict interpretation of the relevant law.

### Case Management Hearings (CMHs)

The case management hearing begins with a discussion phase, in which both sides debate the landlord's case for the AGRI, followed by a mediated negotiation phase, during which both sides are separated, and the mediator runs back and forth with offers and counter-offers, until either both sides agree to a figure and the terms of payment, or one of the sides walks away.

The point of the case management hearing is to attempt to get the landlord and tenants to negotiate and find a compromise. Consider the perspective of both sides for a moment… The tenants, after suffering through a lengthy, unpleasant, and inconvenient renovation project, are being asked by the

landlord to pay for those renovations, and so it is pretty safe to assume that the tenants are angry about being involved in the AGRI. But what about your opponent – what about the landlord? Realise that as they walk into the CMH hearing the landlord knows that they are going to face an unpleasant angry mob of tenants, and the landlord has the right to refuse to negotiate – they could opt to go straight to the merits hearing. So why do they do it? Why try to negotiate with the angry mob? Do they really expect the tenants to agree to pay any part of the AGRI? The reason that the landlord tries negotiation is that they are apprehensive about what might go badly for them at a merits hearing, because from time-to-time there have been AGRIs that have been completely tossed out. The landlord sees the CMH as an opportunity to mitigate their risk – they are presuming that the tenants will not be able to argue down all of the landlord's expenses, and ultimately the landlord would rather we awarded some of the expenses than risk getting none of them. The other thing that attracts landlords to CMHs is that sometimes the tenants will be disorganised and hence unable to mount any sort of defence; this is lucky for the landlord when it happens because if their claims are uncontested, then the landlord wins everything (even the things that an adjudicator would disallow at a merits hearing) without having to risk presenting their case in front of an adjudicator.

Because the case management hearing is a negotiation, your arguments are being presented to the landlord, not to the mediator (who is impartial and only facilitates the discussion), and (most importantly!) not to an adjudicator. Consequently you do not have to limit yourself to strictly formal legal arguments. Casual arguments can be quite effective at a CMH, because they invariably make the landlord look bad in front of the very group of tenants that they are trying to negotiate with, and this hurts their bargaining position. So, don't be afraid to use casual arguments at the CMH, and if the landlord counters that your arguments would not be accepted by an adjudicator, then rebut that at a CMH there is no adjudicator, and that if the landlord wants a deal then they have to come to an agreement with the angry mob of tenants sitting there in the room with them. The creativity of you and your neighbours is your only limit in preparing the casual arguments that you bring to the CMH. Be inventive. If some issue bothered you or any of your neighbours and you feel that it makes the landlord look bad, then add it to your list, document it as best as you can, and use it at the case management hearing. Put the pressure on them to satisfy you.

Remember, that you have two objectives – it is obviously best to totally refute the landlord's claims if you can, but if you cannot do this, then your goal is to cast doubt. For example, the landlord may claim that they had to "bring the staircase handrails up to code", in which case your job is to ask "which code?", and "specifically which section?" of that code, and if the landlord didn't bring along a copy of the code, then argue that their statements are unfounded because they didn't bring along the necessary supporting documentation. It is also effective to research the building code yourself a little bit (it's online –

google it, and then search using your browser for the relevant sections); if you think that you can argue that something was already "up to code" then bring along three copies of the relevant sections of the building code and keep asking them questions about it until they admit that they don't really know which part of the code applies, or why it had to be changed. Another way to cast doubt is to ask questions about why the repairs were done a certain way… they say that the front door needed to be enlarged to bring it up to the code, but did the entire front of the lobby have to be replaced just to make the front door larger? If the balcony railings needed to be replaced because there was too much space between the railings, then why didn't they just weld additional rails in-between the existing railings? Sow seeds of doubt. You do not have to just accept what the landlord says – object to their arguments, and appear sceptical of their explanations.

