

## 19. Assignment and Sublet

July-16

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*This Policy Guideline is intended to help the parties to an application understand issues that are likely to be relevant and 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.*

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This Policy Guideline addresses the assignment of a tenancy agreement and the subletting of a rental unit or manufactured home site.

### A. LEGISLATIVE FRAMEWORK

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*<sup>1</sup> (the Legislation) allow a tenant to assign their tenancy agreement and to sublet their rental unit or manufactured home site. In most circumstances, unless the landlord consents in writing, a tenant must not assign or sublet (there are exceptions to this for manufactured home parks). A tenant who assigns their tenancy agreement, or sublets their rental unit, without obtaining the written consent of the landlord, may be served with a One Month Notice to End Tenancy (form RTB-33), pursuant to the Legislation<sup>2</sup>.

It is important to refer to the relevant Act, and to the regulation made under that Act, as there are differences between residential rental units and manufactured home sites with respect to assignments and subletting.

The *Manufactured Home Park Tenancy Regulation*<sup>3</sup> sets out conditions under which a tenant may assign a tenancy agreement or sublet a manufactured home site, and conditions under which a landlord may withhold this consent.

In addition, s. 2 of the *Residential Tenancy Regulation* provides an exemption from s. 34 (2) of the *Residential Tenancy Act* [assignment and subletting] for certain types of rental units.

The *Residential Tenancy Act* does not apply to living accommodation occupied as vacation or travel accommodation<sup>4</sup>. If a property owner or their agent rents out their unit or property as a vacation or travel accommodation, they have no recourse through the Residential Tenancy Branch for relief under the Act.

In the event of a dispute about whether a matter is a residential tenancy or a vacation or travel accommodation, an arbitrator must first determine whether the Branch has jurisdiction over the dispute.

If a tenant is allowing their rental unit or space within their rental unit to be used for a commercial venture, such as a vacation or travel accommodation, a landlord may issue a One Month Notice to End Tenancy (form RTB-33) for a breach of a material term. Variables such as the terms of the tenancy agreement and whether a tenant remains in

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<sup>1</sup> *Residential Tenancy Act*, s. 34; *Manufactured Home Park Tenancy Act*, s. 28

<sup>2</sup> RTA, s. 47(1)(i)

<sup>3</sup> *Manufactured Home Park Tenancy Regulation*, Part 7, ss. 42-52

<sup>4</sup> RTA, s. 4 (e)

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occupation of the rental unit will be considered on a case-by-case basis by an arbitrator. See section C for more information.

### B. ASSIGNMENT

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.

When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement. For example:

- the assignment to the new tenant was made without the landlord's consent; or
- the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.

#### *Residential Tenancy Act*

Under s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement is for a fixed term of six months or more. (By implication a landlord *has* the discretion to withhold consent, without regard to reasonableness, in the case of a fixed-term tenancy with less than six months remaining).

The Act does not specifically refer to month-to-month (periodic) tenancies. An arbitrator may find that a landlord has acted reasonably for withholding consent to assign a periodic tenancy, unless the tenant can demonstrate a compelling reason why the landlord should agree to the assignment. The circumstances of each case would have to be examined.

In either a fixed-term or a periodic tenancy, failure to obtain the landlord's written consent prior to the assignment could result in the landlord serving a One Month Notice to End Tenancy (form RTB-33).

Failure of a landlord to accept a reasonable assignment may interfere with the landlord's ability to claim for loss of rental income as it may be found that the landlord failed to mitigate that loss.

An assignment may take place in various circumstances, such as a tenant leaving town, but still having a period of time left on a fixed-term tenancy agreement. The original tenant may wish to assign the tenancy agreement to a new tenant who takes over the tenancy agreement for the remainder of the term.

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### *Manufactured Home Park Tenancy Act and Regulation*

Under s. 28 (1) of the *Manufactured Home Park Tenancy Act*, a tenant may assign a tenancy agreement (or sublet a manufactured home site) in three circumstances only:

- a) The tenant has obtained the prior written consent of the landlord, or is deemed to have obtained consent, in accordance with the regulations;
- b) The tenant has obtained an order from the Residential Tenancy Branch director authorizing the assignment or sublease; or
- c) The tenancy agreement authorizes the assignment or sublet.

