

3. Claims for Rent and Damages for Loss of Rent

Aug 25, 2021

This Policy Guideline is intended to help the parties in an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. This policy may be revised and new guidelines issued from time to time.

A. Purpose of Guideline

This guideline addresses situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement. It also addresses situations where a tenant has unsuccessfully disputed a notice to end tenancy issued for the non-payment of rent or utilities, triggering section 55 (1.1) of the *Residential Tenancy Act (RTA)* (section 48 (1.1) of the *Manufactured Home Park Tenancy Act (MHPTA)*).¹

B. Overholding tenant and compensation

Section 44 of the *RTA* (section 37 of the *MHPTA*) sets out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended. If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the *RTA* (section 50(3) of the *MHPTA*). This includes compensation for the use and occupancy of the unit or site on a *per diem* basis until the landlord recovers possession of the premises. In certain circumstances, a tenant may be liable to compensate a landlord for other losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant's occupancy of the unit or site.

C. Tenancies ending early and compensation

A tenant is liable to pay rent until a tenancy agreement ends. Sections 45 and 45.1 of the *RTA* (section 38 of the *MHPTA*) set out how a tenant may unilaterally end a tenancy agreement.

Where a tenant vacates or abandons the premises before a tenancy agreement has ended, the tenant must compensate the landlord for the damage or loss that results from their failure to comply with the legislation and tenancy agreement (section 7(1) of the *RTA* and the *MHPTA*). This can include the unpaid rent to the date the tenancy agreement ended and the rent the landlord would have been entitled to for the remainder of the term of the tenancy agreement.

Similarly, when a landlord ends a fixed term tenancy early as a result of the tenant's actions (such as not paying rent or most of the grounds for cause), the landlord may also be able to claim the loss of rent for the remainder of the term of the tenancy agreement.

¹ These subsections came into effect on March 25, 2021; pursuant to sections 30 and 35 of the Tenancy Statutes Amendment Act, 2021, they do not apply to any application for dispute resolution that was accepted by the director before March 25, 2021, even if the application is determined on or after that date.

3. Claims for Rent and Damages for Loss of Rent

Aug 25, 2021

Compensation is to put the landlord in the same position as if the tenant had complied with the legislation and tenancy agreement. Compensation will generally include any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. It may also take into account the difference between what the landlord would have received from the defaulting tenant for rent and what they were able to re-rent the premises for during the balance of the term of the tenancy.

For example, a tenant has entered into a tenancy agreement for a fixed term of 12 months with rent of \$1000 per month. The tenant leaves the premises in the middle of the second month, after not paying rent for that month and having received a notice to end tenancy for non-payment of rent. The landlord re-rents the premises from the first of the next month but only at \$950 per month. The landlord would be able to recover the unpaid rent for the second month and the \$50 difference over the remaining 10 months of the original term.

If instead of a fixed term tenancy, the example involved a month-to-month tenancy, the landlord who issued the notice to end tenancy for non-payment of rent could recover any loss of rent suffered for the next month. That is because a notice given by the tenant mid-month would not end the tenancy until the end of the subsequent month. If instead the month to month tenancy was ended for cause, the landlord could not claim for loss of rent for the subsequent month after the notice is effective because a notice given by the tenant could have ended the tenancy at the same time.

In all cases, the landlord must do whatever is reasonable to minimize their damages or loss (section 7(2) of the *RTA* and the *MHPTA*). A landlord's duty to mitigate the loss includes re-renting the premises as soon as reasonable for a reasonable amount of rent in the circumstances. In general, making attempts to re-rent the premises at a greatly increased rent or putting the property on the market for sale would not constitute reasonable steps to minimize the loss.

Even if a landlord is successful in re-renting the premises, a claim for loss of rent may still be successful where the landlord has other vacancies and is able to establish that those other premises would have been rented had the tenancy in question continued.

In a fixed term tenancy, if a landlord is successful in re-renting the premises for a higher rent and as a result receives more rent over the remaining term than would otherwise have been received, the increased amount of rent is set off against any other amounts owing to the landlord for unpaid rent. The tenant is not entitled to recover any remainder. In a month-to-month tenancy the fact that the landlord may have been able to re-rent the premises at a higher rent for a subsequent tenancy does not reduce the liability of the previous tenant for unpaid rent until the date the tenancy agreement could lawfully have been ended.