The important take-away here is that, during the CMH you have the right to object to any or all of the landlord's expense claims, and you should do so! The stronger and more persuasive your arguments are, the more nervous the landlord will be of what might happen if the AGRI goes to the merits hearing, and consequently the better a deal you will be offered. The landlord wants to resolve the AGRI, and they fear their AGRI getting thrown out or dramatically reduced, so your job is to convince the landlord that although you are indeed an angry group of tenants you are willing to negotiate, but you will only agree to a "good deal". Your objective is to push back on each of the landlord's arguments with the best arguments you can muster, and to not accept what the landlord tells you. Question everything, demand documentation from them supporting everything they claim, and make a big deal out of any documentation that they cannot provide or may have forgotten to bring to the hearing: demand to see the "building code" if they reference it, and to know which precise section justifies the capital project; demand to see the "engineering reports"; and make a fuss if they don't bring the "municipal orders" that they say ordered them to perform the repairs, etc.

**What to watch–out for during the Case Management Hearing**

The landlord's goal at the Case Management Hearing is to impress upon the tenants the necessity and costs of the renovations, but because the CMH is a negotiation, you should expect that the landlord will employ one or more time–honoured dirty "negotiation tactics" against you:

**Deal Fatigue** – The landlord's legal representative will speak at length going on and on about the most boring procedural or legal minutiae they can, and all the while the tenants are becoming increasingly bored, disengaged, and sleepy. Their hope is to wear everyone down, so that by the time the actual numbers are being discussed, the exhausted tenants will agree to the first crummy offer

they hear because they all just want to get out of there. Your counter-move is to arrange to take the entire day off of work (so you are not in a rush to leave), to eat something healthy before the hearing, and to bring coffee and chocolate to the hearing (or whatever your idea of energising food is), and happily wait them out. Remember, in a negotiation, the whole thing comes down to the last few minutes – it's really all about the final number and terms that you negotiate, so be prepared to keep yourself optimistic and energised right to the very end, and to encourage the other tenants as necessary.

**Threats and Warnings** – The landlord's legal representative will muster all the sincerity that they can, will look you right in the eye, and lie to your face about what would happen if the negotiation fails. They will assure you that your arguments are invalid because at a merits hearing the adjudicator won't agree with you ("that's just not how things work…"), and that they would basically win if you don't acquiesce. They are just trying to scare you and sow doubt in your mind. Your reply should be that you are all currently at a case management hearing not a merits hearing, so there is no adjudicator present, and so whether an adjudicator would agree or disagree is irrelevant. Tell them that the landlord would be wise to listen to your arguments because it will form the context within which the tenants will be negotiating once the discussion is over. Remember that you are negotiating with the landlord, not with an imaginary adjudicator.

**The Illusion of Control** – The landlord's team will act as if they are in control of the proceedings. For example, they will all be wearing power-suits, and they will behave as if they are doing the tenants a favour by participating. They will attempt to appear chummy with the mediator or adjudicator, to make it seem that they know what's going on and have more influence over the proceedings than you do. In their replies they will condescend to you, and attempt to always get the "last word" objecting to every argument that you make, using some trifling technicality, psychologically undermining you so you feel that none of your arguments have stuck. This is all just an illusion designed to make you weaken your bargaining position. Just realise that they are trying to manipulate the conversation to their advantage. Realise that a case management hearing is a meeting of equals for the purpose of finding consensus, and that they have no more control over the proceedings than you do, and that they don't get to dictate which of your arguments are valid. So make it clear that you do not accept their version of things, counter their counter–arguments, do not agree to their version of things, speak up and stand up for yourself, and repeat your arguments as necessary.

**Framing the Discussion** – is what happens when you present one of your arguments, and the landlord's legal representative doesn't directly contradict it,

instead they re-word and re-frame your argument so as to debarb it. So for example, say you have just argued that the hallway carpets were only a few years old and did not need to be replaced, and they counter that it sounds like you simply don't like the style (colour, pattern, etc.) of the new carpets. If you engage them in a discussion regarding the aesthetic failings of the new carpets (which indeed might be quite ugly) then they will have successfully shifted the discussion away from your valid argument (AGRIs for capital expenses only apply to repairs that actually needed to be done) to an invalid one (legally it is the landlord who gets to choose the style of the new carpets), and if you don't watch out for this trap then you'll find yourself arguing a losing battle about the details of interior decorating, instead of a valid legal argument about whether the original carpets needed to be replaced.

