

17. Security Deposit and Set off

Jan-16

This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help the parties to 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 Guideline may be revised and new Guidelines issued from time to time.

A. LEGISLATIVE FRAMEWORK

The *Residential Tenancy Act* (the Act) allows a landlord to require a tenant to pay a security deposit¹. The *Manufactured Home Park Tenancy Act* prohibits a landlord from requiring a tenant to pay a security deposit in respect of a manufactured home site tenancy².

B. SECURITY DEPOSIT

1. A landlord may require a security deposit when the landlord and tenant enter into a tenancy agreement³.
2. The tenancy agreement must not provide that the landlord automatically keeps all or part of the security deposit at the end of the tenancy⁴.
3. A landlord may issue and serve on the tenant a Notice to End a Residential Tenancy if the tenant fails to pay the required security deposit within thirty days of the date it is required to be paid by the tenancy agreement⁵.
4. A tenant must not apply all or part of the security deposit to rent without the written consent of the landlord⁶.
5. The tenant may agree in writing at the end of the tenancy that the landlord may retain all or part of the security deposit⁷.
6. The right of a tenant to the return of a security deposit is extinguished if the landlord has offered the tenant at least two opportunities for a condition inspection as required by the Act and the tenant has not participated on either occasion⁸.
7. The right of a landlord to obtain the tenant's consent to retain or file a claim against a security deposit for damage to the rental unit is extinguished if⁹:
 - the landlord does not offer the tenant at least two opportunities for inspection as required¹⁰ (the landlord must use Notice of Final Opportunity to Schedule a Condition Inspection (form RTB-22) to propose a second opportunity); and/or
 - having made an inspection does not complete the condition inspection report, in the form required by the Regulation, or provide the tenant with a copy of it.
8. In cases where both the landlord's right to retain and the tenant's right to the return of the deposit have been extinguished, the party who breached their obligation first will bear the loss. For example, if the landlord failed to give the tenant a copy of the inspection done at the beginning of the tenancy, then even though the tenant

¹ *Residential Tenancy Act* (RTA), s. 17.

² *Manufactured Home Park Tenancy Act*, s. 17.

³ RTA, s. 17.

⁴ RTA, s. 20(e).

⁵ RTA, s. 47(a).

⁶ RTA, s. 21.

⁷ RTA, s. 38(4)(a).

⁸ RTA, s. 24(1); RTA 36(1); RTA s. 38(2).

⁹ RTA, s. 24(2); RTA 36(2).

¹⁰ RTA, s. 23(3); Residential Tenancy Regulation, s. 17.

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may not have taken part in the move out inspection, the landlord will be precluded from claiming against the deposit because the landlord's breach occurred first.

9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
 - to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
 - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
 - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
 - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.
10. The landlord has 15 days, from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to return the security deposit plus interest to the tenant, reach written agreement with the tenant to keep some or all of the security deposit, or make an application for dispute resolution claiming against the deposit¹¹.
11. If the landlord does not return or file for dispute resolution to retain the deposit within fifteen days, and does not have the tenant's agreement to keep the deposit, the landlord must pay the tenant double the amount of the deposit¹². Where the landlord has to pay double the security deposit to the tenant, interest is calculated only on the original security deposit amount before any deductions and is not doubled.
12. The obligations of a landlord with respect to a security deposit run with the land or reversion¹³. Thus, if the landlord changes, the new landlord retains these obligations.

C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION

1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
 - a landlord's application to retain all or part of the security deposit; or
 - a tenant's application for the return of the deposit.unless the tenant's right to the return of the deposit has been extinguished under the Act¹⁴. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.
2. Where the tenant applies for return of the security deposit and the landlord later applies for dispute resolution for claims arising out of the tenancy and the hearings are not scheduled at the same time, the arbitrator will order the return of the security deposit to the tenant and the landlord's claims will be heard whenever scheduled after that, unless the parties and the arbitrator agree to having the landlord's claim heard at the same time.

¹¹ RTA, s. 38(1).

¹² RTA, s. 38(6).

¹³ RTA, s. 93.

¹⁴ RTA, s. 24(1); RTA, s. 36(1), RTA, s. 38(2).

