1. Landlord & Tenant – Responsibility for Residential Premises

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.

1. This guideline is intended to clarify the responsibilities of the landlord and tenant regarding maintenance, cleaning, and repairs of residential property and manufactured home parks, and obligations with respect to services and facilities[1].

   The Landlord is responsible for ensuring that rental units and property, or manufactured home sites and parks, meet “health, safety and housing standards” established by law, and are reasonably suitable for occupation given the nature and location of the property. The tenant must maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit or site, and property or park. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act* (the Legislation).

   Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.

   Residential Tenancy Agreements must not include terms that contradict the Legislation. For example, the tenant can not be required as a condition of tenancy to paint the premises or to maintain and repair appliances provided by the landlord. Such a term of the tenancy agreement would not be enforceable. The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible. The landlord and tenant may enter into a separate agreement authorizing the tenant to provide services for compensation or as rent.

2. The section in these guidelines on "Property Maintenance" and "Septic, Water and Oil Tanks" is applicable to both Manufactured Home Park tenancies and traditional residential premises tenancies.

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1 *Residential Tenancy Act*, ss. 27, 32 and 37; *Manufactured Home Park Tenancy Act* ss. 21, 26 and 30

RENOVATIONS AND CHANGES TO RENTAL UNIT

1. Any changes to the rental unit and/or residential property not explicitly consented to by the landlord must be returned to the original condition.

2. If the tenant does not return the rental unit and/or residential property to its original condition before vacating, the landlord may return the rental unit and/or residential property to its original condition and claim the costs against the tenant. Where the landlord chooses not to return the unit or property to its original condition, the landlord may claim the amount by which the value of the premises falls short of the value it would otherwise have had.

CARPETS

1. At the beginning of the tenancy the landlord is expected to provide the tenant with clean carpets in a reasonable state of repair.

2. The landlord is not expected to clean carpets during a tenancy, unless something unusual happens, like a water leak or flooding, which is not caused by the tenant.

3. The tenant is responsible for periodic cleaning of the carpets to maintain reasonable standards of cleanliness. Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year. Where the tenant has deliberately or carelessly stained the carpet he or she will be held responsible for cleaning the carpet at the end of the tenancy regardless of the length of tenancy.

4. The tenant may be expected to steam clean or shampoo the carpets at the end of a tenancy, regardless of the length of tenancy, if he or she, or another occupant, has had pets which were not caged or if he or she smoked in the premises.

INTERNAL WINDOW COVERINGS

1. If window coverings are provided at the beginning of the tenancy they must be clean and in a reasonable state of repair.

2. The landlord is not expected to clean the internal window coverings during the tenancy unless something unusual happens, like a water leak, which is not caused by the tenant.

3. The tenant is expected to leave the internal window coverings clean when he or she vacates. The tenant should check with the landlord before cleaning in case there are any special cleaning instructions. The tenant is not responsible for water stains due to inadequate windows.

4. The tenant may be liable for replacing internal window coverings, or paying for their depreciated value, when he or she has damaged the internal window

coverings deliberately, or has misused them e.g. cigarette burns, not using the "pulls", claw marks, etc.

5. The tenant is expected to clean the internal window coverings at the end of the tenancy regardless of the length of the tenancy where he or she, or another occupant smoked in the premises.

WINDOWS

1. At the beginning of the tenancy the landlord is expected to provide the tenant with clean windows, in a reasonable state of repair.

2 The tenant is responsible for cleaning the inside windows and tracks during, and at the end of the tenancy, including removing mould.
The tenant is responsible for cleaning the inside and outside of the balcony doors, windows and tracks during, and at the end of the tenancy
The landlord is responsible for cleaning the outside of the windows, at reasonable intervals.

MAJOR APPLIANCES

1. At the end of the tenancy the tenant must clean the stove top, elements and oven, defrost and clean the refrigerator, wipe out the inside of the dishwasher.

2. If the refrigerator and stove are on rollers, the tenant is responsible for pulling them out and cleaning behind and underneath at the end of the tenancy. If the refrigerator and stove aren't on rollers, the tenant is only responsible for pulling them out and cleaning behind and underneath if the landlord tells them how to move the appliances without injuring themselves or damaging the floor. If the appliance is not on rollers and is difficult to move, the landlord is responsible for moving and cleaning behind and underneath it.

3. The landlord is responsible for repairs to appliances provided under the tenancy agreement unless the damage was caused by the deliberate actions or neglect of the tenant.

WALLS

<u>Cleaning:</u>
The tenant is responsible for washing scuff marks, finger prints, etc. off the walls unless the texture of the wall prohibited wiping.

Nail Holes:

1. Most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.

2. The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.

3. The tenant is responsible for all deliberate or negligent damage to the walls.

PAINTING

The landlord is responsible for painting the interior of the rental unit at reasonable intervals.

BASEBOARDS AND BASEBOARD HEATERS

The tenant must wipe or vacuum baseboards and baseboard heaters to remove dust and dirt.

SMOKE DETECTORS

1. If there are smoke detectors, or if they are required by law, the landlord must install and keep smoke alarms in good working condition. Regular maintenance includes:
   - annual inspection of the system
   - annual cleaning and testing of the alarm
   - replacing batteries at least annually and according to the manufacturer's instructions.

2. The tenant must not prevent the smoke alarm from working by taking out batteries and leaving them out, or by replacing them with batteries that are dead or the wrong size. For his or her own safety and the safety of others, the tenant must tell the landlord when a smoke alarm needs new batteries, or that it seems to need to be repaired or replaced.

FURNACES

1. The landlord is responsible for inspecting and servicing the furnace in accordance with the manufacturer’s specifications, or annually where there are no manufacturer’s specifications, and is responsible for replacing furnace filters, cleaning heating ducts and ceiling vents as necessary.
2. The tenant is responsible for cleaning floor and wall vents as necessary.

FIREPLACE, CHIMNEY, VENTS AND FANS

1. The landlord is responsible for cleaning and maintaining the fireplace chimney at appropriate intervals.

2. The tenant is responsible for cleaning the fireplace at the end of the tenancy if he or she has used it.

3. The tenant is required to clean the screen of a vent or fan at the end of the end of the tenancy.

4. The landlord is required to clean out the dryer exhaust pipe and outside vent at reasonable intervals.

LIGHT BULBS AND FUSES

1. The landlord is responsible for:
   - making sure all light bulbs and fuses are working when the tenant moves in.
   - replacing light bulbs in hallways and other common areas like laundry and recreational rooms; and
   - repairing light fixtures in hallways and other common areas like laundry and recreational rooms.

2. The tenant is responsible for:
   - Replacing light bulbs in his or her premises during the tenancy,
   - Replacing standard fuses in their unit (e.g. stove), unless caused by a problem with the stove or electrical system, and
   - Making sure all fuses are working when he or she moves out, except when there is a problem with the electrical system.

TELEPHONES

1. Where provided under the tenancy agreement, the cost of repairing telephones, jacks and wiring, are the responsibility of the landlord.

2. If the tenant wants to install extra jacks or change jacks, he or she must get written permission from the landlord. If the landlord allows the installation, the tenant must pay for it, unless otherwise agreed. The tenant must leave the changes / additions at the end of the tenancy, unless there is an agreement to the contrary, in which case the tenant must repair the damaged wall etc.

3. The tenant is responsible for problems with his or her own telephone and cord and any wiring and/or jacks provided by him or her.

4. The landlord shall not unreasonably withhold consent for extra jacks or change of jacks where these are reasonably required by the tenant.

SECURITY

1. The tenant must get the landlord's approval, in writing, before installing a security system or alarm.

2. The tenant who has installed an alarm system, and then moves out, must either:
   - leave the system in the unit; or
   - remove the system and repair any damage caused to the unit during installation or removal.

3. Unless an arbitrator has ordered otherwise[2], the tenant must give the landlord the access code to his or her alarm.

4. If a security system is provided in the premises when the tenant moves in, the landlord is responsible for maintaining and repairing the security system unless the security system is damaged by the tenant or a person permitted in the premises by the tenant, in which case the tenant shall be responsible for the cost of repair.

5. If the tenant requests that the locks be changed at the beginning of a new tenancy, the landlord is responsible for re-keying or otherwise changing the locks so that the keys issued to previous tenants do not give access to the residential premises. The landlord is required to pay for any costs associated with changing the locks in this circumstance. The landlord may refuse to change the locks if the landlord had already done so after the previous tenant vacated the rental premises.

6. The landlord is responsible for providing and maintaining adequate locks or locking devices on all exterior doors and windows of a residential premises provided however that where such locks or locking devices are damaged by the actions of the tenant or a person permitted on the premises by the tenant, then the tenant shall be responsible for the cost of repairs.

7. In a multi-unit residential premises, in addition to providing and maintaining adequate locks or locking devices on all doors and windows of each individual unit within the premises, the landlord is responsible for providing adequate locks or locking devices on all entrances to common areas in the premises and on all storage areas.

KEYS

The landlord must give each tenant at least one set of keys for the rental unit, main doors, mail box and any other common areas under the landlord's control, such as recreational or laundry rooms. The tenant must return all keys at the end of the tenancy, including those he or she had cut at his or her own expense.

2 RTA, section 31(3).

PROPERTY MAINTENANCE

1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.

2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.

3. Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.

4. Generally the tenant living in a townhouse or multi-family dwelling who has exclusive use of the yard is responsible for routine yard maintenance, which includes cutting grass, clearing snow.

5. The landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.

6. The landlord is responsible for cutting grass, shovelling snow and weeding flower beds and gardens of multi-unit residential complexes and common areas of manufactured home parks.

GARBAGE REMOVAL AND PET WASTE

Unless there is an agreement to the contrary, the tenant is responsible for removal of garbage and pet waste during, and at the end of the tenancy.

SEPTIC, WATER AND OIL TANKS

1. The landlord is responsible for emptying a holding tank that has no field and for cleaning any blockages to the pipe leading into the holding tank except where the blockage is caused by the tenant's negligence. The landlord is also responsible for emptying and maintaining a septic tank with a field.

2. The landlord is responsible for winterizing tanks and fields if necessary

3. The tenant must leave water and oil tanks in the condition that he or she found them at the start of the tenancy e.g. half full.

FENCES AND FIXTURES

A fixture is defined as a "thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as a part of the land"[3].

For the purposes of determining whether chattels annexed to realty remain personal property or become realty, chattels are divided into two classes:

1. Chattels, such as brick, stone and plaster placed on the walls of a building, become realty after annexation. In other words, where personal property does not retain its original character after it is annexed to the realty or becomes an integral part of the realty, or is immovable without practically destroying the personal property, or if all or a part of it is essential to support the structure to which it is attached then it is a fixture.

2. Other personal property, that does not lose its original character after attachment may continue to be personal property, if the owner of the personal property and the landowner agree.

   Fixtures that have been considered tenant's fixtures are:
   - Trade fixtures - where the tenant has attached them for the purposes of his trade or business.
   - Ornamental and domestic fixtures which are whole and complete in themselves and which can be removed without substantial injury to the building. Examples of a chattel which can be moved intact and are more likely to be considered a tenant's fixture are blinds and a gas stove.

2. The landlord is responsible for maintaining fences or other fixtures erected by him or her.

3. The tenant must obtain the consent of the landlord prior to erecting fixtures, including a fence.

4. Where a fence, or other fixture, is erected by the tenant for his or her benefit, unless there is an agreement to the contrary, the tenant is responsible for the maintenance of the fence or other fixture.

5. If, at the end of the tenancy, the tenant removes the fixture erected by him or her, he or she is responsible for repairing any damage caused to the premises or property.

6. If the tenant leaves a fixture on the residential premises or property that the landlord has agreed he or she could erect, and the landlord no longer wishes the fixture to remain, the landlord is responsible for the cost of removal, unless there is an agreement to the contrary.

7. If the tenant leaves a fixture on the residential premises or property that the landlord did not agree the tenant could erect, and the landlord wishes the fixture removed, the tenant is responsible for the cost of removal.

3 R.A. Brown. Law of Personal Property. 2d ed. Chicago: Callaghan, 1955 at 137.

8. If the tenant leaves a fixture on the residential premises or property at the end of the tenancy, and the landlord does not remove it prior to the commencement of the following tenancy, the landlord is responsible for future repairs, unless the fixture only remains because the in-coming tenant agreed to maintain it, in which case it may be found that the ownership of the fixture passes to the in-coming tenant.
9. Where a fence or fixture is placed on the premises or property by the tenant, at the request of the landlord, the landlord may be held responsible for its repair and maintenance.

SHARED UTILITY SERVICE

1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable[4] as defined in the Regulations.

2. If the tenancy agreement requires one of the tenants to have utilities (such as electricity, gas, water etc.) in his or her name, and if the other tenants under a different tenancy agreement do not pay their share, the tenant whose name is on the bill, or his or her agent, may claim against the landlord for the other tenants' share of the unpaid utility bills.

SERVICES AND FACILITIES

1. A landlord must continue to provide a service or facility that is essential to the tenant's use of the rental unit as living accommodation.

2. If the tenant can purchase a reasonable substitute for the service or facility, a landlord may terminate or restrict a service or facility by giving 30 days' written notice, in the approved form, of the termination or restriction. The landlord must reduce the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.[5]

4 Refer also to Guideline 8
5 RTA, s. 27; MHPTA, s. 21

2. Ending a Tenancy Agreement: Good Faith Requirement

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.

The *Residential Tenancy Act*[1] *and the Manufactured Home Park Tenancy Act*[2] allow the landlord to end a tenancy agreement if the landlord intends, in specified instances to change the use of the residential unit or manufactured home park site.

The specified circumstances in the Residential Tenancy Act are as follows:

- the landlord intends in good faith to rent or provide the rental unit to a new caretaker, manager or superintendent;[3]

- the landlord or a close family member of the landlord intends in good faith to occupy the rental unit;[4]

- a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit;[5]

- the landlord enters into an agreement in good faith to sell the rental unit,[6][7]

    (b) all the conditions on which the sale depends have been satisfied, and
    (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
        (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
        (ii) the purchaser is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

- the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:[8]
    (a) demolish the rental unit;
    (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;
    (c) convert the residential property to strata lots under the *Strata Property Act*;

1 *Residential Tenancy Act* ss. 48(1)(c), 49(3), (4), (5)(a), (5)(c)(i) (ii), (6)
2 *Manufactured Home Park Tenancy Act* ss. 41(1)(c), 42(1)
3 RTA s. 48(1)(c)
4 RTA s. 49(3)
5 RTA s. 49(4)
6 RTA s. 49(5)(a)
7 RTA s. 49(5)(c)(i)(ii)
8 RTA s. 49(6)

(d) convert the residential property into a not for profit housing cooperative under the *Cooperative Association Act*;
(e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;
(f) convert the rental unit to a non-residential use.