**Running out of Time** – Instead of refuting your arguments, they cut you off because you are suddenly "out of time". Beware of this one happening near the end of the discussion phase – if they are done presenting their expenses, but you still have a list of concerns to present, they might suddenly claim that the allocated time slot is running out so maybe things should switch from the discussion phase to negotiating Right Now! Don't let them get away with this – they do not have the right to control the proceedings any more than you do. The best way to avoid this is to counter their arguments as they make them from the start, so that you get the time you need, and so that they feel the pressure of being point-by-point rebutted from the start. Do not let the landlord present their entire case first with you rebutting only afterwards.

**Divide and Conquer** – It is to the advantage of the landlord to get the tenants arguing amongst themselves, because responding to offers during the negotiation phase requires cooperation and consensus among the tenants. The tenants' side will not be able to employ strategy, nor come up with reasonable counter-offers, etc., if they cannot work together. Further, on the day of the hearing the tenants are likely to be annoyed at having to take a day off work to listen to the arguments from their landlord that will ultimately increase their rent. The landlord knows this, and will exploit this if they can, so it is important to get the majority of tenants to somehow find a way to work as a group. Petty arguments between neighbours in your building need to stay in your building – they are a giant liability at the hearing. The landlord may make divisive statements, or attempt to create a situation wherein the group is split – for example, don't get into an argument about why some tenants are included in the AGRI, while others have been spared – this is not a productive area of discussion for the tenants. You need to be able to work together. However, be realistic, do not expect all of the tenants to be cooperative (there's always one jerk in every group, isn't there?) – vote using a show of hands to make decisions using "a majority" to carry the motion, so that angry, uncooperative, or stubborn tenants won't be able to adversely impede the group's progress.

**Helpful strategies for the Case Management Hearing**

**Ultimately this is a negotiation** – You are presenting your case to the landlord, not to the mediator (the mediator is supposed to remain impartial). So you should think of this as a "sales pitch". It's not necessarily about conforming tightly to the law, it's about letting the landlord know that you do not accept their claims. If you can convince them that you do not agree with their claims, then they are more likely to make you a better offer in order to get this resolved (remember – the landlord wants to get this resolved quickly with as little inconvenience to them as possible – they don't want to have to pay their paralegal and property manager to come to another hearing, any more than you want to take another day off of work to come a second time). So be firm, anticipate their claims (because you've looked at their supporting documentation) and have a plausible argument to refute each point.

**Decide in advance what you are willing to accept** – The first rule of successful negotiation is to have in mind a realistic figure before you start the negotiation phase, and don't get greedy along the way – if they offer you your figure then take it. Beware of getting overconfident and holding out for something too extreme, which may backfire if they walk away from the negotiations and the adjudicator takes their side during the subsequent merits hearing. Recognise the value to the tenants of a fair agreement – you won't have to come to another hearing on another day, and you won't get screwed by an angry adjudicator who is having a bad day, which is always a possibility at a merits hearing.

**Consider your first counter-offer carefully** – When the negotiation begins, the landlord will be moved out of the hearing room to somewhere else, and the mediator will speak with the landlord and will come back with an offer. Your options will be to accept what they propose, or to make your own counter-offer, which the mediator will take back to the landlord. The negotiation will proceed like this, with the mediator running offers and counter-offers back and forth.

Care must be taken in deciding what your counter-offers will be, especially the first counter-offer the tenants make to the landlord. The mistakes you should avoid are countering with an offer that is either too high or too low. Too low an offer will send the message that the landlord is unlikely to get a high-enough rent increase through negotiation, and they may walk out hoping to get a better rent increase from a merits hearing. But too high a counter-offer will limit how low a rent increase you can get, because you cannot backtrack on your offers.

