

Interpretation Guidelines are intended to assist the parties in understanding the Board's usual interpretation of the law, to provide guidance to Members and promote consistency in decision-making. However, a Member is not required to follow a Guideline and may make a different decision depending on the facts of the case.

This Guideline deals with applications based on a tenant's failure to pay rent. (See also Guideline 10 on "Procedural Issues regarding Eviction Applications".)

Method of Ordering Arrears¹

If the landlord's application for termination based on arrears of rent is granted, the tenant will be ordered to pay: a) rent arrears up to the termination date in the notice of termination; and b) lump sum compensation for use of the rental unit from the termination date in the notice to the order date. The rent deposit and interest owing thereon will be deducted from the arrears and compensation in accordance with subsection 87(4) of *Residential Tenancies Act* (the "RTA"). Daily compensation will then be ordered from the order date until the tenant vacates.

If the landlord is attempting to enforce the order, the landlord has an obligation to inform the Court or the Court Enforcement Office of any rent payments the tenant made that are not reflected in the order.

If the tenant vacated the unit after the application was filed but before the date of the hearing, the tenant will be ordered to pay arrears plus compensation only up to the date they vacated, less the rent deposit and interest.

If the order does not evict the tenant but rent is found owing, the tenant may be ordered to pay arrears up to the end of the current month. The rent deposit will not be deducted from the arrears because the tenancy has not been terminated.

The determination of arrears is usually based on the principle that payments are applied to the earliest rent owing. For example, if the tenant did not pay the May rent, but paid in June, the payment for June will be applied to May leaving the June rent outstanding.

¹ For simplicity, the descriptions in this Guideline assume monthly payment of rent. If the tenancy was on a weekly or other basis, it should be adjusted accordingly.

Arrears Less than a Rent Deposit

A notice of termination is not invalid simply because the landlord holds a rent deposit that is greater than the rent owing. The rent deposit can only be applied to the last month of the tenancy. Therefore, the landlord should not apply the deposit to the rent arrears before applying to evict the tenant.

The amount that is owed to the landlord on the order date may be a negative amount, after the deposit and interest are deducted from the rent and compensation owing to the landlord. If so, the landlord would owe money to the tenant. In that case, the Board may order the landlord to pay the tenant the amount that will be owed as of the order date. The authority for this lies in section 205 of the RTA which states that the Board may order that "The landlord or the tenant shall pay to the other any sum of money that is owed as a result of this order."

Non-Sufficient Funds Charges

Under section 87 of the RTA, where a landlord applies for an order for the payment of arrears of rent, the application may include a claim for the amount of NSF charges paid to a financial institution in respect of cheques tendered to the landlord by the tenant, plus the landlord's administrative charges in respect of those cheques. The administrative charges are limited to a maximum of \$20.00 per cheque per section 17 of Regulation 516/06.

These charges, if claimed, will normally be awarded and, if the order terminates the tenancy, the tenant will have to pay these amounts in addition to the other amounts payable in order to avoid eviction. See also the section below on Amount Payable to Prevent an Eviction.

Although a landlord may apply for NSF charges, they cannot be claimed in an N4 notice of termination. Under subsection 59(3) of the RTA, a notice of termination is void if the tenant pays the arrears and the additional rent that has become owing. There is no requirement for the tenant to pay NSF charges to void the notice. Therefore, including NSF charges on an N4 will likely invalidate the notice.

Similar Charges

Other amounts may be owed to the landlord for charges permitted under the RTA or regulations, such as the cost of installing a mobile home under section 166 of the RTA, or for transferring a tenant to another unit in a social housing complex under section 17 of Regulation 516/06. Although the RTA allows a landlord to levy these charges, the RTA does not provide for their recovery in an application to the Board. A landlord should

therefore not include such charges in a notice of termination or application for non-payment of rent.

Certain charges are not permitted by the RTA, even if they are set out in the tenancy agreement. This includes non-refundable key deposits, most types of administrative charges, and late payment charges in excess of what is permitted. See section 17 of Regulation 516/06.

Utilities Charges

When a landlord and tenant are entering into a tenancy agreement, they may agree that utilities will be included in the rent. In this case, the landlord is responsible for paying all utility bills and the rent would remain unchanged despite any fluctuations in these costs.

Alternatively, the landlord and tenant may agree that utilities will not be included in the rent, and that the tenant will be responsible for paying all utility costs directly to the utility company. In this case it is clear that the payment of the utility costs is not rent, and even if the landlord pays the bill because the tenant fails to, they would not be able to claim the amount as rent arrears.

However, in some cases the tenancy agreement may require the tenant to reimburse the landlord for the actual amount of the utility costs. The question that then arises is, if the tenant is in default, can the landlord include these amounts in an application for the payment of rent arrears?

In these situations, it will generally be considered that the cost of utilities is not included in the "rent", and that the landlord is acting as an agent for the utility company for the purposes of collecting payment from the tenant. If these amounts were considered to be part of the rent then any upward fluctuations in the utility charge could be considered an unlawful rent increase.

Therefore, any unpaid amounts for utilities will not be included in the calculation of arrears, although they may be a debt owing to the landlord that may be recovered through the courts.

In all cases, the Member must review the tenancy agreement. However, the definition of rent cannot be affected by the tenancy agreement in view of sections 3 and 4 of the RTA. Section 3 provides that the RTA applies despite any agreement to the contrary, and section 4 provides that any provision of the tenancy agreement inconsistent with the RTA is void.