The specified circumstances in the Manufactured Home Park Tenancy Act are as follows:

- the landlord intends in good faith to rent or provide the manufactured home site to a new caretaker, manager or superintendent.[9]

- the landlord has all the necessary permits and approvals required by law, and intends in good faith, to convert all or a significant part of the manufactured home park to a non-residential use or a residential use other than a manufactured home park.[10]

The "good faith" requirement imposes a two part test. First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

For example, the landlord may intend to occupy or convert the premises as stated on the notice to end. That intention may, however, be motivated by dishonest or undisclosed purposes. If the primary motive for the landlord ending the tenancy is to retaliate against the tenant, then the landlord does not have a “good faith” intent. Similarly, if the landlord is attempting to avoid his/her legal responsibilities as a landlord, or is attempting to obtain an unconscionable or undue advantage by ending the tenancy, the intent of the landlord may not be a “good faith” intent. Rather, the circumstances may be such that dishonesty may be inferred.

If the “good faith” intent of the landlord is called into question, the burden is on the landlord to establish that he/she truly intends to do what the landlord indicates on the Notice to End, and that he/she is not acting dishonestly or with an ulterior motive for ending the tenancy as the landlord's primary motive

9 MHPTA s. 41(1)(c)
10 MHPTA s. 42(1)

3. Claims for Rent and Damages for Loss of Rent

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.

This guideline deals with situations where a landlord seeks to hold a tenant liable for loss of rent after the end of a tenancy agreement.

Section 44 of the *Residential Tenancy* Act and section 37 of the *Manufactured Home Park Tenancy Act* set out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended pursuant to these provision, however if a tenant remains in possession of the premises (overholds), the tenant will be liable to pay occupation rent 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 loss of rent.

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;

2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

The damages awarded are an amount sufficient to put the landlord in the same position

as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of $1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at $50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the $50.00 difference over the remaining 10 months of the original term. In a month to month tenancy, if the tenancy is ended by the landlord for non-payment of rent, the landlord may recover any loss of rent suffered for the next month as a notice given by the tenant during the month would not end the tenancy until the end of the subsequent month. If a month to month tenancy is ended for cause, even for a fundamental breach, there can be no 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's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.

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 or damages, but any remainder is not recoverable by the tenant. In a month to month tenancy the fact that the landlord may have been able to re-let the premises at a higher rent for a subsequent tenancy does not serve to reduce the liability of the previous tenant.

Even where a tenancy has been ended by proper notice, if the premises are un-rentable due to damage caused by the tenant, the landlord is entitled to claim damages for loss of rent. The landlord is required to mitigate the loss by completing the repairs in a timely manner.

4. Liquidated Damages

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.

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

5. Duty to Minimize Loss

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.

Where the landlord or tenant breaches a term of the tenancy agreement or the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss[1]. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation[2]. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation.

If the arbitrator finds that the party claiming damages has not minimized the loss, the arbitrator may award a reduced claim that is adjusted for the amount that might have been saved. The landlord or tenant entitled to contract for repairs as a result of a breach by the other party, may choose to pay a service charge that exceeds what one would reasonably be required to pay for the service in the circumstances. In that case, the arbitrator may award a reduced claim based on the reasonable cost of the service. If partial mitigation occurs, the arbitrator may apportion the claim to cover the period during which mitigation occurred. The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit or site prior to the expiry of a fixed term lease may not be entitled to claim loss of rent for the first month of vacancy;

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1 *Residential Tenancy Act*, s. 7(2); *Manufactured Home Park Tenancy Act*, s. 7(2)
2 RTA, s. 32; MHPTA, s. 26

however, claims for loss of rent for subsequent months may be successful once efforts to find a new tenant are made.

Claims for loss of rental income

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent. Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the Legislation or the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect. Oral notice is not effective to end the tenancy agreement, and the landlord may require written notice before making efforts to re-rent. Where the tenant has vacated or abandoned the rental unit or site, the landlord must try to rent the rental unit or site again as soon as is practicable.

Where the landlord gives a notice to end tenancy and is entitled to claim damages for loss of rental income, the landlord's obligation to re-rent the rental unit or site begins after the relevant dispute period set out in the *Residential Tenancy Act*[3] or the *Manufactured Home Park Tenancy Act*[4] have expired. If the tenant files an application to dispute the notice, the landlord is not required to find a new tenant until the arbitration decision and order are received, the time limits for a review application have passed, and, where a review application is made by the tenant, after the review decision is received by the landlord.

Where an arbitrator orders the tenancy ended under the *Residential Tenancy Act*[5] or the *Manufactured Home Park Tenancy Act*[6], or issues an order of possession[7], the landlord must begin efforts to find a new tenant after the time limits for a review application have passed, and, where a review application is made by the tenant, after the decision and order are received by the landlord.

3 RTA, ss. 46(4), 47(4), 48(5) and 49(8)
4 MHPTA, ss. 39(4), 40(4), 41(5) and 42(4)
5 RTA, s. 56
6 MHPTA, s. 49
7 RTA, s. 55: MHPTA ss 48

6. Right to Quiet Enjoyment

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.

This guideline deals with a tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."[1] A landlord does not have a reciprocal right to quiet enjoyment.

The *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* [2] (the Legislation) establish rights to quiet enjoyment, which include, but are not limited to:

- reasonable privacy
- freedom from unreasonable disturbance,
- exclusive possession, subject to the landlord's right of entry under the Legislation, and
- use of common areas for reasonable and lawful purposes, free from significant interference.

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written provision exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

- **Basis for a finding of breach of quiet enjoyment**

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of:

· entering the rental premises frequently, or without notice or permission;

1 "Black's Law Dictionary", Sixth Edition, 1990, p. 1248.
2 *Residential Tenancy Act*, s. 28: *Manufactured Home Park Tenancy Act,* s. 22.

- unreasonable and ongoing noise;
- persecution and intimidation;
- refusing the tenant access to parts of the rental premises;
- preventing the tenant from having guests without cause;
- intentionally removing or restricting services, or failing to pay bills so that services are cut off;
- forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or,
- allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable.

A tenant does not have to end the tenancy to show that there has been sufficient interference so as to breach the covenant of quiet enjoyment, however it would ordinarily be necessary to show a course of repeated or persistent threatening or intimidating behaviour. A tenant may file a claim for damages if a landlord either engages in such conduct, or fails to take reasonable steps to prevent such conduct by employees or other tenants.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it. A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy.

- **Harassment**

Harassment is defined in the Dictionary of Canadian Law as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".[3] As such, what is commonly referred to as harassment of a tenant by a landlord may well constitute a breach of the covenant of quiet enjoyment. There are a number of other definitions, however all reflect the element of ongoing or repeated activity by the harasser.

3 "Dictionary of Canadian Law", Second Edition, Carswell Toronto, 1995, p. 542.

- **Application to a residential hotel or other license to occupy**

If an arbitrator determines that an agreement is a residential tenancy under the Legislation, that tenant is entitled to the covenant of quiet enjoyment.

- **Claim for damages**

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

The Supreme Court has decided that arbitrators have the ability to hear claims in tort, and that the awarding of monetary damages might be appropriate where the claim arises from the landlord's failure to meet his obligations under the Legislation. Facts that relate to an issue of quiet enjoyment might also be found to support a claim in tort for compensation in damages. An arbitrator can award damages for a nuisance that affects the use and enjoyment of the premises, or for the intentional infliction of mental suffering.

On application, an arbitrator may award aggravated damages where a very serious situation has been allowed to continue. Aggravated damages are those damages which are intended to provide compensation to the applicant, rather than punish the erring party, and can take into effect intangibles such as distress and humiliation that may have been caused by the respondent's behaviour.

- **Ending Tenancy for Breach of a Material Term**

A breach of the covenant of quiet enjoyment has been found by the courts to be a breach of a material term of the tenancy agreement. A tenant may elect to treat the tenancy agreement as ended, however the tenant must first so notify the landlord in writing. The standard of proof is high – it is necessary to find that there has been a significant interference with the use of the premises. An award for damages may be more appropriate, depending on the circumstances.

- **Non-payment of Rent**

A tenant may not refuse to pay rent because of a breach of the covenant of quiet enjoyment by the landlord, except as ordered by an arbitrator.

7. Locks and Access

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.

At common law, the tenant has a right to quiet enjoyment and peaceful occupation of the premises. At the same time, the landlord has the right to enter under certain conditions. The *Residential Tenancy Act* (the Act) addresses the rights and obligations of landlords and tenants with respect to entry into a rental unit.

The Act[1] allows the tenant to request that the locks be changed at the beginning of a new tenancy. The landlord is responsible for re-keying or otherwise changing the locks so that the keys issued to previous tenants do not give access to the rental unit. The landlord is required to pay for any costs associated with changing the locks in this circumstance. The landlord may refuse to change the locks if the landlord had already done so after the previous tenant vacated the rental unit.[2]

A landlord must not enter a rental unit in respect of which the tenant has a right to possession unless one of the following applies:[3]

- an emergency exists and the entry is necessary to protect life or property,
- the tenant gives permission at the time of entry, or
- the tenant gives permission not more than 30 days before the time of entry,
- the landlord gives the tenant written notice not less than 24 hours, and not more than 30 days before the time of entry.
- the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms,
- the tenant has abandoned the rental unit, or
- the landlord has an arbitrator's order authorizing the entry.

Regarding written notices, the notice must state a reasonable purpose for the entry and must give the date and time intended for the entry. The time stated must be between 8:00 a.m. and 9:00 p.m.

The notice must be served in accordance with the *Residential Tenancy Act.*[4] If the landlord leaves the notice in the mailbox or mail slot, or attaches it to the door or other conspicuous place on the rental unit, the notice is not deemed to be received until 3 days after posting or placing it in the mailbox or slot. If the notice is sent by mail, the notice is

1 *Residential Tenancy Act,* s. 25
2 RTA, s.25(2)
3 RTA, s.29
4 RTA, s.88

not deemed received until 5 days after mailing. If the notice is sent by fax, the notice is not deemed received until 3 days after faxing it. This additional time must be taken into consideration by the landlord when advising of the date and time of entry.

Where a valid notice has been given by the landlord it is not required that the tenant be present at the time of entry.

Where a notice is given that meets the time constraints of the Act, but entry is not for a reasonable purpose, the tenant may deny the landlord access. A "reasonable purpose" may include:

- inspecting the premises for damage,
- carrying out repairs to the premises,
- showing the premises to prospective tenants, or
- showing the premises to prospective purchasers.

However, a "reasonable purpose" may lose its reasonableness if carried out too often. Note that under the *Act* a landlord may inspect a rental unit monthly.[5]

Where possible the parties should agree beforehand on reasonable times for entry. Where the parties cannot agree on what are reasonable times, and the tenant's quiet enjoyment of the rental unit is interrupted (for example where the house is listed for sale and there are numerous showings of the rental unit), the tenant may apply for arbitration to suspend the rights of the landlord, or an Order that the landlord's right of entry be exercised only on conditions.

The tenant may not prevent a landlord from entering to carry out repairs, where a valid notice of entry has been given, even if the tenant is capable, and willing to carry out the repairs.

Where a tenant prevents a landlord entering, after a valid notice of entry has been given, the landlord may apply for an Order for entry at a specified time and for a specified purpose. The arbitrator can, at that time, determine if the reason for entry is a reasonable one. An arbitrator may find that the holding of an "Open House" by the landlord's realtor is not a reasonable purpose if the landlord cannot ensure the safety of the tenant's possessions.

The *Residential Tenancy Act* does not require that notice be given for entry onto **residential property**, however, the Act recognizes that the common law respecting landlord and tenant applies. Therefore, unless there is an agreement to the contrary, entry on the property by the landlord should be limited to such reasonable activities as collecting rent, serving documents and delivering Notices of entry to the premises.

Landlords of manufactured homes parks are subject to similar rules under the *Manufactured Home Park Tenancy Act.* They must not enter onto a manufactured home site except on the terms provided above for residential tenancies (but for housekeeping

5 RTA, s.29(2).

services), with the added provision that the landlord of a manufactured home park may come onto a site to collect rent or to give or serve a document provided for by the *Manufactured Home Park Tenancy Act.* The landlord of a manufactured home park may not enter the manufactured home of a tenant, on notice or otherwise, without the tenant's permission.

Where a tenant can prove that the landlord has entered contrary to the *Residential Tenancy Act*, the tenant may apply to have the locks to the rental unit changed. The arbitrator will consider, among other things, whether an order to change the locks on a particular suite door could endanger the safety of other nearby tenants. An order for change of locks will only apply to areas where the tenant has exclusive possession.

In some circumstances, where there has been substantial interference with the tenant's use and enjoyment of the property, it may be appropriate for the tenant to be awarded damages for unlawful entry in addition to, or rather than, a change of locks.

Where a Strata Council changes the locks to the residential property and the Council does not provide a new key to the tenant, the landlord must obtain a key for the tenant. Failure to do so could result in a claim for damages being sustained.

8. Unconscionable and Material Terms

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.

This guideline deals with unconscionable and material terms in a tenancy agreement.

Tenancy agreements contain terms where one party or the other promises to do or not to do something.

Unconscionable Terms

Under the *Residential Tenancy* Act and the *Manufactured Home Park Tenancy* Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms which are unconscionable are not enforceable[1]. Whether a term is unconscionable depends upon a variety of factors. To be unconscionable the term must be oppressive or grossly unfair. A test for determining unconscionability is whether the agreement is so one-sided as to oppress or unfairly surprise the other party. Such terms may be a clause limiting damages or granting a procedural advantage. Use of small print or unintelligible language may indicate an unconscionable term. The burden of proving a term is unconscionable is upon the party alleging unconscionability. Please refer to the definition of unconscionability in the regulation for further information.

An example of a term which may be found to be unconscionable could be a term which is printed in text which is smaller than the rest of the agreement and is difficult to read and understand, or which uses unusual words, to disguise the term or its meaning. Another example of a term which has been found to be unconscionable is where one party took advantage of the ignorance, need or distress of a weaker party which left that party in the power of the stronger. Exploiting the age, infirmity or mental weakness of a party to secure their agreement to the term may be important factors.

Material Terms

To end a tenancy agreement for breach of a material term a landlord must establish that the tenant breached a material term and that the tenant did not rectify the breach within a reasonable time after notice to do so by the landlord[2]. To determine the materiality of a term, an arbitrator will focus upon the importance of the term in

1 *Residential Tenancy Act*, s. 6(3); *Manufactured Home Park Tenancy Act*, s. 6(3)

2 RTA, s. 47(1)(h); MHPTA, s. 40(1)(g)

the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. The arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Where a tenant elects to give written notice ending a tenancy agreement on the basis that the landlord has breached a material term of the tenancy agreement[3], if a dispute arises as a result of this action the tenant bears the same burden as the landlord as noted above, except that the tenant is not obligated to give the landlord the opportunity to rectify the breach prior giving the landlord notice to end the tenancy. The landlord would not normally be found in breach of a material term if unaware of the problem.