So for example, suppose that the landlord's application is seeking a rent increase of about 5%. The first offer that the landlord makes to the tenants depends to a certain degree upon how strong a fight the tenants put up during the face-to-face portion of the hearing, but is typically between about a tenth to a fifth lower than the initial rent increase amount. So, in the case of our example, the landlord's first offer may fall between 4% and 4.5%, and for sake of argument let's assume 4.5%. The question is, what should your first counter-offer be? If you made a counter-offer of, say, 4%, then the final negotiated rent increase will be somewhere between 4% and 4.5%, even if the landlord would have been willing to agree to a rent increase below 4%. That 4% figure is too high, because it doesn't leave you much room to continue the negotiation (moving your offer upwards) and still get a good reduction in the rent increase. But instead, if your first bid had been lower, say 3%, then you've got lots of room to move upwards, showing the landlord how reasonable you are (so they don't walk away), and maybe arriving somewhere near to the middle of 3% and 4.5%, which is 3.75%. Not to say that the final result of negotiations always ends up at the mid-point between the two initial offers, but just that you have to leave yourself room to pull the landlord downward (if you can) to a lower rent increase for you.

At the same time, don't bid too low. Given the hypothetical numbers above, if the landlord's opening bid was 4.5%, then something like 2.5% is too low, because it risks making the landlord feel that the distance between the two bids is too large, causing them to walk away from the negotiations. They also know what we've said here – that a very low bid from you will make it harder for them to get the final rent increase raised up to the high level that they want. So it is better to give them a middle of the road offer to keep them interested in continuing with the negotiations, which is why 3% is a nice balanced counter-offer – it's not too low (it's higher than half of what the landlord's original application was for), and it's not too high (you still have room to increase your offer).

Choose your subsequent counter-offers so that progress is being made at each step (so that the offers from both sides are coming together), which will keep the landlord negotiating, but don't increase your bids too much – try to match the size of the steps that the landlord makes with their offers.

Lastly, be wary of unreasonable tenants! There is always at least one angry tenant in every group who is outspoken and who has completely unrealistic expectations ("I was inconvenienced – and so I want a *rent reduction*! Not an Increase!!"). While we can sympathise with these tenants, the landlord is not going to agree to these sorts of numbers, and the angry tenant may chase away the landlord and ultimately diminish everyone's chances of getting a good deal. If the negotiation fails and your AGRI goes on to the next kind of hearing (the merits hearing), then your likelihood of getting a decent deal may be reduced. These people can ruin it for everyone else, so do your best to convince your

neighbours of the value of a decent deal, and use a "show of hands" vote to outnumber the difficult tenants.

**Use "itemising" of the expenses to your advantage, not theirs** – Remember that the whole thing comes down to one number – your rent increase. Which really means that the most important part of the hearing is the last few minutes when you and your group are negotiating that single number. So although we do our best during the initial phase (where the tenants and the landlord are in the same room arguing back and forth) we recognise that, to a certain degree, the early part is really just for show, because the final outcome will be that single number rent increase.

However, you may find it useful to use the itemisation that the landlord provided in their supporting documentation, if that works to your advantage. Maybe, for example, the landlord's paperwork indicates that there were three capital projects – replacing the roof, some masonry work, and resurfacing the front driveway. In this case, you might be able to utilise their itemisation to your advantage – for example, you could say that the tenants are willing to pay for all of the costs related to the roof, but only three-quarters of the costs pertaining to the masonry, and none of the driveway. You'd have to have a reasonable rationalisation, which would depend upon the specifics of your AGRI, and your arguments, and your evidence. Given that itemisation, you would perform the calculations in the O.Reg 516/06, or ask your legal representative or the mediator to help you calculate how that would work out in terms of the final rent increase. So although your offer would specify a specific rent increase, you could include a rationalisation that would justify your offer. Some tenants have taken this a step further by writing a semi-formal "Ask Sheet" before the hearing, that is presented to the landlord during the hearing to try to frame the rent increase negotiation. This can be quite powerful, especially if you have solid arguments contering some of the landlord's expense claims.