In a manufactured home site tenancy, an assignment of a tenancy agreement usually coincides with the sale of the manufactured home.

Section 49(2) of the *Manufactured Home Park Tenancy Regulation* describes what happens when the owner of a manufactured home who rents a manufactured home site from a park owner, assigns his or her tenancy agreement to a person who has purchased the manufactured home. After the assignment takes effect, the former home owner:

- a) is not liable for any breach of, or obligation under, the Act or the tenancy agreement relating to the period after the assignment;
- b) continues to be liable for any breach of, or obligation under, the Act or tenancy agreement relating to the period before the assignment; and
- c) may enforce his or her rights as a tenant under the Act or the tenancy agreement relating to the period before the assignment.

## C. SUBLETTING

### *Sublets as contemplated by the Residential Tenancy Act*

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and a new agreement (usually called a sublease) is typically entered into by the original tenant and the sub-tenant. The original tenant remains the tenant of the original landlord, and, assuming that the original tenant moves out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant.

Landlord is defined in the RTA as:

"**landlord**", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, **on behalf of the landlord**,

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- (i) permits occupation of the rental unit under a tenancy agreement, or
  - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, **other than a tenant occupying the rental unit**, who
- (i) is entitled to possession of the rental unit, and
  - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.

The sub-tenant's contractual rights and obligations are as set out in the sublease. Generally speaking, the sub-tenant does not acquire the full rights provided to tenants under the Act. For example, if the landlord ends the tenancy with the original tenant, the tenancy ends for the sub-tenant as well. The sub-tenant would not be able to dispute the landlord ending the tenancy with the original tenant; it would be up to the original tenant to dispute the notice.

The sub-tenant typically pays rent to the original tenant; but even if he or she fails to do so, the original tenant's responsibility to pay rent to the landlord is unaffected and the original tenant can be evicted if rent is not paid. Again, it should be noted that there is no contractual relationship between the original landlord and the sub-tenant. In the event of a dispute, the sub-tenant may apply for dispute resolution against the original tenant, but likely not the original landlord, unless it can be shown there has been a tenancy created between the landlord and sub-tenant.

Where an individual agrees to sublet a tenancy for the full period of the tenancy, and does not reserve some period of time at the end of the sublease, the agreement likely amounts in law to an assignment of the tenancy rather than a sublease; an arbitrator may make that determination in a hearing.

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Example: In month four of a twelve month fixed-term tenancy agreement, John (with the written consent of the landlord) sublets his tenancy in a rental unit to Susan for six months because he is going overseas to work. The agreement between John and Susan states that at month 11, John will return, Susan will vacate the rental unit, and John will re-occupy it (although the parties could agree that Susan stays on as an occupant/roommate). During the six month sublet, Susan pays rent to John, who is responsible for paying rent to the original landlord. The landlord would deal with John if any issues arose with the unit.

### Occupants/roommates

Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the *Residential Tenancy Act*.

The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit and has a subletting agreement with a sub-tenant. 'Sublet' is also used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. In determining if a scenario such as this is a sublet as contemplated by the Act, the arbitrator will assess whether or not the relationship between the original tenant and third party constitutes a tenancy agreement and a landlord/tenant relationship, as discussed in the "sublets as contemplated by the RTA" section above. If there is a landlord/tenant relationship, the provisions of the Act apply to the parties. If there is no landlord/tenant relationship, the Act does not apply. Roommates and landlords may wish to enter into a separate tenancy agreement to establish a landlord/tenant relationship between them or to add the roommate to the existing tenancy agreement in order to provide protection to all parties under the legislation.

Example: John returns from his stay overseas and moves back into his rental unit and the subletting agreement between himself and Susan ends. Susan needs more time to find somewhere else to move to and asks John if he will rent a portion of the unit for her exclusive possession until she is able to move. John, without getting the written consent of the landlord, agrees. The landlord finds out about this arrangement and issues John a One Month Notice to End Tenancy (form RTB-33) for John's failure to obtain the landlord's written consent to sublet. At a hearing, an arbitrator determines that since John remained in the rental unit and allowed Susan to stay as an occupant/roommate, this wasn't a sublet as contemplated by the Act. The notice to end tenancy might be cancelled and the landlord may issue a different notice to end tenancy, such as having an unreasonable number of occupants in the rental unit.