3 RTA, ss. 45(3) and (4); MHPTA ss. 38(3) and (4)

9. Tenancy Agreements and Licenses to Occupy

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.

This Guideline clarifies the factors that distinguish a tenancy agreement from a license to occupy. The definition of "tenancy agreement" in the *Residential Tenancy Act* includes a license to occupy. However, the *Manufactured Home Park Tenancy Act* does not contain a similar provision and does not apply to an occupation of land that under the common law would be considered a license to occupy.

A license to occupy is a living arrangement that is not a tenancy. Under a license to occupy, a person, or "licensee", is given permission to use a site or property, but that permission may be revoked at any time. Under a tenancy agreement, the tenant is given exclusive possession of the site for a term, which can include month to month. The landlord may only enter the site with the consent of the tenant, or under the limited circumstances defined by the *Manufactured Home Park Tenancy Act* [1]. A licensee is not entitled to file an application under the *Manufactured Home Park Tenancy Act*.

If there is exclusive possession for a term and rent is paid, there is a presumption that a tenancy has been created, unless there are circumstances that suggest otherwise. For example, a park owner who allows a family member to occupy the site and pay rent, has not necessarily entered into a tenancy agreement. In order to determine whether a particular arrangement is a license or tenancy, the arbitrator will consider what the parties intended, and all of the circumstances surrounding the occupation of the premises.

Some of the factors that may weigh against finding a tenancy are:

- Payment of a security deposit is not required.
- The owner, or other person allowing occupancy, retains access to, or control over, portions of the site.
- The occupier pays property taxes and utilities but not a fixed amount for rent.
- The owner, or other person allowing occupancy, retains the right to enter the site without notice.
- The parties have a family or other personal relationship, and occupancy is given because of generosity rather than business considerations.
- The parties have agreed that the occupier may be evicted without a reason, or may vacate without notice.

1 *Manufactured Home Park Tenancy Act*, s. 23

- The written contract suggests there was no intention that the provisions of the *Manufactured Home Park Tenancy Act* apply.

The arbitrator will weigh all of the factors for and against finding that a tenancy exists, even where the written contract specifies a license or tenancy agreement. It is also important to note that the passage of time alone will not change the nature of the agreement from license or tenancy.

Tenancies involving travel trailers and recreational vehicles

Although the *Manufactured Home Park Tenancy Act* defines manufactured homes in a way that might include recreational vehicles such as travel trailers, it is up to the party making an application under the Act to show that a tenancy agreement exists. In addition to any relevant considerations above, and although no one factor is determinative, the following factors would tend to support a finding that the arrangement is a license to occupy and not a tenancy agreement:

- The manufactured home is intended for recreational rather than residential use.
- The home is located in a campground or RV Park, not a Manufactured Home Park.
- The property on which the manufactured home is located does not meet zoning requirements for a Manufactured Home Park.
- The rent is calculated on a daily basis, and G.S.T. is calculated on the rent.
- The property owner pays utilities such as cablevision and electricity.
- There is no access to services and facilities usually provided in ordinary tenancies, e.g. frost-free water connections.
- Visiting hours are imposed.

A landlord and tenant may enter into a tenancy agreement for rental of a manufactured home site upon which the tenant is entitled to bring a manufactured home. It is important to note that a binding tenancy agreement may exist even where there is no home on the site.

10. Bias and Conflict of Interest

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.

This guideline deals with situations where a party to an arbitration alleges that the arbitrator is in a conflict of interest or is biased.

An arbitrator will refuse to conduct a hearing if he or she is satisfied that there is a reasonable apprehension of bias. A reasonable apprehension of bias exists when an arbitrator is satisfied that a person who is informed of all the facts would reasonably conclude that there is an appearance of bias on the part of the arbitrator.

A reasonable apprehension of bias may exist where the arbitrator has a personal or financial interest in the case which he or she is to hear.

Examples of interests or relationships which give rise to claims of bias

- A financial interest may exist in any situation where the arbitrator has a financial stake in one of the parties which is appearing before him or her. If a hearing involves a company in which the arbitrator holds shares, this could indicate a financial interest of the arbitrator in the outcome of the hearing.

- The fact that the arbitrator and one of the parties previously had a landlord and tenant relationship may be raised as grounds to support a bias claim. The passage of time may make this claim less significant, depending on the nature of the relationship. For example, where the arbitrator was the tenant of a large corporate landlord and had little or no contact with the officers or directors of that corporation, any claim of bias would usually end when the landlord/tenant relationship ends. On the other hand, if the arbitrator had direct personal contact with the other party, either as a landlord or tenant, bias may continue to be an issue for a longer period of time.

- Membership of a party in a large organization to which the arbitrator also belongs is not sufficient to support the suggestion of bias or an appearance of bias.

- A family relationship may be sufficient to support an allegation of bias. An arbitrator should not hear a case involving a member of his or her immediate or extended family.

- A personal friendship may be sufficient to support an allegation of bias. An arbitrator should not hear a case involving a close personal friend.

- Relationships of the same kind and degree with an agent or lawyer appearing on behalf of a party may support a claim of apprehension of bias. A relationship of the same kind or degree with a material witness of one of the parties may also support a claim of apprehension of bias.

What bias is not

The fact that one or both of the parties may have appeared before the arbitrator previously, or that the arbitrator previously denied an application by one of the parties, does not by itself support a claim of bias.

Procedure for party to follow if allegation of bias is made

(a) Prior to application for arbitration

If a party to an arbitration hearing is related to or knows one of the arbitrators, in his or her region, personally, the party should advise the Residential Tenancy Office as soon as possible. If appropriate, the Office will ensure that another arbitrator is appointed to conduct the hearing.

(b) At the arbitration hearing

If a party discovers at an arbitration hearing that the arbitrator is known to him or her or to the other party, the party should, as soon as possible, advise the arbitrator of the relationship. If a party discovers that the arbitrator has a financial or other personal interest in a matter which is about to be heard by the arbitrator, the party should advise the arbitrator of this as soon as possible.

The arbitrator will make a decision whether he or she can proceed to conduct the hearing. If a party waives any right to object to the arbitrator hearing the case, the arbitrator will proceed to hear the case and will note this in his or her decision. If a party waives any right to object to the arbitrator hearing the case, the arbitrator will proceed to hear the case and will note this in his or her decision. If the right to object is waived at the arbitration hearing, the party is unlikely to succeed on the ground of bias on judicial review.

If an allegation of bias or conflict of interest is raised at the hearing, the arbitrator will decide whether or not there is any basis to support the allegation and if he or she so concludes, will withdraw and forward the file to the Director for the assignment of another arbitrator.

In appropriate circumstances the arbitrator may reserve his or her decision and if necessary obtain further information relevant to the issue. For example, if the allegation is that the arbitrator previously had a professional relationship with one of the parties, the arbitrator may wish to consult his or her files to confirm whether or not he or she has ever dealt with the party in question. Any information obtained by the arbitrator will be disclosed to both parties.

If the arbitrator concludes that there is no reasonable apprehension of bias then the hearing will proceed and this will be noted in the arbitrator's decision.

11. Amendment and Withdrawal of Notices

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.

Notice to End Tenancy

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) set out the requirements[1] for giving a Notice to End Tenancy. The Legislation [2] allows an arbitrator, on application, to amend a Notice to End Tenancy where the person receiving the notice knew, or should have known, the information that was omitted from the notice, and it is reasonable in the circumstances.

In determining if a person "should have known" particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is "reasonable in the circumstances" an arbitrator will look at all of the facts and consider, in particular, if one party would be unfairly prejudiced by amending the notice.

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest

1 *Residential Tenancy Act*, s. 45 – 50 & 52; *Manufactured Home Park Tenancy Act*, s. 37 – 43 & 45
2 RTA, s. 68(1); MHPTA, s. 61(1)

intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. A Notice to End Tenancy given by the landlord must also be in the form approved by the Director of the Residential Tenancy Office.

Notice of Rent Increase

Where a Notice of Rent Increase has been given by the landlord, the Notice may be withdrawn as long as the tenant has not applied for arbitration of the rent increase, or acted on the notice to his or her detriment. For example, where a landlord withdraws a Notice of Rent Increase after having given the Notice to the tenant with the expectation or intention that the tenant will vacate, and the tenant has made arrangements to vacate the premises because of the amount of the rent increase, the tenant may still have a valid claim for moving expenses and other compensation, as permitted in the Legislation[3] .

3 RTA, s. 51; MHPTA, s. 44

12. Service Provisions

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.

This Guideline deals with the ways in which documents required or permitted to be given to or to be served on a person under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) must be served. Such documents may include the tenancy agreement, notices, applications, decisions, orders, statements, summons to testify, and certain types of evidence. As this guideline deals with sections of the Legislation[1], landlords and tenants should also refer to Rule 3 of the Arbitration Rules of Procedure for more information on serving the Application and exchanging evidence.

The purpose of serving documents under the Legislation is to notify the person being served of matters relating to the Legislation, the tenancy agreement, an arbitration, or a review. Failure to serve documents properly may result in the application being adjourned, dismissed with leave to reapply, or dismissed without leave to reapply.

1. ADDRESS FOR SERVICE

Where the applicant does not disclose the applicant's address on the application, the applicant must provide an address for service of documents on the application for each applicant named.

2. SERVICE OF DOCUMENTS with respect to:

- An application for Arbitration (except for section 3 below)
- An arbitrator's Decision to proceed with a review of an arbitrator's decision

There are only three methods of service that may be used with respect to these matters. These are: [2]

Personal service

- Where a tenant is personally serving a landlord, the tenant must serve a document by leaving a copy of it with the landlord or an agent of the landlord.
- Where a landlord is personally serving a tenant, the landlord must serve a document by leaving a copy with the tenant.

This requires actually handing a copy of the document to the person being served. If the person declines to take a copy of the document, it may be left near the person so long as the person serving informs the person being served of the nature of the document being

1 *Residential Tenancy Act*, ss. 88 to 90; *Manufactured Home Park Tenancy Act*, ss. 81 to 83
2 RTA, s. 89(1); MHPTA, s, 82(1)

left near them.

Registered Mail

- Where a tenant is serving a landlord by registered mail, the address for service must be where the landlord resides at the time of mailing or the address at which the landlord carries on business as a landlord. (See section 5 and 6 below)
- Where a landlord is serving a tenant by registered mail, the address for service must be where the tenant resides at the time of mailing, or the forwarding address provided by the tenant.

"Registered Mail" includes any method of mail delivery provided by Canada Post for which confirmation of delivery to a named person is available.

An Arbitrator's Order Regarding Service [3]

- See sections 10 and 11 below for discussion of this subject.

3. SERVICE OF DOCUMENTS ON TENANT with respect to:

- An application by a landlord for an order of possession for the landlord.
- An application by a landlord for an order ending tenancy early.

There are only four methods of service that may be used with respect to these matters. [4]

These are:

Personal Service

- Where a landlord is personally serving a tenant, the landlord must serve by leaving a copy with the tenant, or by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant.

This requires actually handing a copy of the document to the person being served. If the person declines to take a copy of the document, it may be left near the person so long as the person serving informs the person being served of the nature of the document being left near them.

Registered Mail

- Where a landlord is serving a tenant by registered mail, the address for service must be where the tenant resides at the time of mailing.

"Registered Mail" includes any method of mail delivery provided by Canada Post for which confirmation of delivery to a named person is available.

3 Page 5
4 Section 89(2) of RTA and section 82(2) of MHPTA

Posting

- By attaching a copy to a door or other conspicuous place at the address at which the tenant resides.

An Arbitrator's Order Regarding Service [5]

- See sections 10 and 11 below for discussion of this subject.

4. SERVICE OF DOCUMENTS GENERALLY

The Legislation provides a number of service methods which may be used where a landlord or tenant is serving documents which are not covered by the sections referred to above. These methods are:[6]

- **by personally leaving a copy of the document with the person to be served**
  If this method is used, the document must be given personally to the person. If the person refuses to take it, it should be left with or near the person while advising the person of the nature of the document being served.

- **by personally serving an agent of the landlord**
  The tenant should check the tenancy agreement for the name and address of the landlord's agent, who may be an individual, a firm, such as a sole proprietorship or a partnership, or an incorporated company or society, that is authorized to act on behalf of the landlord. Before leaving a document with an agent, the person serving or leaving the document should make sure that the agent is in fact the landlord's agent and obtain the name of the person accepting the document.

- **by sending a copy of the document by ordinary mail or registered mail to the address at which the person to be served resides at the time of mailing**
  If registered mail is used, it will generally provide a record of the mail being sent and received, which ordinary mail will not.

- **if serving a landlord, by sending a copy of the document by ordinary mail or registered mail to the address at which the person carries on business as a landlord**
  See sections 5 and 6 below for discussion of this subject

- **if serving a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant**

- **by leaving a copy of the document at the person's residence with an adult person who apparently resides with the person to be served**
  A person may be considered to apparently reside with someone, if, from what can be seen, observed, or is evident from all of the circumstances known to the person serving the document, the person appears to reside with the person to be served.

5 Page 7
6 RTA, s. 88; MHPTA, s. 81

- **by leaving a copy of the document in a mailbox or mail slot for the address where the person to be served resides at the time of service**
  If this method of service is used, the person leaving the document needs to determine that the mailbox or mail slot belongs to the person to be served, particularly in a multi-unit building, such as an apartment, condo, or office building.

- **by leaving a copy of the document in a mailbox or mail slot for the address where the person to be served carries on business as a landlord.**
  (See sections 5 and 6 below)
  If this method of service is used, the person leaving the document needs to determine that the mailbox or mail slot belongs to the address at which the landlord carries on business as a landlord, particularly in a multi-unit building, such as an apartment, condo, or office building.

- **by attaching a copy of the document to a door or other conspicuous place at the address where the person to be served resides at the time of service**
  If this method is used, the person attaching the document should make sure that the door or conspicuous place belongs to the person's residence, and that the document will be readily seen by the person entering or leaving the residence.

- **by attaching a copy of the document to a door or other conspicuous place at the address at which the landlord carries on business as a landlord**
  (See sections 5 and 6 below)
  If this method is used, the person attaching the document should make sure that the door or conspicuous place belongs to the address where the person carries on business as a landlord, and that the document will be readily seen by the person entering or leaving the place of business.

- **by transmitting a copy of the document to the fax number provided as an address for service by the person to be served**
  If no fax number for service has been provided, then this method of service may not be used. If this method of service is used, then the person serving the document will need to provide proof that the document transmitted by fax was sent to the fax number provided, and that the transmission of all pages was completed. A fax transmission report may provide this information.