But you should only do this if the itemisation actually helps your case. If you have already exchanged a couple of counter offers, and you have a gut feeling that you might be able to get the landlord to agree to something, say 3.6%, then do not allow yourself to be pushed into coming up with an itemised rationalisation if you don't already have one. The way this could fail you is like this: the landlord or maybe the mediator may say, "Hmmm… 3.6%? Which expense items on the landlord's application (the roof? the masonry work? etc.) are you asking to have removed from the AGRI application to reach that 3.6% figure?" If you contrive an itemised rationalisation when you didn't really have one ("we'll pay all of the roof, three-quarters of the masonry, and none of the driveway"), then the landlord could counter that they agree to you paying the entire costs of the roof, and three quarters of the masonry, but they disagree with the driveway – so now they only want to discuss the driveway from now

on… So now, by having agreed with part of your rationalisation, your manoeuvrability is limited (later on you can't say that you've changed your mind, and now you want to pay only three-quarters of the roofing costs, because you have already agreed to pay the entire cost of that item) – remember ultimately you just wanted 3.6%, which they might have agreed to, but they may not agree if they think that you've slipped up on the itemisation, and consequently can be manipulated into agreeing to a higher rent increase.

So, if they are demanding an itemisation and you don't have one, then you should tell them that the tenants want a deal today, and that you are willing to participate in the negotiation process, but that the tenants only want to negotiate the final rent increase amount NOT the particulars of each of the landlord's claims, and that the 3.6% figure feels reasonable to the tenants at this point in the negotiation process.

**Missing Documentation** – Make a big deal about any missing documentation or references – if the landlord claims something needed to be brought "up to code", or an engineer said something had to be repaired, protest if they haven't brought a copy. Pull out a copy of the "Notice of Hearing" and read aloud to them the section on the second page that states: "What you should bring to the CMH: You should bring any documents to support your position and two copies, one for the other party and one for the LTB." You should then direct them to the instructions to the landlord that appear in the box at the top of the fourth page: "The landlord must file all their supporting documents for their Application for a Rent Increase above the Guideline when they file their application with the LTB." Point out that their failure to follow the instructions significantly undermines the fairness of the mediation process. If they push back – make it clear that you want the hearing to continue, but that you believe that the lack of proper documentation should undermine the landlord's position not the tenants', and that you will take all of that into consideration during the negotiation phase of the hearing. The point is to put the pressure on them to give you a better deal.

**Good Cop / Bad Cop** – It can be helpful to have a useful level of discord between the tenants who attend the hearing (the "rabble") and whomever is speaking for the tenants. There is no need to fake this – all you need is to have a few tenants in attendance who are particularly annoyed and outspoken; they will be loud and outspoken and thus communicate their dissatisfaction with the AGRI (scoffing and guffawing), while the tenants' representative (you) can remain calm and sincere. This is a classic "Good cop / Bad cop" scenario, and it can be quite effective at unnerving the landlord's representatives, while simultaneously hammering them with sound arguments. Ultimately the landlord wants the tenants to agree to something, it may be helpful to your

side to make it appear that an agreement isn't very likely – so a more acceptable offer may be the result.

**Negotiate Advantageous Terms** – Don't forget that in addition to the size of the rent increase that you are negotiating, there are also the terms, and you have more flexibility to negotiate favourable terms at the case management hearing (at a merits hearing, the adjudicator is required to rigidly follow the rules and regulations that dictate the terms).