D. Loss of rent due to damage

When a tenant vacates a rental unit or manufactured home site, they must leave it reasonably clean and undamaged except for reasonable wear and tear (section 37 of the *RTA* and section 30 of the *MHPTA*). If a tenant does not comply with this requirement and the premises are un-rentable because of this, then in addition to compensation for the damage to the property or for cleaning, the landlord can also seek compensation for loss of rent. The landlord is required to mitigate this loss by completing the cleaning or repairs in a timely manner.

3. Claims for Rent and Damages for Loss of Rent

Aug 25, 2021

E. Determining when a tenancy has ended for the purposes of section 55 (1.1) of the *RTA* (s. 48 (1.1) of the *MHPTA*)

Under section 55(1.1) of the *RTA* (section 48(1.1) of the *MHPTA*), the director must grant a landlord an order requiring the tenant to pay the unpaid rent if the following conditions are met:

- the tenant has disputed a notice to end tenancy issued by the landlord for unpaid rent under section 46 of the *RTA* (section 39 of the *MHPTA*);
- the notice to end tenancy complies with section 52 of the *RTA* (section 45 of the *MHPTA*); and
- the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

This provision allows a landlord to obtain a monetary order for unpaid rent without having to file their own application. Under the legislation, the requirement to pay rent flows from the tenancy agreement. Unpaid rent is money that is due and owing *during* the tenancy.

Compensation for overholding under section 57 of the *RTA* (section 50 of the *MHPTA*) is not considered rent since overholding only occurs *after* a tenancy has ended. Compensation due to a loss of rent resulting from the tenant ending the tenancy early or by leaving the rental unit or manufactured home site in an unrentable condition is also not considered unpaid rent. The loss arises after and because of the tenancy ending. If a landlord is seeking such compensation, they must make a separate application for dispute resolution and give proper notice to the tenant in accordance with the provisions of the legislation. The director cannot make an order for this type of compensation under section 55(1.1) of the *RTA* (section 48(1.1) of the *MHPTA*).

To determine whether an amount owing is for unpaid rent and must be ordered at the hearing, the director must make a finding about when the tenancy ends or ended.

If the tenant has vacated or abandoned the rental unit prior to the date of the dispute resolution hearing, the date the tenancy ended is the date that the tenant vacated or abandoned the rental unit. Only rent owing up until this date would constitute unpaid rent for the purpose of section 55(1.1) of the *RTA* (section 48(1.1) of the *MHPTA*).

Under section 46(5) of the *RTA* (section 39(5) of the *MHPTA*), a tenant is conclusively presumed to have accepted the tenancy ends on the effective date of the notice if they do not pay the rent or make their application for dispute resolution within 5 days after receiving the notice to end tenancy. If the tenant submits their application late and the director does not extend the time limit under section 66 of the *RTA* (section 59 of the *MHPTA*), then the tenancy ended on the effective date of the notice to end tenancy. Only rent owing up until the effective date of the notice to end tenancy would constitute unpaid rent for the purpose of section 55 (1.1) of the *RTA* (section 48 (1.1) of the *MHPTA*).

If a tenant has not vacated or abandoned the unit, or the conclusive presumption does not apply, (in other words the right of possession of the rental unit or manufactured home site is in issue at the dispute resolution hearing), the director will usually rely on section 68(2) of the *RTA* (section 61(2) of the *MHPTA*) to order that the date the tenancy ends is

3. Claims for Rent and Damages for Loss of Rent

Aug 25, 2021

the date of the dispute resolution hearing, rather than the effective date shown on the notice to end tenancy.

If the director is satisfied upon reviewing submitted materials and hearing evidence as to an amount of unpaid rent owing, including rent owing since the time the notice to end tenancy was issued, the director must grant an order to the landlord for the amount of unpaid rent found to be owing.

F. Changes to Policy Guideline

Section	Change	Notes	Date Guideline Changed
B-D	Am/Del	Rewritten with substantial legal changes to section C	August 25, 2021
E	New	New section added to address legislative amendment that came into force March 25, 2021.	August 25, 2021

Change notations

am = text amended or changed

del = text deleted

new = new section added