- **as ordered by an arbitrator (Substituted service – see section 10 and 11 below for discussion of this subject)**

- **by any other means of service prescribed in the regulations**

5. SERVICE OF DOCUMENTS ON AN INCORPORATED COMPANY OR SOCIETY

- As the Legislation does not provide for service of documents on a landlord that is an incorporated company or a society in the manner provided by the *Company Act*

or the *Society Act*, service on a landlord that is an incorporated company or society should be in the manner provided in the Legislation, and not in the manner provided by the *Company Act* or *Society Act*. The registered office of a landlord that is an incorporated company or a society, such as a lawyer's office or accountant's office, may not necessarily be the address at which the landlord carries on business as a landlord. If it is not, service on the registered office may not be adequate service for the purposes of the Legislation. (See section 6 below)

6. SERVING DOCUMENTS AT THE ADDRESS AT WHICH THE LANDLORD CARRIES ON BUSINESS AS A LANDLORD

The Legislation permits a tenant to serve a document on a landlord at the address at which the landlord carries on business as a landlord, in one of the following ways:[7]

- by mail,
- by leaving a copy of the document in a mailbox or mail slot,
- by attaching a copy of the document to a door or other conspicuous place.

If a tenant intends to serve a document on the landlord in one of the above ways at the address at which he or she carries on business as a landlord, the tenant will need to determine the address at which the landlord carries on business as a landlord before serving. Such an address may include the following:

- The address of the landlord as set out in the written tenancy agreement.
- The address of the landlord's office or the landlord's manager's suite in an apartment or condominium building. Service on the strata corporation's office or strata corporation's manager's suite will usually not be effective, unless the strata corporation is also the landlord.
- The address where the landlord resides.
- A separate address where the landlord operates his or her business as landlord, such as an office in a office building or in a storefront operation, whether he or she carries on his or her business as landlord as the only business in the premises, or whether he or she carries on business as a landlord in conjunction with any other business of his or hers in premises shared with another business owned or operated by the landlord, or by someone else.
- A post office box where it is set out in the tenancy agreement as the address of the landlord, or it is the address where the landlord receives mail and notices, or is specified by the landlord to be his or her address for receiving mail or notices.

A landlord may operate a business as a landlord from one location and operate another business from a different location. The Legislation does not permit a tenant to serve a landlord in one of the ways set out above at the address where the landlord carries on that other business unless the landlord also carries on his or her business as a landlord at that same address.

If the landlord disputes that he or she has been served in one of the permitted ways at the

7 RTA, s. 88; MHPTA, s.81

address where he or she carries on business as a landlord, or if the landlord does not attend at the hearing, the tenant will have to provide sufficient evidence to the arbitrator to prove that the address used is in fact the address at which the landlord carries on business as a landlord.

7. SERVICE OF DOCUMENTS ON INFANTS

Service of a document on a person who is under the age of 19 years and has entered into a residential tenancy agreement is to be effected in one of the ways required or permitted under the Legislation.

8. SERVICE OF DOCUMENTS ON INCOMPETENT PERSONS

Service of documents on an incompetent person, that is, a person who is incapable by reason of age, illness, or mental infirmity of managing himself or herself or his or her affairs, is to be effected by serving a copy of the document in one of the ways required or permitted under the Legislation:

- on the person's Committee appointed under the *Patients Property Act*, or
- on the person's representative appointed under the *Representation Agreement Act*, or
- where there is no Committee, or representative,
  1. on the person with whom he or she resides or in whose care he or she is or with the person appointed by a court to be served in the incompetent person's place, (see note 1 below) and
- 2. on the Public Trustee (see note 2 below).

(Note 1) Even though a hospital or care facility may "acknowledge receipt" of documents on behalf of incapable adults in their care, the person leaving the documents with a nurse, administrator, or other person at a hospital or care facility should not assume that the person "acknowledging receipt" of the documents has "accepted service" of the documents unless that person advises that he or she has authority to "accept service" on behalf of the incapable adult.

(Note 2) When the Public Trustee is served documents on behalf of an incapable adult, the Public Trustee will accept service on behalf of the Public Trustee only, not on behalf of the adult. In other words, the Public Trustee simply "acknowledges receipt" of the documents served. This arrangement allows the person serving the documents to comply with the statutory requirements for service, but does not compel the Public Trustee to appear for, or to take further steps on behalf of, the incapable adult. The Public Trustee will investigate the incapable adult's circumstances, and where appropriate, may seek authority to act on the adult's behalf. The Public Trustee will not, however, automatically act on behalf of the incapable adult.

9. DEEMED SERVICE

The Legislation deems that a document not served personally, has been served a

specified number of days after service:[8]

- if given or served by mail, on the fifth day after mailing it
- if given or served by fax, on the third day after faxing it
- if given or served by attaching a copy of the document to a door or other place, on the third day after attaching it
- if served by leaving a copy of the document in a mail box or mail slot, on the third day after leaving it

"Deemed" service means that the document is presumed to have been served unless there is clear evidence to the contrary.

Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deeming provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

10. ARBITRATOR'S ORDERS REGARDING SERVICE

The Legislation provides that an arbitrator may make the following orders:[9]

- That a notice, order, process or other document may be served by substituted service in accordance with the order.
- Where a document has not as yet been served, that a document must be served in a manner the arbitrator considers necessary, despite the other service provisions of the Legislation.
- Where a document has been served, that a document has been sufficiently served for the purposes of the Legislation on a day the arbitrator specifies.
- That a document not served in accordance with the service sections of the Legislation has been sufficiently given or served for the purposes of the Legislation.

11. ORDERS FOR SUBSTITUTIONAL SERVICE[10]

An application for substituted service may be made at the time of filing the application or at a time after filing. The party applying for substituted service must be able to demonstrate two things:

- that the party to be served cannot be served by any of the methods permitted under the Legislation, and
- that the substituted service is likely to result in the party being served having actual knowledge of what is being served

12. PROOF OF SERVICE

8 RTA, s. 90; MHPTA, s. 83
9 RTA, s. 71; MHPTA, s. 64
10 RTA, s. 71; MHPTA, s. 64

Where the respondent does not appear at an arbitration hearing, the applicant must be prepared to prove service under oath. The person who actually served the documents must either:

- be present at the hearing, or
- have sworn an affidavit of service or a statutory declaration which is sworn before either a Notary Public or a Lawyer, and which is given to the arbitrator at the hearing

A sworn affidavit of service or statutory declaration must have sworn exhibits attached to it which are copies of each of the actual document(s) served.

Proof of service personally should include the date and time of service, where the person was when served, and the name of the person served.

Proof of service by registered mail should include the original receipt given by the post office and should include the date of service, the address of service, and that the address of service was the person's residence at the time of service, or the landlord's place of conducting business as a landlord at the time of service.

Failure to prove service may result in the matter being dismissed, or dismissed with leave to reapply. Adjournments to prove service are given only in unusual circumstances.

Proof of service by methods other than personal service or registered mail should include:

- the date and time of service,
- details of the method used to serve, including:
- the name of the adult served,
- if posted, the address where the documents were attached,
- the fax number to which the document was faxed and proof that the fax transmission was completed,
- the address of the mail box or mail slot used.

13. PARTIES NOT SERVED

Where one or more parties on an application for arbitration has not been served, the arbitrator's Order will indicate this and will dismiss, or dismiss with leave to reapply, the application involving the party not served.

13. Rights and Responsibilities of Co-tenants

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.

This Guideline clarifies the rights and responsibilities relating to multiple tenants renting premises under one tenancy agreement.

A tenant is the person who has signed a tenancy agreement to rent residential premises. If there is no written agreement, the person who made an oral agreement to rent the premises and pay the rent is the tenant. Co-tenants are two or more tenants who rent the same property under the same tenancy agreement. Co-tenants are jointly responsible for meeting the terms of the tenancy agreement. Co-tenants also have equal rights under the tenancy agreement.

Co-tenants are jointly and severally liable for any debts or damages relating to the tenancy. This means that the landlord can recover the full amount of rent, utilities or any damages from all or any one of the tenants. The responsibility falls to the tenants to apportion among themselves the amount owing to the landlord.

Where co-tenants have entered into a fixed term lease agreement, and one tenant moves out before the end of the term, that tenant remains responsible for the lease until the end of the term. If the landlord and tenant sign a written agreement to end the lease agreement, or if a new tenant moves in and a new tenancy agreement is signed, the first lease agreement is no longer in effect.

Where co-tenants have entered into a periodic tenancy, and one tenant moves out, that tenant may be held responsible for any debt or damages relating to the tenancy until the tenancy agreement has been legally ended. If the tenant who moves out gives proper notice to end the tenancy the tenancy agreement will end on the effective date of that notice, and all tenants must move out, even where the notice has not been signed by all tenants. If any of the tenants remain in the premises and continue to pay rent after the date the notice took effect, the parties may be found to have entered into a new tenancy agreement. The tenant who moved out is not responsible for carrying out this new agreement.

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* require that tenancy agreements be in writing. Any changes regarding who is a tenant should be recorded in writing.

A security deposit or a pet damage deposit[1] is paid in respect of a particular tenancy agreement. Regardless of who paid the deposit, any tenant who is a party to the tenancy agreement to which the deposit applies may agree in writing to allow the landlord to keep all or part of the deposit for unpaid rent or damages, or may apply for arbitration for return

1 A security deposit or a pet damage deposit may only be collected under the *Residential Tenancy Act*. They are not permitted under the *Manufactured Home Park Tenancy Act*

of the deposit[2].

Tenants in Common

"Tenants in common" sharing the same premises or portion of premises may enter into separate tenancy agreements with a landlord. A tenant in common has the same rights and obligations as an ordinary tenant with a separate tenancy, and is not responsible for debts or damages relating to the other tenancy.

In the absence of clear evidence of a tenancy in common, there is a presumption in law of a joint tenancy.

Occupants

Where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the tenancy agreement, unless all parties agree to enter into a tenancy agreement to include the new occupant as a tenant.

2 *Residential Tenancy Act,* s. 38

14. Type of Tenancy: Commercial or Residential

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.

Generally

Neither the *Residential Tenancy Act* nor the *Manufactured Home Park Tenancy Act* applies to a commercial tenancy. Commercial tenancies are usually those associated with a business operation like a store or an office. If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction. For more information about an arbitrator's jurisdiction generally, see Policy Guideline 27 - "Jurisdiction."

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The *Residential Tenancy Act* provides that the *Act* does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.[1]

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is.[2] Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises.[3]

The *Manufactured Home Park Tenancy Act* applies to manufactured home sites, the parks in which the sites are located and the tenancy agreements governing them. A "manufactured home site" is defined in that *Act* as a site rented or intended to be rented to a tenant for the purpose of being occupied by a manufactured home.[4] The *Act* defines a "manufactured home" as, among other things, a structure used or intended to be used as living accommodation.[5] A rental or tenancy relationship over land onto which a manufactured structure is brought or intended to be brought, will be outside the scope of the *Manufactured Home Park Tenancy Act* unless it is within those definitions.

Tenancies Established for the Purpose of Re-renting

Sometimes a tenant will rent out a number of rental units or manufactured home sites and re-rent them to different tenants. It has been argued that there is a "commercial tenancy" between the landlord and the "head tenant" and that an Arbitrator has no jurisdiction. This generally occurs in a manufactured home park.

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1 *Residential Tenancy Act,* s. 4(d)
2 See for example, *Re: Hahn and Kramer* (1979), 97 D.L.R. (3d) 141 (Ont. Div. Ct.).
3 Tanasiuk, ARP File No. 9602 – 131.
4 *Manufactured Home Park Tenancy Act,* s. 1
5 MHPTA, s. 1

The courts in BC[6] have indicated that these relationships will usually be governed by the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act.* It is the nature or type of property that is regulated by the legislation. If the type of property comes within the definitions in the legislation and does not fall within any of the exceptions in the legislation, the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act* will govern.

6 See *Henricks, et al.* v. *Hebert, et al.,* (B.C.S.C.) Oct. 22, 1998, Prince George Reg. No. 02572. *Blue Rentals Ltd.* v. H*ilbig et al.* (B.C.S.C.) Feb. 1, 1999, Terrace Reg. No. 10656.

15. Summons to Testify

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.

This guideline deals with the issuance of a summons requiring a person to testify or to produce documents or other things pursuant to the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation).

The Legislation[1] allows an arbitrator, either at the request of a party, or on his or her own initiative, to issue a summons requiring a person to either attend an arbitration hearing or proceeding and give evidence, or to produce before the arbitrator documents or any other thing relating to the subject matter of the arbitration that the arbitrator considers necessary to give full consideration of the matters before him or her.

The decision to issue a summons is at the discretion of the arbitrator and in determining whether or not to issue the summons the arbitrator will consider the following points:

1. The information sought from the summons must be relevant to the proceedings. A summons cannot be used to go on a fishing expedition for information without any clear relevance to the issue at hand.

2. The summons must not be an abuse of process and cannot be used to harass or annoy a party.

3. The summons cannot be used to interfere with a privilege recognized by law. For example a summons would not be issued to a landlord's lawyer for the purpose of obtaining evidence respecting legal advice given to the landlord.

4. A summons cannot be issued where the witness in question resides outside the Province unless there is an agreement for the reciprocal enforcement of summonses with the jurisdiction where the witness resides.

In determining whether or not to issue the summons, the arbitrator will also weigh the importance of the evidence with the inconvenience to the witness of being summonsed to the hearing. There are also cases where it may not be in the public interest to issue a summons. For example, it may not be in the public interest to summons a police officer to attend and give evidence, and thus take him or her off their regular policing duties where that evidence is not vital to the case or could be put before the arbitrator by other witnesses.

As the arbitrator will normally want to hear details of the evidence that the summonsed witness will give prior to issuing the summons, a summons will not usually be issued prior to the hearing.

1 *Residential Tenancy Act*, s. 76; *Manufactured Home Park Tenancy Act*, s. 69

If a summons is issued, the party requesting the summons must comply with the Arbitration Rules of Procedure, and pay any witness fees and conduct money payable under the Rules.[2] The fees must be paid at the time the summons is served on the party. A witness is not obligated to attend if the required fees are not paid. If the witness fails to attend in accordance with the summons, the onus is on the party requesting the summons to take necessary steps to enforce the witnesses' attendance through the Supreme Court. The arbitrator may, on request, adjourn the hearing to allow this to be done.

2 Rule 7.3 and Schedule I of Rules

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.

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) recognize two types of remedies:
(1) the statutory remedy allowed with respect to a "service or facility".
(2) a monetary claim in Tort and/or Breach of Contract .

1. TERMINATION OR RESTRICTION OF SERVICE OR FACILITY[1] REMEDIES

The Legislation allows a tenant to file a claim by way of a "hidden rent increase" where there has been a charge for, a failure to provide, or a reduction of a "service or facility" provided under the tenancy agreement.

2. MONETARY REMEDIES[2]

The Legislation allows a landlord or tenant to make a claim in debt or in damages against the other party where there has been a breach of the tenancy agreement or the Act. Damages is money awarded to a party who has suffered a loss which the law recognizes. Claims may be brought in Tort and/or Breach of Contract.