You can ask for the rent increase to be spread over multiple years – this makes the increase in each year more affordable by spreading it out a bit. Section 126 (11) of the RTA stipulates that the above guideline portion of a rent increase pertaining to capital expenses cannot exceed 3% in a given year, and that if an above guideline rent increase is greater than 3%, then the remaining part of the rent increase can be applied in the subsequent two years. So in other words, a 5% rent increase would be applied as 3% in the first year, and 2% in the second. This represents an opportunity for negotiation; for example, instead of facing a 3% rent increase in that first year, the tenants could negotiate that the 5% rent increase be split 2% in the first year, 2% in the second, and 1% in the third. This does not affect the total rent increase, but it may make the individual rent increases easier for the tenants to bear. Note also that the proportion of an above guideline rent increase pertaining to an extraordinary increase in municipal taxes, is not limited to 3% a year (nor 9% in total), so this idea is particularly helpful for reducing the size of the individual rent increases in cases that include a large component due to municipal taxes.

Another thing that you can do to lower the monthly rent increase dollar figure is to ask for the "Useful Lifespan" to be extended. The useful lifespan is a number that actually has nothing to do with how long the renovations are expected to last, rather, this is the length of time that the payments to the landlord are amortised over (for the mathematically curious, the calculations are described in O.Reg section 26 (5) and (6)). By increasing the useful lifespan number of years, you can reduce the rent increase percentage. For example, say a hypothetical building with 50 apartments had $800,000 of capital expenses, resulting in a 15 year amortised rent increase of 5.95%. By extending the amortisation to 20 years, the rent increase would drop to 4.97%, which is almost 1% lower. This is like reducing your car payments by taking a longer lease – you pay more in the end, but because it's spread out over more years the individual payments are lower which makes them more affordable.

The case management hearing is a negotiation, so you are free to attempt to negotiate these numbers, and the landlord may or may not agree to either of these requests. But if the AGRI is resolved during a merits hearing, then the adjudicator is bound by the law and will apply the calculations stipulated in the O.Reg.

**Think about how best to use the two hearings** – If you don't have many very strong formal legal arguments, in other words if your counter-arguments are mostly casual arguments, then your best option is to reduce the size of the AGRI at the case management hearing as opposed to letting the case go to the merits hearing, where the adjudicator will only consider strictly legal arguments.

On the other hand, if you do have some strong legal arguments then your best option may be to present your arguments at the merits hearing, unless the landlord makes you a really great offer at the case management hearing. However, do not underestimate your opponent – both the adjudicator and the landlord's paralegal have a thorough knowledge of the pertinent laws and regulations, so your arguments have to be pretty decent.

**Merits Hearings (MHs)**

If the AGRI is not resolved during a case management hearing, then there is a second kind of hearing that the landlord and tenant board will use to settle the matter – the merits hearing. This kind of hearing will adhere to a court-room-like process, except that instead of a "judge" the officiant is called an "adjudicator". The only arguments that the adjudicator is allowed to consider in making their decision are strictly formal legal arguments, and they are only allowed to consider the arguments that you actually present during the hearing – so even if they know that the landlord is bending the rules, if you don't point it out to the adjudicator, then they will not do anything about it.

At the merits hearing you are presenting your case to the adjudicator (not to the landlord), so the arguments have to be firmly based upon the law or regulations. The landlord's legal representative will present their arguments which you can refute, and your objective is to convince the adjudicator of the invalidity of the landlord's arguments, and the validity of yours. The three things that you need to do to accomplish this are: you need to cite the relevant portions of the law (the RTA, O.Reg., and prior cases), you need to document your claims with evidence (corroborating documents, photographs, witness testimony, etc.), and you need to object when the landlord makes a claim that they have not brought documentation for – and call them out if they do not have corroborating evidence.

There are lots of formalities that apply to the hearings, but the adjudicator is not going to expect you to know all the details of these formalities (they know that you're not a trained legal professional), and you can get away with a lot so long as you are super-polite. Be polite and respectful and you will do fine.