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Example: John's original tenancy agreement with the landlord contained a term that he and the landlord agreed that John would not sublet a portion of the rental unit thereby allowing other occupants to move into the rental unit without first obtaining the landlord's written consent. When Susan asked John to stay longer as a roommate, John didn't talk to the landlord and get his written consent to have a roommate. Upon discovering the situation, the landlord issued a One Month Notice to End Tenancy (form RTB-33) for a breach of a material term, i.e. John got a roommate without first obtaining the landlord's consent. John challenges the notice but at the hearing, an arbitrator determines that the term of the tenancy agreement was enforceable and upholds the notice to end tenancy.

When determining whether a One Month Notice to End Tenancy (form RTB-33) for cause was issued properly, the arbitrator will examine a number of factors, including the terms of the tenancy agreement between the original landlord and the tenant, whether the agreement contains terms restricting the number of occupants or the ability of the tenant to have roommates and the intent of the parties. As the facts of each case differ, an arbitrator will have to consider all the evidence submitted by the parties when making a determination.

While terms restricting the number of occupants or requiring prior consent of the landlord for additional occupants are not standard terms of a tenancy agreement under the Act, the parties may include such clauses and may also set out in their written tenancy agreement that the amount of rent increases for additional occupants, in accordance with s. 13 (2)(iv) and s. 40 of the Act. Tenants and landlords should also be aware of s. 6 (3) of the Act, which states:

- 3) A term of a tenancy agreement is not enforceable if
  - (a) the term is inconsistent with this Act or the regulations,
  - (b) the term is unconscionable, or
  - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Occupants should be aware that the director's authority is limited to the relationship between the original tenant and their landlord.

### **Use of rental property for travel/vacation accommodation**

Section 4 of the RTA states that the Act does not apply to living accommodations occupied as vacation or travel accommodation and there is no recourse under the RTA for disputes arising from vacation or travel accommodation. However, there have been dispute resolution proceedings arising from tenants who have rented out all or part of



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their rental unit via AirBnB or other vacation/rental listing services and their landlord has issued a One Month Notice to End Tenancy (form RTB-33) for the tenant's failure to obtain the landlord's written consent to sublet. As stated above within section C, unless the tenant is acting as an agent for the landlord or has moved out of the unit, this is not a true sublet under the RTA. It is unlikely that a One Month Notice to End Tenancy (form RTB-33) for cause for the tenant's failure to obtain the landlord's written consent to sublet would be successful in these circumstances, although this type of action by a tenant may constitute other breaches of the Act or tenancy agreement for which the landlord might issue a One Month Notice to End Tenancy (form RTB-33).

Tenants and landlords should be aware that there may be municipal bylaws and strata restrictions against use of property for travel or vacation accommodations, as well as insurance ramifications in the event of a problem client who causes damages to the unit. The tenant is responsible for any damages caused by any guest or occupant in the rental unit. A landlord could issue a One Month Notice to End Tenancy (form RTB-33) for cause if the rental unit suffered damages as a result of the actions of the tenant or any guest/occupant of the tenant.

As a result, landlords may wish to ensure that additional terms to address this are included in any tenancy agreement in order to maintain control over who occupies the rental unit and for what purposes the rental unit is used. As these are not standard terms of a tenancy agreement under the Act, a prospective tenant and the landlord would have to agree to any additional terms being added to the tenancy agreement. If a tenant were to violate such a term, the landlord could issue a One Month Notice to End Tenancy (form RTB-33) for cause for breach of a material term of the agreement. The decision to end the tenancy would be upheld if an arbitrator finds that the terms of the tenancy agreement were material terms that were not unconscionable and that the tenant breached those terms..

- See [Policy Guideline 8: Unconscionable and Material Terms](#).

### *Manufactured Home Park Tenancy Act and Regulation*

The legislation dealing with subleases and assignments in manufactured home park situations is set out in sections 42 to 52 of the Manufactured Home Park Tenancy Regulation. There are no comparable provisions in the Residential Tenancy Regulation.