Limitation Periods for Filing Claims

There are three statutes which provide limits within which a claim must be filed: the *Limitation Act,* and the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act.* The interaction of these statutes means that, even if a claim is filed within the two years permitted under the Legislation, the Limitation Act may prevent it from being heard if it relates to something that occurred more than two years before the claim was filed.

The Limitation Act

The *Limitation Act* provides that certain specified claims must be filed within specified time limits or the right to make those claims will be ended. It is very important to note that there are many variables which could change the specified time limits both for damages and for debt.

The law with regard to when the limitation period begins, how it continues, whether it is extended, and whether it governs in any particular case is complicated. Since failure to make a claim within the specified period(s) will end the claim, a person who is not certain about the applicable time limits in the *Limitation Act* should obtain a legal opinion.

The two most frequently applied sections of the *Limitation Act* are with regard to physical and economic damages, and debt.

The *Limitation Act* provides that the right to bring an action for damages in respect of injury to person or property, including economic loss arising from the injury, ends at two

1 *Residential Tenancy Act* s. 27; *Manufactured Home Park Tenancy Act* s. 21
2 RTA s. 67; MHPTA s. 60

years from the date on which the right arose, whether based on contract, tort or statutory duty.

The *Limitation Act* provides that the right to bring an action for most other claims, including claims in debt, ends at six years from the date on which the right arose. A person who owes a debt may, under certain circumstances, be found to have confirmed that debt such that the limitation period for filing a claim in respect of that debt is extended.

The Ultimate Limitation Period under the Legislation
The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* provide that if these Acts do not state a time by which an application for arbitration must be filed, it must be filed within 2 years of the date that the tenancy to which the matter relates ends or is assigned.[3]

The same sections of the Legislation provide that **despite the *Limitation Act***, if an application for arbitration is not filed within the 2 year period, a claim arising under these Acts or the tenancy agreement in relation to the tenancy ceases to exist for all purposes.

However, in the event that one party files for arbitration within the limitation period and the other party has a claim which was not yet filed and which is barred by the limitation period that party may file an application for arbitration so long as it is filed before the first application is heard.[4] This exception does not apply to a limitation established under the *Limitation Act*, however that Act has its own provisions for counterclaims.

Claims in Tort
A tort is a personal wrong caused either intentionally or unintentionally. An arbitrator may hear a claim in tort as long as it arises from a failure or obligation under the Legislationor the tenancy agreement. Failure to comply with the Legislation does not automatically give rise to a claim in tort. The Supreme Court of Canada decided that where there is a breach of a statutory duty, claims must be made under the law of negligence. In all cases the applicant must show that the respondent breached the care owed to him or her and that the loss claimed was a foreseeable result of the wrong.

An arbitrator may also hear a claim where there has been a breach of the common law of landlord and tenant. These are evolving legal principles set out by court decisions and may, or may not, be recorded in a tenancy agreement or set out in the Legislation.

Claims for Breach of Contract
Prior to making a claim for breach of the tenancy agreement, the Legislation permits either the landlord or the tenant to apply for arbitration for an order that the other party comply with the tenancy agreement or the Act.[5] that governs the agreement.
The purpose of damages is to put the person who suffered the loss in the same position as if the contract had been carried out. It is up to the person claiming to prove that the

3 RTA s. 60; MHPTA s. 53 (3)
4 RTA s. 60; MHPTA s. 53 (3)
5 RTA s. 55 and s. 58; MHPTA s.55 and s. 58

other party breached the contract and that the loss resulted from the breach. The loss must be a consequence that the parties, at the time the contract was entered into, could reasonably have expected would occur if the contract was breached. Losses that are very unexpected are normally not recoverable. The party making the claim must also show that he/she took reasonable steps to ensure that the loss could not have been prevented, and is as low as reasonably possible.

Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.

Types of Damages

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award “nominal damages”, which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

In addition to other damages an arbitrator may award aggravated damages. These damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. (Losses of property, money and services are considered "pecuniary" losses. Intangible losses for physical inconvenience and discomfort, pain and suffering, grief, humiliation, loss of self-confidence, loss of amenities, mental distress, etc. are considered "non-pecuniary" losses.) Aggravated damages are designed to compensate the person wronged, for aggravation to the injury caused by the wrongdoer's willful or reckless indifferent behaviour. They are measured by the wronged person's suffering.

- The damage must be caused by the deliberate or negligent act or omission of the wrongdoer.

- The damage must also be of the type that the wrongdoer should reasonably have foreseen in tort cases, or in contract cases, that the parties had in contemplation at the time they entered into the contract that the breach complained of would cause the distress claimed.

- They must also be sufficiently significant in depth, or duration, or both, that they represent a significant influence on the wronged person's life.
  They are awarded where the person wronged cannot be fully compensated by an award for pecuniary losses. Aggravated damages are rarely awarded and must

specifically be sought.

An arbitrator does not have the authority to award punitive damages, to punish the respondent.

Criteria Considered When Awarding Damages

If a claim is made by the tenant for loss of quiet enjoyment, the arbitrator may consider the following criteria in determining the amount of damages:

- the amount of disruption suffered by the tenant.
- the reason for the disruption.
- if there was any benefit to the tenant for the disruption.
- whether or not the landlord made his or her best efforts to minimize any disruptions to the tenant.

If a claim is made by a tenant for damages for breach of the abandonment regulations by the landlord the normal measure of damages is the market value of the lost articles, i.e. the price of a similar item in the market. The price of a similar item in the market must include reference to its condition at the time of its loss. For items, such as photographs, which may have limited market value but great sentimental value to the tenant, an arbitrator may consider the size and scope of the collection and the intrinsic value to the tenant.

If a claim is made by the landlord for damage to property the normal measure of damage is the cost of repairs, with some allowance for loss of rent or occupation during repair, or replacement (less depreciation), which ever is less. The onus is on the tenant to show that the expenditure is unreasonable.

17. Security Deposit and Set off

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.

SECURITY DEPOSIT

1. A landlord may require a security deposit when the landlord and tenant enter into a tenancy agreement.

2. The tenancy agreement may not provide that the landlord automatically keeps all or part of the security deposit at the end of the tenancy.

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 agreement.

4. A tenant may not apply all or part of the security deposit to rent without the written consent of the landlord.

5. The tenant may agree in writing at the end of the tenancy that the landlord may retain all or part of the security deposit.

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 occasion.

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 if:
   - the landlord does not offer the tenant at least two opportunities for inspection as required by the Act, 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 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
   - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

10. The landlord has fifteen days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an arbitration application claiming against the deposit, or return the deposit plus interest to the tenant.

11. If the landlord does not return or file for arbitration 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 deposit. Where the landlord has to pay double the security deposit to the tenant, interest is calculated only on the original security deposit amount and is not doubled.

12. The obligations of a landlord with respect to a security deposit run with the land or reversion. Thus, if the landlord changes, the new landlord retains these obligations.

RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION

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 Act. The arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

2. Where the tenant applies for return of the security deposit and the landlord later applies for arbitration for claims arising out of the tenancy and the arbitrations 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.

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 deposit:
   - 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 Act;
   - If the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the arbitration 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:
   - any arbitrator's monetary order outstanding at the end of the tenancy;
   - 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 unit;
   - if the landlord's right to deduct from the security deposit for damage to the rental unit has not been extinguished, any amount the tenant has agreed in writing the landlord may retain for such damage.

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 arbitration 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 landlord.

3. If a landlord who does not apply for arbitration within the time required in order to retain the security deposit retains the right to apply for arbitration and subsequently applies in respect of monetary claims arising out of the tenancy and the landlord has not returned the security deposit, 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 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 with respect to pet damage deposits refer to Guideline 31.

18. Use of Forms

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.

The issue sometimes arises as to whether an arbitrator will issue an order based on a form which is not the current form required by the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation). The problem usually arises with respect to a Notice To End Tenancy, which is in a form previously prescribed by the former *Residential Tenancy Act*[1] prior to adoption of the current form. This guideline covers when an arbitrator will issue an order based upon a previous form and when an arbitrator will not accept an older version and require a landlord to serve a notice in the current form.

Notice To End Tenancy

If the landlord has served the old, single sheet Termination Notice, and seeks an order of possession based upon that notice, the arbitrator will deny the application[2] and require the landlord to serve a Notice To End a Tenancy in the form required by the Legislation and thereafter reapply for the order. If a tenant applies to set aside this old version of the notice[3], that application will be granted.

Where a new form of Notice To End Tenancy is required[4], a reasonable transition period will be afforded to a landlord prior to denying an application by a landlord to enforce the notice, or granting an application to set it aside, on the basis that it is not in the required form. The transition period will only be allowed where the change was not substantive in the circumstances in which the notice was issued, having regard to section 28 of the *Interpretation Act*. For example, if a tenant relied on information in the form which is out of date to their detriment, such as the time limited for bringing an application to set aside the notice, then the arbitrator may find the notice to be invalid. However, the old, single sheet form of notice will continue to be unacceptable.

A form not approved by the Director is not invalid if the form used still contains the required information and is not constructed with the intention of misleading anyone[5]. As a result, it is advisable to apply to an arbitrator to dispute the notice, so that the validity of the notice can be determined. Where a tenant accepts a Notice To End A Tenancy that is in the old form or is not in the required form and the tenant vacates in response to the notice, the landlord cannot rely upon the failure to give notice in the required form and allege that the tenant owes the landlord rent as a result of the improper ending of the tenancy.

Other Forms

If an application is made on an application form which predates the version currently

1 Under s. 42(2)(a) of the prior Act, now *Residential Tenancy Act*, s. 52; *Manufactured Home Park Tenancy Act*, s. 45
2 RTA, s. 52; MHPTA, s. 45
3 RTA, s. 47(4); MHPTA, s. 40(4)
4 RTA, s. 52; MHPTA s. 45
5 RTA, s. 10(2): MHPTA, s. 10(2)

required by the Legislation, the arbitrator may order the form amended, or may accept the application as validly filed. The arbitrator may refuse to order the application amended to the current form if a respondent proves prejudice that is attributable to the use of the previous version

An arbitrator will not order amended a form which is not required by the Legislation or any predecessor legislation at any time; for example, if a Notice To End A Tenancy is handwritten and does not contain the information required by the Legislation in any version. In such situations the arbitrator will find that the proper form has not been served and make the appropriate order.

With respect to all forms required by the Legislation, a form not approved by the Director is not invalid if the form used still conveys the required information and is not constructed with the intention of misleading anyone[6].

Reproductions
Mechanical reproductions of a form required under the Legislation, either by photocopying or printed by a computer, and containing the exact wording of the required form, are acceptable as a form required by the Legislation.

6 RTA, s. 10(2): MHPTA, s. 10(2)

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.

Assignment

Assignment is the act of transferring all or part of a tenant's interest in or rights under a lease or tenancy agreement to a third party, who becomes the tenant of the original landlord. In a manufactured home site tenancy, an assignment usually coincides with the sale of the manufactured home.

The assignee takes on the obligations of the original tenant commencing at the time of the assignment, and is not responsible for actions or failure of the assignor to act prior to the assignment. Unless the landlord agrees otherwise, the original tenant may retain some residual liability, in the event of a failure of the assignee to carry out the terms of the tenancy agreement or lease.

Subletting

A sublease is a lease given by the tenant or lessee of residential premises to a third person (the sub-tenant or sub-lessee). A sublease can convey substantially the same interest in the land as is held by the original lessee, however such a sublease must be for a shorter period than the original lease in order that the original lessee can retain a reversionary interest in the property. The sub-tenant does not take on any rights or obligations of the original tenancy agreement that are not contained in the sub-agreement, and the original lessee remains the tenant of the original lessor, and is the landlord of the sub-tenant.

Where an individual agrees to sublet a tenancy for the full period of the tenancy, and does not reserve the last day or some period of time at the end of the sublease, the agreement amounts in law to, and will be treated as, an assignment of the tenancy.

Death or Bankruptcy of a Tenant or Lessee

Where a tenant or lessee dies, the executor or administrator of the estate becomes the assignee of the tenancy in law and, as such, is responsible for any rights and obligations under the original tenancy as a representative of the original tenant. The tenancy may subsequently be ended in accordance with the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation), or may pass to a person who has a right to the tenancy in accordance with the appropriate statute. Such an assignment does not require the agreement of the landlord. If, in winding up an estate, an executor or administrator wishes to assign the tenancy to a third party who is not named or entitled under the estate, then the agreement of the landlord must be request, in accordance with the Legislation.

When a tenant or lessee becomes bankrupt, rights of action for breach of contract pass to the trustee in bankruptcy. Where the trustee wishes to assign the tenancy to a third party, the agreement of the landlord must be requested, in accordance with the Legislation.

Statutory Provisions

A tenant may assign or sublet his or her interest in a tenancy agreement or lease with the consent of the landlord. If a tenant assigns or sublets a tenancy agreement without obtaining the landlord's consent, the landlord may serve a one month notice to end the tenancy under the Legislation [1] - the tenant has purported to assign or sublet the residential premises without the written consent of the landlord.

It is up to the original tenant to seek the landlord's consent – the proposed new tenant is not a party to the tenancy agreement until such time as the landlord has agreed to assignment or sublet, and the formal transfer is made. A landlord is not required to give consent if not asked to do so. Once the request is made, the landlord's consent cannot be unreasonably or arbitrarily withheld if the tenancy agreement:

- has a fixed term of 6 months or more, or
- is in respect of a manufactured home site where the manufactured home and the site are not rented from the same landlord (although a landlord may require the request to be in the form set out in the Manufactured Home Park Tenancy Regulation).

A landlord is not required to give consent to an assignment or sublet other than those specified.

It is not reasonable to withhold consent and require a new tenancy agreement in order to increase the rent. It may be reasonable to withhold consent if reference or credit checks indicate that a prospective tenant is unlikely to adhere to the terms of the tenancy agreement.

If a landlord arbitrarily or unreasonably withholds consent to assign or sublet the tenant's interest in a tenancy agreement, contrary to the provisions of the Legislation, the tenant may apply to an arbitrator for an order that the tenancy agreement is assigned or sublet. In hearing such an application, the arbitrator would consider whether the request had been given in writing, whether the landlord has properly responded to the request, and whether the reasons given for refusing the request were reasonable. If the request is concerning a manufactured home site, the arbitrator will consider whether the provisions of the Manufactured Home Park Tenancy Regulation have been followed.

Damages

Monetary damages can be awarded where they result from a landlord's breach of contract in refusing to agree to an assignment, contrary to a term of the tenancy agreement of to the provisions of the Legislation (which are deemed to be a term of every tenancy agreement).

1 *Residential Tenancy Act*, ss. 47(1)(i), *Manufactured Home Park Tenancy Act*, ss. 40(1)(h).