Hearings at the landlord and tenant board are technically not "courts of law", but they function in a similar manner – there is a table that the landlord's representatives sit at, and a table for the tenants' representatives, and the adjudicator presides over the hearing rendering a decision following the hearing. At a Merits Hearing the job of the adjudicator is to determine which of the landlord's expenses are valid, and to calculate the appropriate rent increase accordingly. There are criteria that the adjudicator uses when considering the landlord's supporting documentation, and you can learn a lot about what factors the adjudicators are supposed to consider as they evaluate AGRI applications by reading the "Interpretation Guideline" discussed earlier.

**What Strategies are Helpful at a Merits Hearing?**

**The Balance of Probabilities** – You've seen courtroom dramas on TV where they make a big deal about "proof beyond a reasonable doubt". This concept does not apply at hearings at the landlord and tenant board, instead the concept they use is a "balance of probabilities", which basically means: which side seems more believable? So the landlord does not have to perfectly prove their claims beyond a reasonable doubt, and you don't have to present perfect counter–arguments either. You have to generate doubt about each of the landlord's claims using formal legal arguments. The adjudicator has to follow a strict interpretation of the law, and so the best thing to do is find and present as many legal arguments as you can. If the law says "X" and you can prove that the landlord did not do "X" then you win, and in general you do not have to actually prove it, you just have to be more convincing.

However, if the landlord makes a ludicrous and unbelievable claim, and the tenants do not present a counter argument, then the adjudicator is required to accept the landlord's statement as truth, which means that the correct strategy to use is one of sowing uncertainty – argue against everything, and ask questions that undermine their credibility.

**Unbiased Equals the Middle** – When there is no clearly winning argument concerning some detail of the AGRI, then the adjudicator has to make a decision, and when they do so their objective is to appear to be unbiased. If they render a decision that looks unfair, then the landlord or tenant could ask for the case to be reviewed by the board or they can appeal the decision to Divisional Court – and both of these reflect badly upon the adjudicator. Consequently, most adjudicators strive to make decisions that fall somewhere in the middle. The implication of this is that you should always present an argument against each of the landlord's claims, and that you should justify and strengthen your arguments by finding relevant sections of the law and evidence. You may not have an exceedingly strong argument, but the landlord

may not have one either, and in this case the decision could go either way. So make and present your arguments.

**Missing Documentation** – The balance of probabilities also implies that you should make a big deal about any missing documentation (engineering reports, the building code, orders from the city, etc.). There is a good chance that the landlord either won't possess this documentation, or won't have brought it along with them, in which case you have tilted the "balance of probabilities" in your favour.

Make sure that the lack of documentation undermines their arguments. Pull out the "Notice of Hearing" and read aloud to them the sections that state that they should bring all of their evidence to the hearing. (See the "Missing Documentation" paragraph in the Case Management Hearings section above.) Point out that the landlord's failure to follow the instructions significantly undermines the fairness of the hearing, and is against the rules – they are supposed to disclose all of their relevant evidence to you before the hearing so you have the opportunity to study and become familiar with it. Ask the adjudicator to disallow expenses when the landlord has no documentation.

But do not agree to let them have an adjournment in order to get the paperwork. Having the paperwork is not likely to help your arguments, see the following section.

**Refuse Adjournments** – Do NOT agree to a request by the landlord for an adjournment for the purpose of filing more documentation (or, for any other reason). If they ask for an adjournment, then complain about the inconvenience to the tenants of taking days off of work to come to additional hearing dates, and point out that, according to the interpretation guideline, adjournments are only supposed to be given in "exceptional circumstances", and the landlord failing to follow the requirements to produce all of the necessary documentation does not constitute an exception. Allowing them to bring more documentation is probably not going to help your case – but the lack of documentation can be advantageous because you can use the lack of documentation to cast doubt on their claims.

**Serious Health and Safety Maintenance Issues** – If you have any ongoing maintenance issues that constitute a serious health or safety concern then you can argue to get the entire AGRI tossed out using RTA section 126 (12) "If the Board finds that the landlord has not completed items on work orders … related to a serious breach of health, safety, housing or maintenance standard … or is in serious breach of the landlord's obligations under subsection 20 (1) or section 161".