Whether or not the director has jurisdiction will, in the context of the *Manufactured Home Park Tenancy Act*, depend on the specifics of each case. The definition of "landlord" in the *Manufactured Home Park Tenancy Act* does, however, use the words "other than a tenant whose manufactured home occupies the manufactured home site", so it does appear to be the case that a tenant who sublets his or her site *complete with the tenant's manufactured home* cannot be a "landlord" under this Act.

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### D. LANDLORD'S CONSENT

A tenant may assign or sublet their interest in a tenancy agreement only with the prior written consent of the landlord. If a tenant assigns or sublets without obtaining the landlord's prior written consent (or, in the case of a manufactured home, a director's order), the landlord has cause to serve a One Month Notice to End Tenancy (form RTB-33) under the Legislation<sup>5</sup>. Whether or not such a notice is successful, if challenged, will depend on an arbitrator's finding as to whether a sublet as contemplated by the Legislation has occurred.

It is up to the original tenant to seek the landlord's consent. In the case of a tenancy agreement under the *Residential Tenancy Act*<sup>6</sup>, the landlord cannot unreasonably withhold consent if the tenancy agreement is for a fixed term of six months or more.

Sometimes a landlord will stipulate conditions that the original tenant must meet before the landlord agrees to consent to an assignment or sublet. If the original tenant believes that a landlord is unreasonably withholding consent to assign or sublet, the original tenant is able to apply, under s. 65 (1)(g) of the *Residential Tenancy Act* or s. 58 (1)(g) of the *Manufactured Home Park Tenancy Act*, for an order of the director that a tenancy agreement be assigned or the rental property/manufactured home site be sublet. An arbitrator would then determine whether or not the circumstances in that particular case constituted the landlord unreasonably withholding consent. The arbitrator would also consider whether the requirements of the applicable Act, if any, had been met.

#### *Manufactured Home Park Tenancy Act and Regulation*

The statutory provisions under the *Manufactured Home Park Tenancy Act* are more complex than they are in the *Residential Tenancy Act*, and should be carefully assessed in each case. In general, section 48 of the *Manufactured Home Park Tenancy Regulation* sets out the only grounds under which the landlord may withhold consent to an assignment of a tenancy agreement or a sublet of a manufactured home site. It should be noted that the assignment provisions apply only in the context of a sale of the manufactured home that is situated on the manufactured home site. Also, a *Manufactured Home Park Tenancy Agreement* may prohibit subletting under any circumstances, pursuant to section 48 (c) of the *Manufactured Home Park Tenancy Regulation*.

A manufactured home owner must request an assignment or sublet in a form as approved by the director, as per s. 44 (1) of the *Manufactured Home Park Tenancy Regulation*. There are two different forms:

[Request for Consent to Assign a Manufactured Home Site Tenancy Agreement](#) (form RTB-10) (PDF): Manufactured home owners can use this form to request the park

<sup>5</sup> *Residential Tenancy Act*, ss. 47(1)(i); *Manufactured Home Park Tenancy Act*, ss. 40(1)(h)

<sup>6</sup> S. 34 (2) of the *Residential Tenancy Act*



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owner's consent to assign a tenancy agreement to the purchaser of his or her manufactured home.

[Request for Consent to Sublet a Manufactured Home Site](#) (form RTB-25) (PDF): A tenant may use this form to request a park owner's consent to sublet a manufactured home site to the renter of the manufactured home.

### F. COMPENSATION FOR LOSS

The director has authority to make an order for the payment of compensation if it is determined that a landlord acted unreasonably in refusing to consent to a request to assign a tenancy agreement or to sublet a rental unit. Failure to accept a reasonable assignment or sublet may affect a landlord's claim for rental loss because it may be determined that the landlord did not mitigate his or her losses. See Policy Guideline 16 – Compensation for Damage or Loss.

### G. CHANGES TO POLICY GUIDELINE

Section	Change	Notes	Effective Date
A	new	Added legislative framework section to mirror format of other Policy Guidelines and add references to legislation	22-Jul-2016
B	am	Removed reference to residual liability and clarified language	22-Jul-2016
C	am	Clarified content on RTA jurisdiction in sublet situations	22-Jul-2016
E	del	Deleted section on death or bankruptcy of a tenant	22-Jul-2016
F	am	Clarified language around director's authority to make an order for the payment of compensation	22-Jul-2016

Change notations

am = text amended or changed

del = text deleted

new = new section added