20. Illegal Contracts

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.

This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.

Other situations may arise where rental of the premises would be in violation of a provincial or federal statute. Previously, a contract made in violation of a statute was void from the beginning, if the making of the contract is expressly or impliedly prohibited by the statute in question. The result was that the contract could not be enforced. This is referred to as statutory illegality.

Breach of a statute which is only incidental to the rental of premises, where the rental would otherwise be legal, does not make the contract illegal and thus void. For example, while failure to have a written tenancy agreement is a breach of the provisions of the Residential Tenancy Regulation and the Manufactured Home Park Tenancy Regulation, it does not make the tenancy agreement itself illegal and thus unenforceable. The landlord may be liable, on conviction, to pay a fine.

Recently the Courts have adopted a more flexible approach to the issue of statutory illegality and enforcement of contracts made in breach of a statute. Before finding a contract made in breach of a statute is void, the following factors will be examined:

- The serious consequences of invalidating the contract
- The social utility of those consequences
- The class of persons for whom the legislation was enacted to determine whether a refusal to enforce the contract would affect other than that group

21. Repair Orders Respecting Strata Properties

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.

This guideline deals with situations where an application is made for an order[1] requiring the landlord to make repairs to the rental unit, and the rental unit is a strata lot.

In a strata development, individual owners own their units, called strata lots, but they jointly own the common areas outside their lots. Where the rental unit is a strata lot, situations may arise where repairs are needed to the strata lot, but the source of the problem lies in the common areas of the development which are administered by the strata corporation. Typically this would arise in the case of a "leaky condo".

The *Strata Property Act* sets out the duties of the strata corporation and the owners in respect of the property. Section 72(1) requires a strata corporation to "repair and maintain common property and common assets". Section 72(2) permits a strata corporation, by by-law, to make an owner responsible for the repair and maintenance of limited common property that the owner has a right to use.[2]

The *Strata Property Act* contains standard by-laws which set out the responsibilities of owners and of the strata corporation for repairs and maintenance. A strata corporation cannot pass a by-law which conflicts with its responsibility for repairs to the common property. However, owners could be made responsible for repairs on common property which has been allocated for their exclusive use, or where the use has been limited to one or more strata lot owners. In any event, the by-laws should always be examined.

An owner has no power to do work on the common areas of the development, save and except for areas of exclusive use common property or limited common property as required by the by-laws. The dividing line between the strata lot and the common areas is usually the mid point of the exterior walls of the strata lot. Any repairs such as the repair of water leaks originating in the common areas is the responsibility of the strata corporation.

Where repairs are required because of a defect originating in the common area, an order that the necessary repairs be done will not be made against a landlord who is the owner or lessor of a strata lot as the owner or lessor has no authority to make the repairs. The owner or lessor is required to ensure that the strata corporation is aware of the problem and take reasonable steps to ensure that the repair is made in a timely manner.

Generally, repairs to the interior of the strata lot are the responsibility of the owner or lessor. Where the strata corporation may be liable for the cost of the repair, the landlord may make a claim against the strata corporation in the appropriate forum.

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[1] *Residential Tenancy Act*, s. 61; *Manufactured Home Park Tenancy Act*, s. 58

[2] Or other common property, as permitted by the Regulations. There are no regulations under this subsection at present.

Even though the defect may originate outside of the strata lot, if the tenant's use and enjoyment of the premises is adversely affected by a problem originating in the common areas, the tenant may be awarded an abatement of rent or damages.

22. Termination or Restriction of a Service or Facility

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.

In a tenancy agreement, a landlord may provide or agree to provide services or facilities in addition to the premises which are rented. For example, an intercom entry system or shared laundry facilities may be provided as part of the tenancy agreement. A definition of services and facilities is included in the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* [1] (the Legislation).

A landlord must not:

- terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
- terminate or restrict a service or facility if providing the service or facility is a material term of the tenancy agreement.[2]

A landlord may restrict or stop providing a service or facility other than one referred to above, if the landlord:

- gives the tenant 30 days written notice in the approved form, and
- reduces the rent to compensate the tenant for loss of the service or facility.

Where the tenant claims that the landlord has reduced or denied him or her a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.

There are six issues which must be addressed by the landlord and tenant.

- Whether it is a service or facility as set out in Section 1 of the Legislation.
- Whether the service or facility has been terminated or restricted.
- Whether the provision of the service or facility is a material term of the tenancy agreement.
- Whether the service or facility is essential to the use of the rental unit as living accommodation, or the use of the manufactured home site as a site for a manufactured home.
- Whether the landlord gave notice in the approved form, and
- Whether the rent reduction reflects the reduction in the value of the tenancy.

An "essential" service or facility is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is "essential" to the tenant's use of the rental unit as living accommodation or use of the manufactured home site as a site for a manufactured home, the arbitrator will hear evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the

1 *Residential Tenancy Act,* s. 1; *Manufactured Home Park Tenancy Act,* s. 1

tenant to use the rental unit as living accommodation. For example, an elevator in a multi-storey apartment building would be considered an essential service.

Even if a service or facility is not essential to the tenant's use of the rental unit as living accommodation, provision of that service or facility may be a material term of the tenancy agreement. A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Additional information about material terms is included in Guideline #8.

In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, an arbitrator will also consider whether the tenant can obtain a reasonable substitute for that service or facility. For example, if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service.

Where it is found there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an arbitrator may make an order that past or future rent be reduced to compensate the tenant.

If the tenancy agreement doesn't state who is responsible for any added service or facility, not provided by the tenant, after the commencement of the tenancy, and there is a cost involved in obtaining the service or facility, the landlord is responsible for the cost, unless the landlord has obtained the written agreement of the tenant to be responsible for the cost.

Where there is a termination or restriction of a service or facility for quite some time, through no fault of the landlord or tenant, an arbitrator may find there has been a breach of contract and award a reduction in rent.

Where there is a termination or restriction of a service or facility due to the negligence of the landlord, and the tenant suffers damages as a result of the negligence, an arbitrator may find there has been both a breach of contract and a failure to take reasonable care which resulted in the damages suffered by the tenant and make an award for damages and/or breach of contract.

23. Amending an Application for Arbitration

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.

Applications for Arbitration: Naming Parties

Parties who are named as applicant(s) and respondent(s) on an application for arbitration must be correctly named. If they are not correctly named, the application may be dismissed, or any orders made by the arbitrator may not be enforceable. This Policy Guideline addresses a number of issues arising out of the naming of parties in applications for arbitration.

Parties Not Served

Where one or more parties on an application for arbitration has not been served, the arbitrator's decision and/or order will indicate this and will dismiss or dismiss with leave to reapply the application involving the party not served. Attendance at the hearing by a party may constitute an admission of service.

Errors in Naming a Party

Where both parties are present at the hearing, the arbitrator may amend the application to show the correct name. Where a party is not present, the arbitrator may decline to amend the application, and may decline to issue a decision or order involving the incorrectly named party.

Adding or Removing a Party

Where both parties are present at the hearing and both parties consent, the arbitrator may add another party or remove a party from the application so long as the party added has consented to be added. If the party removed is an applicant, that party must consent to be removed.

The arbitrator may, at the request of the applicant, dismiss the application with leave to reapply in order to allow the applicant to add or remove a party.

An arbitrator will not add a person, business, or limited company as a party without that party's consent if that party is not named on the application for arbitration and is not properly served.

If a landlord is entitled to claim compensation from an overholding tenant under the Act, and the new tenant brings proceedings against the landlord to enforce his or her right to possess or occupy the rental unit that is occupied by the overholding tenant, the landlord may apply to add the overholding tenant as a party to the proceedings.

Businesses as Parties

Where an application for arbitration names a business as a party, the correct name of the business must be used to ensure that the Order is enforceable. If the party is a limited company, then the full legal name of the company must be used, and include the designations such as Inc., Incorporated, Ltd., Limited, or Corporation (and/or the French language equivalents).

If the party is doing business as a particular named entity, the application should read as follows: *John Smith dba (or doing business as) Garden Apartments,* or *John Smith carrying on business as Garden Apartments.*

If the party is a partnership, every partner is an agent of the firm and the other partners for the purpose of the business of the partnership. Every partner in a firm is liable jointly with the other partners for the obligations of the firm incurred while he is a partner. An application that names the partnership will be enforceable against the partnership. If an applicant seeks to enforce an Order against the individual partners on the basis of the Partnership Act, the individual partners should be named and each served with a copy of the application.

It is up to the applicant to ensure that a party is properly named, so as to result in an enforceable order. Where the business is not properly named, for example *Garden Apartments* (only), the arbitrator may dismiss the application with leave to reapply unless the other party is present and consents to an amendment, or the arbitrator may issue the order using the name set out in the application.

Naming an Estate of a Person Who Has Died

Where a party makes an application for arbitration and the respondent has died, or where a party representing a person who has died (the "decedent") makes an application, the name used must be that of the personal representative of the decedent's estate (collectively, the "estate"). The personal representative may be either the person who has been named as executor in the decedent's will, or the person who has been appointed to administer the estate of a decedent who has not left a will, or a person named in an Order of Probate.

The proper manner of naming the estate is as follows: *John Smith, Executor (or Administrator) of the Estate of Mary Jones, Deceased.*

Where the applicant names the decedent, the application must be served on the personal representative of the decedent, and at the hearing the application may be amended to properly name the estate. Formal consent to the amendment may not be required if evidence of the correct naming of the estate is provided.

The same principles would apply where an estate is the applicant.

Amending the Application Particulars

An application must contain sufficient details and where it does not, the arbitrator may dismiss the application with leave to reapply or allow the application to be amended to get further particulars. Where an applicant requests an amendment of the application to give further and/or better details, the arbitrator may allow the amendment, or may refuse it. Similarly, where an applicant requests an amendment to increase the amount being claimed, the arbitrator may allow the amendment, or may refuse it. The application will not be amended where it would result in prejudice to the other party. If the amendment is allowed, the arbitrator may adjourn the hearing to allow the respondent time to respond to the amended application.

24. Grounds for Review of an Arbitrator's Decision

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.

The *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* [1] (the Legislation) provide for a review of an arbitrator's decision if:

- a party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond his or her control;
- a party has new and relevant evidence that was not available at the time of the original hearing;
- a party has evidence that the arbitrator's decision was obtained by fraud.

The application must clearly set out the grounds for review, and be accompanied by sufficient evidence to support the grounds given. The arbitrator will generally make the initial decision of whether to reopen the matter based solely on the application for review submitted by the applicant and accompanying evidence, without a hearing.

An arbitrator may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the issues raised can be dealt with under the provisions of the Legislation [2] that allow an arbitrator to
  - correct a typographical, arithmetical or other similar error in the decision or order;
  - clarify the decision, order or reasons, or
  - deal with an obvious error or inadvertent omission in the decision, order or reasons.
- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the arbitrator should be set aside or varied;
- the application is frivolous or an abuse of process;
- the applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

Unable to attend

In order to meet this test, the application must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

An arbitration hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning,

1 *Residential Tenancy Act,* s. 79; *Manufactured Home Park Tenancy Act,* s. 72
2 RTA, s. 78, MHPTA, s. 71

could have attended. For example, parties should ensure that they know when and where the hearing is to be held, and permit adequate time to allow for heavy traffic and parking.

New and relevant evidence
Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new,
- the evidence is relevant to the matter which is before the arbitrator,
- the evidence is credible, and
- .the evidence would have had a material effect on the decision of the arbitrator

Only when the applicant has evidence which meets all five criteria will a review be granted on this ground.

It is up to a party to prepare for an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in an arbitration hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be evidence.

Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that he or she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained, such as photographs that could have been taken or affidavits that could have been sworn before the hearing took place.

Evidence is "relevant" that relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact.

Evidence is "credible" if it is reasonably capable of belief.

Evidence that "would have had a material effect upon the decision of the arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

A mere suspicion of fresh evidence is not sufficient.

Decision obtained by fraud
This ground applies where a party has evidence that the arbitrator's decision was obtained by fraud. Fraud is the intentional "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of

that which should have been disclosed, which deceives and is intended to deceive…"[3]. Intentionally false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information that would tend to disprove one's case. Fraud may arise where a witness has deliberately mislead the arbitrator by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the arbitrator, and that that evidence was a significant factor in the making of the decision. The party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing, and which were not before the arbitrator, and from which the arbitrator conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the arbitrator finds that the applicant has met this burden, then the review will be granted.

It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the arbitrator. A review hearing will likely not be granted where an arbitrator prefers the evidence of the other side over the evidence of the party applying.

3 "Black's Law Dictionary", Sixth Edition, 1990, p. 660.

25. Requests for Clarification or Correction of Orders and Decisions

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.

Clarification or Correction of Arbitrator's Order or Decision

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) [1] give arbitrators the power to clarify a decision or order, correct a typographical, arithmetical or other similar error, or deal with an obvious error or inadvertent omission in the decision, order or reasons.

Clarification of an arbitrator's order or decision under the Legislation [2] may be requested if a party is unclear about or does not understand the arbitrator's decision, order or reasons. "Clarification" allows the arbitrator to explain, but not to change, the decision. Clarification involves making the order or decision more clear or plain to the understanding, and the removal of any complexity, ambiguity, or obscurity (Oxford English Dictionary, ed. Vol. 1, 1993).

The Legislation also allows the arbitrators to correct a typographical, arithmetical or other similar error [3]. This provision allows the arbitrator to change the decision or order, to correct typographical, mathematical or other minor errors.

Finally, the Legislation allows an arbitrator to correct an obvious error or inadvertent omission [4]. This provision allows an arbitrator to reopen an order or decision to provide relief that might otherwise only be available to a party under the *Judicial Review Procedure Act.*

An "obvious error" is a mistake which is immediately and clearly apparent to the arbitrator upon re-reading the evidence or reviewing the arbitrator's own notes. An obvious error does not include a different interpretation or assessment of facts or law applicable to the hearing or a change of mind about the outcome of the hearing or the arbitrator's decision.

An example of an "obvious error" would be if the evidence was that the couch was white and the arbitrator misread the evidence of colour and found it was red. The arbitrator could correct this error and any findings based on the error. An obvious error includes a circumstance where the arbitrator made a clear and unequivocal mistake by misreading the Legislation.

An "inadvertent omission" is a matter which the arbitrator would have addressed in the decision but failed to address because of an oversight. If the arbitrator has failed to dispose of a matter that was part of the application, and the matter is one that the

1 *Residential Tenancy Act,* s. 78; *Manufactured Home Park Tenancy Act,* s. 71
2 RTA, s. 78(1)(b); MHPTA, s. 71(1)(b)
3 RTA, s. 78(1)(a); MHPTA, s. 71(1)(a)
4 RTA, s. 78(1)(c); MHPTA, s. 71(1)(c)

arbitrator is permitted to deal with under the Act, the arbitrator may amend the order or decision to properly deal with the omission.