You need a pretty serious health or safety concern, and it has to have remained unresolved for a while, and you need good evidence – like e-mails documenting that the landlord has known about the problem but failed to act, and photos of the problem. It helps to report serious breaches to the local Public Health Department shortly before the hearing, so that with luck they can issue an order, which really weakens the landlord's case, but you don't necessarily have to involve the Health Department, "a breach of the landlord's obligations…" is phrased quite widely and can apply to a number of things There is a nice description of this loophole in the Interpretation Guideline section titled "Responding to an AGI Application" near the end of the guideline document.

**A Final Word**

Be bold and stand your ground. Make the arguments you have, and do the best that you can. Be brave in the face of the landlord's paralegals and lawyers. Know that although ultimately most tenants end up paying a portion of most above guideline rent increase applications, every cent that you reduce the landlord's claim saves you and your neighbours money, and costs your landlord some of their ill begotten profits.

We hope that you find this document to be informative and useful. This document only exists because other tenants went to their hearings and faced the landlord and the adjudicators before you. Above guideline rent increases are an unjust part of life afflicting all tenants until we can get that unfair law changed. So please take a moment to consider how we can make this document better and more useful to other tenants in the future.

We welcome your advice and suggestions (akelius.tenants.network@gmail.com).

**THE END**

## The Questionnaire

This document, "*How to Refute your Landlord's Application for an Above Guideline Rent Increase*", is the result of the contributions of many tenants over many years. The only reason that this document exists is because previous groups of tenants contributed what they learned during their AGRIs, and our hope is that it will continue to grow to encompass new knowledge gained by future groups of tenants who face their own AGRIs.

To that end, we hope that you will e-mail your answers to the following short questionnaire to the Akelius Tenants Network at this e-mail address: akelius.tenants.network@gmail.com.

Please include whatever information you feel comfortable providing. The answers you give will be kept confidential, and only used to improve this document. It is fine to leave unanswerable questions blank. Please include any additional comments that you would like to make. The information that you share will be of great help to other tenants in the future.

**Before your Hearings:**

Question 1 – What is your name, and the address of your building?

Question 2 – Is your building owned by Akelius Canada Limited?

Question 3 – How many apartments are there in your building? How many are subjected to the AGRI?

Question 4 – Did your building already have a tenants' association before the AGRI was announced, and does it have one now? If "yes", then please provide contact information for your Tenants' Association.

Question 5 – How much of a rent increase was the landlord originally asking for?

Question 6 - Please provide a scan of the AGRI notice you received.

**After your Hearings:**

Question 7 – Were the tenants represented by a lawyer or paralegal? If "yes", please provide their name, and answer: would you recommend your paralegal

or lawyer to other tenants facing an AGRI? (Please wait until after your final hearing to answer this question.)

Question 8 – If you were represented by a lawyer or paralegal, how did you pay for them, and how much did you pay?

Question 9 – How many hearings did it take to resolve your AGRI – did you only have the first "Case Management Hearing", or did you also have the second "Merits Hearing" as well? Please list the dates of your hearings.

Question 10 – How many tenants attended the hearings?

Question 11 – How much was the final rent increase? And, if it was greater than 3%, how was it split over multiple years?

Question 12 – It would be very helpful if you would be willing to provide scans of the AGRI documentation – the initial notice, and the final decision document.

Question 13 – How did you first hear about the "How to refute your Landlord's Application for an AGRI" document?

Question 14 – Which strategies and arguments listed in this document do you feel were the most helpful to you?

Question 15 – Were there any strategies and arguments listed in this document that were not good, or that failed when you tried them? What went wrong? What would you do differently next time?

Question 16 – Did you come up with any new strategies or arguments that are not already described in this document?

Question 17 – Do you have any further suggestions for improving this document? If yes, please provide details.

The information you provide has the potential to help many other tenants in the future, and, of course, the next time you face an AGRI you will be the beneficiary of other people's experience in return. Please contribute whatever information you can.

*In Solidarity!*
*– the ATN.*