Rent Deposits

A landlord may require a tenant to pay a rent deposit of no more than one month's rent, so long as the landlord does so on or before entering into the tenancy agreement in accordance with subsection 106(1) of the RTA. If the tenant does not provide a rent deposit, the Board cannot order the tenant to pay one. It follows that if the landlord claims a rent deposit on the notice of termination it will invalidate the notice.

The landlord may require the tenant to update the rent deposit when the rent increases so that the deposit is equal to the lawful rent for the last month: see subsection 106(3) of the RTA.

Tenant Issues

Under section 82 of the RTA, a tenant may raise any issue that could be the subject of a tenant application. If the Board determines that the tenant is entitled to money (e.g., a rent abatement or rebate), it will be deducted from any amount owing to the landlord.

May a Guarantor be Ordered to Pay Rent Arrears

There are tenancies that the landlord only accepted on the basis that a person other than the tenants would guarantee that the rent would be paid, should the tenants not be able to pay. The question is whether the Board may order a guarantor to pay rent arrears if the landlord includes them with the tenants as respondents to the application.

In most cases, the guarantor has no express right of possession and, even if they do, no one expects them to ever occupy the rental unit.

The Board will not make an order against guarantors because they are not tenants. The RTA does not authorize the Board to deal with such claims, even if they are related to the issue of rent arrears. Landlords may seek enforcement of such obligations through the courts.

Relief from Eviction

Where the Board finds there is unpaid rent, the Board must consider whether to delay or refuse the eviction under section 83 of the RTA. In some cases, refusing or delaying the eviction is discretionary; in others, refusing the eviction is mandatory. Even if the eviction claim in the application is refused or delayed, the tenant will be ordered to pay any arrears to the landlord. A payment schedule for the arrears may be imposed upon the tenant

under section 204 as a condition of giving relief under section 83. See also Guideline 7 on “Relief from Eviction” for further discussion of this point.

Amount Payable to Prevent an Eviction

Section 74 of the RTA provides that a tenant may avoid an eviction in three circumstances.

Before the order is issued

Subsection 74(2) provides that if the tenant pays the landlord the full arrears, the application fee and any additional rent that is owed as of the date of payment by the tenant, before the eviction order is issued, the landlord’s application will be discontinued.

After the order is issued

Under subsection 74(3), an order must specify the amount of rent arrears, the daily compensation payable and any costs ordered by the Board. The order will also set out any amount payable for NSF and administration charges. The order must also inform the tenant and the landlord that the order will become void under subsection 74(4) if the tenant pays the landlord or the Board the amount specified in the order before it is enforceable. An order is enforceable on the date the order specifies that the Court Enforcement Office (Sheriff) may give possession to the landlord.

If the tenant pays the amount specified in the order to the Board, staff of the Board will issue a notice to the landlord and tenant acknowledging that the order is void. If the tenant pays the entire amount to the landlord or part to the landlord and part to the Board, the tenant may file a motion with the Board, without notice to the landlord, asking for a Member to issue an order determining that the tenant has paid the full amount due and confirming that the order is void. Such an order will be made without holding a hearing. However, within ten days after it is issued, a landlord may, on notice to the tenant, make a motion to set the order aside. A hearing will be held to determine the landlord’s set aside motion.

After the order is enforceable

Under subsection 74(11), if the tenant pays the amount specified in the order and any additional rent owing after it becomes enforceable but before it is enforced by the sheriff, the tenant may file a motion with the Board, on notice to the landlord, to set aside the eviction order. The eviction order is stayed and cannot be enforced until the Board issues an order lifting the stay.

Although subsection 74(11) refers to an amount being paid to the Board, the tenant may pay the amount required to be paid under that subsection to the landlord, to the Board, or in part to both. This interpretation is consistent with the wording in subsection 74(11) because if the tenant has paid an amount to the landlord that is sufficient to void the order, then the amount that the tenant must pay into the Board under subsection 74(11) is “\$0”.

This interpretation of subsection 74(11) avoids the absurd result of refusing to void an order and allowing a tenant to be evicted where the tenant paid the full amount to the landlord.

The Board will hold a hearing on the motion. If the tenant paid some or all of the amount owing to the landlord by non-certified cheque, and the landlord is concerned that the cheque may be returned NSF, the member holding the hearing can grant an adjournment or permit post-hearing submissions to allow time for the cheque to clear before making their final order.

If the Board determines that the tenant paid the arrears, the additional rent, any NSF and administration charges and the costs ordered by the Board, the Board will make an order declaring the eviction order to be void. However, under subsection 74(15), if the Board determines that the landlord has paid a non-refundable amount under the *Administration of Justice Act* for the purpose of enforcing the order (e.g. sheriff fees), the Board will specify that amount in the motion order and require the tenant to pay that amount into the Board by a specified date.

If the tenant pays the specified amount by the specified date, a Board employee will issue a notice to the tenant and the landlord acknowledging that the eviction order is void.

If the Board determines that the tenant did *not* pay the specified amount by the specified date, a Board employee will issue a notice stating that the stay of the order ceases to apply and the eviction order may be enforced.

A motion to void an order after it has become enforceable may be made only once during the period of the tenant’s tenancy agreement with the landlord: see subsection 74(12).