An arbitrator will not exercise a power to clarify or correct a decision or order unless the arbitrator considers it just and reasonable to do so in all the circumstances.

Process and Time Limit to Apply:

An arbitrator may clarify or correct an order or decision on the arbitrator's own initiative, or at the request of a party.

A request for clarification or correction of an error or omission must be made by a party within 15 days after the decision or order is given. The 15 day time limit does not apply to a request to correct a typographical or arithmetical error, or to a clarification or correction of an obvious error issued on the arbitrator's own initiative. In determining whether to correct an order or decision on his or her own initiative, the arbitrator will consider the amount of time that has passed since the original decision was given, and the effect on the other party and any third parties who may have already acted upon the arbitrator's decision.

An arbitrator reviewing a request for clarification or correction will make his or her decision without delay, and generally within 30 days after the written request is submitted to the Residential Tenancy Office.

A request to an arbitrator for a clarification or correction may be made without notice to any other party; however the arbitrator may require that the other party be given notice. Advance notice of a request, or the holding of a hearing if one is deemed by the arbitrator to be necessary to observe natural justice requirements, would occur only in very exceptional circumstances.

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NAMING AN AGENT OR A PRINCIPAL IN THE APPLICATION FOR ARBITRATION

Where one person ("A") is representing another person, ("B") who may or may not be named in the tenancy agreement, the first person ("A") may be an agent. The person the agent is representing ("B") is the principal. This situation usually occurs with a landlord.

The following situations arise:

a) Where the principal is named in the tenancy agreement and identifies the agent as acting on its behalf.

   This situation arises where the owner or landlord is clearly named in the agreement but the agreement is signed on behalf of that owner or landlord by another person or company named as agent. For example, the landlord may use a property management company to act on its behalf. That agent may also be the representative of the party to the agreement on the premises and conduct the business of the party on the premises. The agent of an owner or landlord may collect the rent and attend to repairs. In such situations both the principal and the agent may be named in the application and orders may be made against either the agent or the principal, or both.

b) Where the principal of the agent is not named in the tenancy agreement.

   In this situation, the tenancy agreement does not identify the principal and the agreement is signed by the agent. Three situations arise in this case:

   i) where the principal is known to all parties even though not named in the tenancy agreement,

      In this situation, either the principal or the agent, or both, may be named in the application, and an order may be made against both or either parties.

   ii) where the principal is not known to the parties although the parties know that the agent is acting on behalf of a principal,

      In this situation, the agent may be named in the application and, upon becoming aware of who the principal is, the principal may be added as a party or be named in another application. An order may be made against either the principal or the agent, or both.

iii) where the agent does not disclose that she or he is acting as an agent and purports to act as a principal.

The agent may be named in the application. Upon becoming aware of the existence of a principal the principal may be added as a party or named in another application. Again, an order may be made against either the principal or the agent, or both.

Guideline 26 applies to the proper naming of a party and adding a party to an application for arbitration.

AGENT APPEARING AT THE HEARING

A party to a hearing may be represented at the hearing by an agent. The party is entitled to remain in the hearing with his or her agent throughout the hearing

The agent at the hearing may speak for the party and present that party's documentary evidence and witnesses. An agent is distinct from a witness who gives evidence on behalf of a party. An agent may also give evidence at the hearing as a witness, but this is a separate role from that as agent.

A party who is represented by an agent may give evidence even though the arbitrator may have excluded other witnesses.

Under the *Residential Tenancy Act* [1], *the Manufactured Home Park Tenancy Act* [2] and the Rules of Procedure[3] the arbitrator may decide the extent to which an agent will be permitted to give evidence and make submissions on behalf of a party.

If the party does not appear at the hearing and instead sends only his or her agent, it is recommended that the party send a letter with the agent addressed to the arbitrator confirming that the agent has the authority to represent the party.

1. *Residential Tenancy Act,* ss. 62 to 75
2. *Manufactured Home Park Tenancy Act,* ss. 55 to 68
3. Arbitration Rules of Procedure, Rule 8

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The issue of the jurisdiction of an arbitrator appointed under the BC *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation) can arise in two ways:

A. Constitutional Jurisdiction: Does the provincial legislature under the *Constitution Act* have the constitutional authority to enact a statute which can affect the relationship between the parties who are before the arbitrator?

B. Statutory Jurisdiction: Does the statute confer upon the arbitrator the statutory authority to hear the dispute between the parties or to make the requested order?

A. CONSTITUTIONAL JURISDICTION

The first issue is complex and, for the most part, beyond the scope of this guideline. The only issue which will be addressed in this guideline, as a matter of constitutional authority, is Indian Lands. A brief discussion of the basis of the jurisdiction follows:
In 1982 the *Constitution Act* continued the rights and powers originally enacted under the *British North America Ac*t of 1867, except that the *Constitution Act* added the Charter of Rights and Freedoms. Those statutes provide that Canada is a federal state with multiple levels of government. Each level of government has its own powers and responsibilities as set out in sections 91 and 92 of the Constitution Act. With some exceptions, one level of government cannot legislate within the sphere of the other level, except to "incidentally affect" that other level of government's power. If a level of government purports to legislate within the other's sphere, the courts will hold the legislation either invalid or inapplicable to the facts in dispute.

1. Indian Lands

Section 91 of the *Constitution Act* confers the jurisdiction over federal lands to the federal government. The Legislation are acts of the provincial legislature. The case law makes it clear that provincial legislation cannot affect the "use and occupation" of Indian Lands because that power belongs to the federal government under section 91.

The Legislation governs residential tenancy agreements within British Columbia. Since a tenancy agreement is an interest in land, any part of the Legislation which affects the use and occupation of Indian Lands does not apply to the rental unit or manufactured home site which is in dispute. Examples of sections in the *Residential Tenancy Act* which could affect the use and occupation of Indian Lands, and therefore may not apply to premises on Indian Lands, are sections 27 (order respecting a service or facility), 44 (notice to end the tenancy agreement) and 54 or 55 (order of possession). Equivalent sections in the *Manufactured Home Park Tenancy Act* are sections 21, 37 and 47 or 48.

The situation is less clear for disputes which do not affect the use and occupation of Indian Lands but which are nonetheless governed by the Legislation. A monetary claim for damages or rent arrears under the Legislation may not affect the right to the use and occupation of Indian Lands, particularly if the tenancy agreement has ended. In one case a landlord and tenant in dispute over a monetary claim were found to be subject to the BC *Residential Tenancy Act*. Worth noting, however, is that both the landlord and tenant were non-Indians. In another case a dispute over a rent increase was found not to affect the use and occupation of Indian Lands.

Until the issue respecting monetary claims is clarified by the courts, parties to arbitration are cautioned that an arbitrator may refuse jurisdiction if the arbitrator finds that the nature of the dispute could affect the use and occupation of Indian Lands.

B. STATUTORY JURISDICTION

The Legislation does not confer upon an arbitrator the authority to hear all disputes regarding every type of relationship between two or more parties. The arbitrator only has the jurisdiction conferred by the Legislation over landlords, tenants and strata corporations. There may be a problem with the arbitrator's jurisdiction in the following relationships between the parties:

1. EXCLUDED JURISDICTION

a. Generally

The *Residential Tenancy Act* [1] provides that the Act applies to tenancy agreements, rental units and other residential property. The definition of tenancy agreement in the *Residential Tenancy Act* provides that the Act applies to a license to occupy. Section 4 of the Act contains a list of accommodation and agreements to which the Act does not apply. An arbitrator will therefore decline jurisdiction, and refuse to hear the dispute, if the accommodation or agreement is listed in section 4.

The *Manufactured Home Park Tenancy Act* does not include a license to occupy a manufactured home site in the definition of a tenancy agreement. See Guideline 11 for information regarding a license to occupy as distinct from a tenancy agreement.

b. Hotel Tenants

Occupancy of a hotel is a license and if occupied pursuant to a tenancy agreement, the *Residential Tenancy Act* assumes jurisdiction and confers power upon the arbitrator over certain hotels and hotel tenants. An arbitrator will therefore hear the dispute if the tenant is a hotel tenant under a tenancy agreement.

The Act would not apply to living accommodation owned or operated by an educational institution and provided to students or employees of the institution because they would

1 *Residential Tenancy Act*, s. 2

be excluded by section 4. In addition, a hotel is not a facility in which the owner of that accommodation shares kitchen or bathroom facilities because they are also excluded from the *Residential Tenancy Act* by section 4.

So, for example, if the facility is operated by a university and provided to students of the university, the tenant who is a student of that university may otherwise meet the requirements of the Act, but the arbitrator will likely decline jurisdiction and refuse to hear the dispute. This is because the relationship between the parties has been excluded by section 4. On the other hand, rental accommodation operated by the university but not provided to students or employees of the university would be included in the Act.

On the other hand, if the tenant resides in shared accommodation, which is a license to occupy, the arbitrator will assume jurisdiction and hear the dispute if the tenant satisfies the requirements of section 2.

c. Travel Trailers and Recreational Vehicles

If the residential premises consist of a travel trailer or a recreational vehicle in a recreational vehicle park, the agreement between the parties may well be included in the *Residential Tenancy Act* if they meet the requirements of section 2. Each case will turn on its particular circumstances and it is possible that the relationship is not a tenancy and not included in the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (see Guideline 9).

A similar question arises where the dispute is between the owner of the floating home and a person who has rented the floating home from the owner. The issue will be whether the parties have entered into a tenancy agreement included in section 2 of the *Residential Tenancy Act*. Such rental agreements are a license to occupy. While a license to occupy is included in the *Residential Tenancy Act*, a floating home does not meet the definition of a "rental unit" in section 1 of that Act. Since the rental of a floating home is a license to occupy, the *Manufactured Home Park Tenancy Act* would not apply.

2. VACATION ACCOMMODATION

The *Residential Tenancy Act*[2] provides that the Act does not apply to vacation or travel accommodation. However; the Act would apply to summer cottages and winter chalets that are rented other than on a vacation or travel basis. For example, a winter chalet rented for a fixed term of one year is not rented on a vacation basis.

3. COOPERATIVES

If the landlord is a cooperative and the tenant is a member of the cooperative, the *Residential Tenancy Act*[3] would not apply to a dispute which arises between them.

2 RTA, s. 4
3 RTA, s. 4(a)

4. TENANCY AGREEMENTS EXCEEDING TWENTY YEARS

The *Residential Tenancy Act*[4] excludes from the Act tenancy agreements with a term longer than twenty years. Two or more agreements which provide for a total term exceeding twenty years may be an agreement exceeding twenty years.

If the landlord complies with the steps set out in the sections referred to above, that does not mean that the *Residential Tenancy Act* applies to the relationship between the parties. It means only that the landlord has complied with the statutory requirements to enter into a valid agreement. For historical reasons, the Act does not otherwise apply to residential tenancy agreements with a term exceeding twenty years and the arbitrator will likely decline jurisdiction over any dispute between the parties.

5. TRANSFER OF AN OWNERSHIP INTEREST

If the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply as the parties have not entered into a "Tenancy Agreement" as defined in section 1 of the Acts. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are changing hands are part of the purchase price, a tenancy agreement has not been entered into.

Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Acts, is the right to possession of the residential premises. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In such a case the arbitrator may again decline jurisdiction because the Acts would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Acts may apply and the arbitrator may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

6. COMMERCIAL TENANCIES

The *Residential Tenancy Act*[5] provides that the Act does not apply to living accommodation included with premises that

(i) are primarily occupied for business purposes, and
(ii) are rented under a single agreement

4 RTA, s. 4(i)
5 RTA, s. 4(d)

Where the premises are used primarily for residential purposes and the tenant operates a home-based business from the premises, this does not mean the premises are occupied for business purposes. The distinction is whether the premises are business premises which includes an attached dwelling unit or whether the premises are residential in nature with a lesser business purpose. The bylaws of a city may be a factor in considering whether the premises are primarily occupied for a business purpose.

For example, if a tenant uses part of the residential premises as an art studio, or operates a bookkeeping business from the home, the Act would apply as the premises are not primarily used for business purposes. However, if the primary purpose of the tenancy was to operate a business, then the Act may not apply and the arbitrator may decline jurisdiction over the dispute. See also Guideline 14 on this topic.

7. OPTING OUT NOT PERMITTED

The Legislation[6] provides that the parties must submit to arbitration any dispute which is covered by the Acts. Under section 5 of both Acts, the parties may not contract out of or avoid the Acts or their regulations.

If the Legislation does not apply then the parties must pursue their claims in Supreme or Provincial Court.

8. POWER OF THE ARBITRATOR

The power and authority of the arbitrator is derived from the Legislation. The arbitration process does not create a court and so an arbitrator does not have inherent powers arising under the common law which are possessed by a judge. For example, an arbitrator does not have jurisdiction in "equity" to grant some forms of relief that a court may grant.

Similarly, the monetary limit of the arbitrator's jurisdiction is limited to the same amount as the provincial court, the sum of $10,000 as of the date of the guideline. A claim for money that exceeds that amount must be heard in Supreme Court. An applicant, however, may abandon part of a claim to come within the jurisdictional limits of the arbitrator. In addition, an arbitrator does have the power to hear a claim for the return of goods the value of which exceeds $10,000.

The provincial court does not have jurisdiction over residential tenancy disputes except in respect of enforcement of monetary orders issued by an arbitrator. The Supreme Court, however, may by order, assume jurisdiction over a residential tenancy matter, in which case the arbitrator loses jurisdiction over that dispute. If the dispute is linked substantially to a Supreme Court action then the arbitrator may decline jurisdiction.

6 RTA, s. 58; *Manufactured Home Park Tenancy Act*, s. 51

9. STANDING

a. Strata Corporations

The *Strata Property Act* contains procedures for carrying on and ending a residential tenancy in a condominium development and for the arbitration of disputes.

The *Strata Property Act* contains arbitration provisions in sections 175 to 189. Importantly, the arbitration provisions in the *Strata Property Act* do not apply if the arbitration provisions of the *Residential Tenancy Act* apply. The *Residential Tenancy Act* would apply to disputes between the landlord and the tenant. Similarly, the arbitration provisions of the *Strata Property Act* do not apply if the *Residential Tenancy Act* does not apply and the parties agree that the *Commercial Arbitration Act* will apply.

If the landlord or the strata corporation is ending the tenancy under section 47 of the *Residential Tenancy Act*, as provided by sections 137 and 138 of the *Strata Property Act*, then the arbitration provisions of the *Residential Tenancy Act* would apply. Section 58 of the *Residential Tenancy Act* includes disputes under section 68 which confers the ability of a tenant to apply to set aside a notice to end the tenancy delivered under section 47.