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3. Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit¹⁵:
 - if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;
 - if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act¹⁶;
 - if the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the dispute resolution process;
 - if the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;
 - whether or not the landlord may have a valid monetary claim.
4. In determining the amount of the deposit that will be doubled, the following are excluded from the calculation:
 - any arbitrator's monetary order outstanding at the end of the tenancy¹⁷;
 - any amount the tenant has agreed, in writing, the landlord may retain from the deposit for monies owing for other than damage to the rental unit¹⁸ (see example B below);
 - if the landlord's right to deduct from the security deposit for damage to the rental unit has not been extinguished¹⁹, any amount the tenant has agreed in writing the landlord may retain for such damage²⁰.
5. The following examples illustrate the different ways in which a security deposit may be doubled when an amount has previously been deducted from the deposit:
 - Example A: A tenant paid \$400 as a security deposit. At the end of the tenancy, the landlord held back \$125 without the tenant's written permission and without an order from the Residential Tenancy Branch. The tenant applied for a monetary order and a hearing was held.

The arbitrator doubles the amount paid as a security deposit ($\$400 \times 2 = \800), then deducts the amount already returned to the tenant, to determine the amount of the monetary order. In this example, the amount of the monetary order is \$525.00 ($\$800 - \$275 = \525).
 - Example B: A tenant paid \$400 as a security deposit. During the tenancy, the parties agreed that the landlord use \$100 from the security deposit towards the payment of rent one month. The landlord did not return any amount. The tenant applied for a monetary order and a hearing was held.

The arbitrator doubles the amount that remained after the reduction of the security deposit during the tenancy. In this example, the amount of the monetary order is \$600.00 ($\$400 - \$100 = \300; $\$300 \times 2 = \600).

¹⁵ RTA, s. 38(6).

¹⁶ RTA, s. 24(1); RTA, s. 36(1), RTA, s. 38(2).

¹⁷ RTA, s. 38(3).

¹⁸ RTA, s. 38(4).

¹⁹ RTA, s. 24(2); RTA, s. 36(2).

²⁰ RTA, s. 38(4).

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- Example C: A tenant paid \$400 as a security deposit. The tenant agreed in writing to allow the landlord to retain \$100. The landlord returned \$250 within 15 days of receiving the tenant's forwarding address in writing. The landlord retained \$50 without written authorization.

The arbitrator doubles the amount that remained after the reduction authorized by the tenant, less the amount actually returned to the tenant. In this example, the amount of the monetary order is \$350 ($\$400 - \$100 = \$300 \times 2 = \600 less amount actually returned \$250).

Note: Interest is not included in the examples above, for the sake of simplicity. Interest is calculated on the original security deposit amount, before any deductions are made, and it is not doubled.

D. SET-OFF

1. Where a landlord applies for a monetary order and a tenant applies for a monetary order and both matters are heard together, and where the parties are the same in both applications, the arbitrator will set-off the awards and make a single order for the balance owing to one of the parties. The arbitrator will issue one written decision indicating the amount(s) awarded separately to each party on each claim, and then will indicate the amount of set-off which will appear in the order.
2. The *Residential Tenancy Act* provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord²¹.
3. If a landlord does not return the security deposit or apply for dispute resolution to retain the security deposit within the time required, and subsequently applies for dispute resolution in respect of monetary claims arising out of the tenancy, any monetary amount awarded will be set off against double the amount of the deposit plus interest.
4. In cases where the tenant's right to the return of a security deposit has been extinguished under section 24 or section 36 [consequences for tenant and landlord if report requirements not met] of the Act, and the landlord has made a monetary claim against the tenant, the security deposit and interest, if any, will be set off against any amount awarded to the landlord notwithstanding that the tenant's right to the return of the deposit has been extinguished. In this situation, while the right to the return of the deposit has been extinguished, the deposit itself remains available for other lawful purposes under the Act.

If the amount awarded to the landlord does not exceed the amount of the deposit and interest, the balance may be retained by the landlord as the tenant has forfeited the right to its return.

- For information about pet damage deposits refer to Policy Guideline 31: Pet Damage Deposits.

²¹ RTA, s. 72(2).

E. CHANGES TO POLICY GUIDELINE

Section	Change	Notes	Effective Date
All	New	Added footnotes to legislative authority; added reference letters for policy guideline sections; minor revisions for clarity	2016-01-21
A	new	Added section on Legislative authority	2016-01-21
B, 10	Am	Revised for clarity	2016-01-21
			2016-01-21
C, 5	new	Examples illustrating application of doubling provisions	2016-01-21

Change notations

am = text amended or changed

del = text deleted

new = new section added