However, under section 177, a dispute between a strata corporation and an owner would be subject to the arbitration provisions of the *Strata Property Act* and an arbitrator under the *Residential Tenancy Act* would likely decline to hear that dispute. Section 177 also provides that a dispute between an owner or tenant and the strata corporation or with another owner or tenant may be heard by arbitration under the *Strata Property Act.* In all cases a dispute can only be referred to arbitration under the *Strata Property Act* if the dispute concerns one of the topics set out in section 177(3). Consequently, if the dispute concerns one of the topics in section 177(3), the arbitration would proceed under the *Strata Property Act*. If the dispute is otherwise within the jurisdiction of the *Residential Tenancy Act*, such as between the landlord and the tenant, an arbitrator under that Act may hear the dispute. The topics listed in section 177(3) are as follows:

- the interpretation or application of the *Strata Property Act*, the regulations, the bylaws or the rules
- the common property or the common assets
- the use or enjoyment of a strata lot
- money owing, including money owing as a fine under the *Strata Property Act*, the regulation, the bylaws or the rules
- an action or threatened action by, or decision of the strata corporation, including the council, in relation to an owner or tenant
- the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

If the arbitration provisions of the *Strata Property Act* apply then the arbitration proceeds under sections 175 to 189 of that Act. If the *Residential Tenancy Act* applies then sections 58 to 78 of the *Residential Tenancy Act* apply.

Some disputes may arise and be heard by an arbitrator under the *Residential Tenancy Act* which arise from the *Strata Property Act*. Disputes which would fall within the jurisdiction of an arbitrator under the RTA arising from the *Strata Property Act* include:

- A claim by a tenant against the landlord for moving expenses under section 67 of the *Residential Tenancy Act* pursuant to sections 145 or 146 of the *Strata Property Act*.
- An application to set aside a notice to end the tenancy delivered by either a landlord or a strata corporation under section 47 of the *Residential Tenancy Act* pursuant to sections 137 or 138 of the *Strata Property Act*.

If an owner of a strata lot fails to perform repairs as ordered by a local public authority, including an arbitrator under the *Residential Tenancy Act*, the strata corporation may perform the repairs under sections 84 and 85 and look to the owner for repayment. However, since the jurisdiction of an arbitrator under the *Residential Tenancy Act* arises from the tenancy agreement, an arbitrator under the *Residential Tenancy Act* does not have jurisdiction to order a strata corporation to perform repairs to common property.

The Supreme Court also has jurisdiction under sections 164 and 165 of the *Strata Property Act*, on application brought by a tenant or an owner of a strata lot, to make an order against the strata corporation.

b. Guarantors

If a person guarantees the performance of the tenancy agreement as a signatory to the agreement, the other party may pursue the guarantor on the tenancy agreement by filing an Application for Arbitration against that person. The other parties to the tenancy agreement may be, but need not be, joined in the application.

If, however, the guarantor signs a separate document of guarantee and is not therefore a party to the tenancy agreement, the Legislation does not apply to claims in debt arising under the separate document and therefore outside the tenancy agreement. The arbitrator would not have jurisdiction to hear that claim.

Worth noting is that the *Law and Equity Act*[7] requires that, to be enforceable, a guarantee must be evidenced in writing and signed by the guarantor

7 *Law and Equity Act,* s. 58(6)

28. Pet Clauses

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.

Sometimes a tenancy agreement will contain what is commonly referred to as a "pets clause" prohibiting the tenant from keeping pets or animals generally or from keeping pets of a certain size, kind or number or setting out the tenant's obligations regarding the keeping of the pet.

When a landlord feels that a tenant is breaching a pets clause by having an animal on the premises, it is not uncommon for the landlord to give the tenant a written notice to get rid of the pet. If the tenant fails to do so within a reasonable time, the landlord might give the tenant a notice to end the tenancy claiming that the tenant has breached a material term of the tenancy agreement and failed to rectify the breach within a reasonable time after being given written notice to do so[1]. Alternatively, the landlord might apply for an order that the tenant comply with the tenancy agreement[2].

If a tenant chooses to dispute the landlord's notice to end the tenancy or opposes the landlord's application to comply, the matter will come before an arbitrator who will determine, in the case of a notice to end the tenancy, whether the pets clause in the tenancy agreement is a "material term" of the tenancy agreement. In the case of an application for an order that the tenant comply with the tenancy agreement, the arbitrator will determine whether the pets clause is an enforceable term of the tenancy agreement. In making that determination, an arbitrator will be governed by three factors: that the term is not inconsistent with the *Residential Tenancy Act,* the *Manufactured Home Park Tenancy Act,* or their respective Regulations, that the term is not unconscionable, and that the term is expressed in a manner that clearly communicates the rights and obligations under it.[3]

The question of whether or not a pets clause is a material term of the tenancy agreement will depend upon what the parties intended to be the consequence of a breach of the clause. The tenancy agreement itself may designate the pets clause to be a "material term". While that is an important indication, it is not always conclusive.

Generally speaking, if the wording of a pets clause captures even trivial breaches which a reasonable person wouldn't expect would justify ending a tenancy, the pets clause may be found not to be a material term by an arbitrator. The question of whether or not a pets clause is "unconscionable" involves a number of factors too detailed to outline here.

For a better understanding of these twos subjects see Guideline 8 - "Unconscionable and Material Terms".

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1 *Residential Tenancy Act,* s. 47(1)(h); *Manufactured Home Park Tenancy Act,* s. 40(1)(g)
2 RTA, s. 62(3); MHPTA, s. 55(3)
3 RTA, s. 6(3); MHPTA, s. 6(3)

In some cases a landlord may know of a pet being kept by a tenant in contravention of a pets clause and do nothing about it for a period of time. The landlord's mere failure to act is not enough to preclude him or her from later insisting on compliance with the pets clause. However, a delay may indicate that the pets clause is not considered by the landlord to be a material term of the tenancy agreement.

As well, if a landlord is aware of the breach of a pets clause and does not insist on compliance and does something which clearly indicates that the pet is acceptable, the landlord may be prohibited from ending the tenancy for that breach. This is called "waiver". It is important to note that it is not a waiver of the pets clause itself, but only a waiver of the landlord's right to terminate the lease for that particular breach.

Where a landlord makes a clear representation to the tenant that the pet is acceptable, the landlord may later be prevented from claiming the pets clause has been breached.

It is always acceptable and advisable for the parties to write down and sign an agreement that pets or a certain pet is acceptable despite a pets clause in the tenancy agreement.

It is important to note that whether or not there is a pets clause in a tenancy agreement, if a pet causes extraordinary damage, unreasonably disturbs the enjoyment of other occupants of the property or threatens the safety or other lawful rights or interests of the landlord or other occupants, the tenant might be given a notice to end the tenancy.[4] Similarly, if a pet causes damage that might be less than “extraordinary damage”, the tenant might be given a notice to end the tenancy if the damage is not repaired within a reasonable time after the tenant has been given written notice to do so by the landlord.[5]

The *Guide Animal Act* of B.C. prohibits a landlord from discriminating against a person with a disability who intends to keep a guide animal in the residential premises.

4 RTA, ss. 47(1)(d),(e) and (f); MHPTA, ss. 40(1)©, (d) and (e)
5 RTA, s. 47(1)(g); MHPTA, S. 40(1)(f)

29. Security Deposits

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.

The *Residential Tenancy Act* permits a landlord to collect a security deposit[1]. Under that Act the issue often arises as to what a landlord may collect as a deposit or payment, other than the rent, at the commencement of a residential tenancy. The Act contains a definition of "security deposit"[2], which also contains exclusions. As a result of the definition of a security deposit in the *Residential Tenancy Act* and the regulations, the following payments by a tenant, or monies received by a landlord, irrespective of any agreement between a landlord or a tenant would be, or form part of, a security deposit:

- The last month's rent;
- A fee for a credit report or to search the records of a credit bureau;
- A deposit for an access device, where it is the only means of access;
- Development fees in respect of a manufactured home site;
- A move-in fee in respect of a manufactured home;
- Carpet cleaning deposit or other monies paid to secure possible future expenses;
- Blank signed cheques provided as security, where the amount could exceed one-half of one month's rent;
- A furniture deposit in respect of furnished premises.

The *Residential Tenancy Act* [3] requires that a security deposit must not exceed one-half of one month's rent. If one or more of the above payments, together with other monies paid, exceeds one-half of one month's rent then the remedies afforded by the Act[4]-would be available to a tenant. In addition, the Act[5] provides that a landlord who contravenes these provisions commits an offence and is liable, on conviction, to a fine of not more than $5,000.

The *Residential Tenancy Act* defines a "security deposit" as follows:

> "security deposit" means money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property, but does not include any of the following:
>
> (a) post-dated cheques for rent;
> (b) a pet damage deposit;
> (c) a fee prescribed under section 97 (2) (k) *[regulations in relation to fees]*;

1 *Residential Tenancy Act,* s. 17
2 RTA, s. 1
3 RTA, s. 19(1)
4 RTA, ss. 19(2) and 67
5 RTA, s. 95

In addition, the *Residential Tenancy Act*[6] provides that a landlord must not require that a security deposit be paid except at the time that the tenancy agreement is entered into, and that the security deposit must not exceed one-half of one month's rent. The Act[7] further provides that if a landlord receives an extra security deposit in excess of one-half of one month's rent, the tenant may set off the excess amount against rent due. In addition, a landlord must not require more than one security deposit in respect of premises despite the number of occupants in those premises.[8.] A tenant may set off all or part of the security deposit plus accrued interest against the rent, but the consent of the landlord is required.

With respect to the return of the deposit after the tenancy has ended, the Act[9] sets out the applicable time limits and procedure.

With respect to manufactured homes, the *Manufactured Home Park Tenancy Act* provides that a landlord must not require or collect a security deposit in respect of a manufactured home park site tenancy.[10.] If a landlord accepts a security deposit from a tenant, the tenant may deduct the amount of the security deposit from rent or otherwise recover the amount.

If a tenant of a manufactured home park under a site tenancy agreement pays a security deposit, the tenant may deduct the amount of the security deposit from rent or recover the amount[11]. If a landlord fails to comply with the requirements of the Residential Tenancy Act respecting the return of a deposit, the landlord may be liable for double the amount of the deposit. See Guideline 17 for more information.

6 RTA, ss. 19(1 and 20(1)
7 RTA, s. 19(2)
8 RTA, s. 20(2)
9 RTA, s. 38 and 39
10 *Manufactured Home Park Tenancy Act*, s. 17
11 MHPTA, s. 17(2) and 60

30. Fixed Term Tenancies

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.

Definition of a Fixed Term Tenancy

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date. At least one Court has interpreted "predetermined expiry date" to include a provision in the tenancy agreement that the tenancy will terminate as a result of a specified occurrence or circumstance.

Fixed Term Tenancy Agreement

The agreement must state the date the tenancy ends, and whether the tenancy may continue as a periodic tenancy or for another fixed term after that date or whether the tenant must vacate the rental unit on that date. If the parties do not agree that the tenant must vacate the rental unit at the end of the fixed term, and if the parties do not enter into a new tenancy agreement, the tenancy continues as a month to month tenancy.

Ending a Fixed Term Tenancy

During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties. For example, during the fixed term a landlord may end the tenancy if the tenant fails to pay the rent when due**.** A proper Notice to End Tenancy must be served on the tenant. During the fixed term a tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act* (the Legislation). Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

A landlord cannot give notice for owner occupancy or purchaser occupancy that will have the effect of ending a fixed term tenancy before the end of the fixed term. If a landlord wishes to end the tenancy for reasons such as owner occupancy or purchaser occupancy, the landlord must serve a proper Notice to End Tenancy on the tenant. Proper notice in respect of purchaser occupancy includes the pre-requisites to issuance of the Notice to End: any conditions precedent removed from the sales agreement and the purchaser intends in good faith to occupy the rental unit and requests the vendor in writing to issue the Notice to End. The effective date of that Notice will be two months from the end of the month in which the Notice was served but in any case not before the end of the fixed term. The tenant may **not**, during the fixed term, give the landlord a minimum 10 day notice to end the tenancy on a date that is earlier than the effective date of the landlord's notice.

A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term. Any one month notice will take effect not sooner than the end of the fixed term.

Renewing a Fixed Term Tenancy Agreement

A landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term.

When a Fixed Term Tenancy becomes a Month to Month Tenancy

If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

If the tenant wishes to vacate the premises at the end of the fixed term, but is not otherwise required to vacate the premises at the end of the fixed term, the tenant must give notice of intent to vacate the premises in the rental period prior to the rental period in which the tenant wishes to vacate the premises and not less than one month prior to the end of the fixed term.

Early End to a Fixed Term Tenancy by Agreement

A landlord and tenant may agree in writing to end a fixed term tenancy before its expiry date.

Orders of Possession and Fixed Term Tenancies

In addition to the procedures under the Legislation for terminating a tenancy for cause or for non-payment of rent, a landlord may apply for an Order of Possession in respect of a fixed term tenancy when any of the following occur:

- the tenant has given proper notice to the landlord as a result of a material breach by the landlord;
- the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- the landlord and tenant enter into a written agreement specifying that the tenancy agreement shall end on a specified date.

Rent Increases and Fixed Term Tenancies

The rent increase provisions of the Legislation apply to fixed term tenancy agreements. If the parties so agree, the fixed term tenancy agreement may specify that the rent shall continue to be the same amount throughout the fixed term. The parties may not, however, agree that the rent will increase during the fixed term as this would potentially contravene the justified rent increase provisions of the Legislation.

Subletting and Fixed Term Tenancies

A request to sublet the rental unit must be in writing. Under the *Residential Tenancy Act*, where the fixed term tenancy is for six months of more, consent to sublet must not be unreasonably withheld.

31. Pet Damage Deposits

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.

As of January 1, 2004, a landlord may require, under the *Residential Tenancy Act,* that a tenant pay a "pet damage deposit" in addition to a normal security deposit[1]. The rule does not apply to existing tenants with pets nor does it apply to manufactured homes governed by the *Manufactured Home Park Tenancy Act.*

When is the deposit given?

A landlord may require a pet damage deposit either when the tenant has a pet at the start of a tenancy or later, at the time a tenant acquires a pet and the landlord's required agreement is obtained[2].

Sometimes a tenancy agreement might already provide that a tenant will pay a pet damage deposit on acquiring a pet, in which case, the deposit would be paid then.

If a tenancy agreement is silent about pets, then the landlord cannot require a pet damage deposit.

A landlord cannot require a pet damage deposit for a guide animal under the *Guide Animal Act*.

How much is the deposit?

A landlord can require a deposit of up to one-half month's current rent as a pet damage deposit, regardless of the type or number of pets. This amount is in addition to any security deposit that may also be required by a landlord[3].

What does the deposit cover?

The deposit is to be held by the landlord as security for damage caused by a pet.

When can a landlord keep the deposit?

Pet damage deposits are generally treated the same as security deposits.

At the end of a tenancy, if the tenant agrees in writing, the landlord may keep all or part of the pet damage deposit[4].
At the end of a tenancy, the landlord may keep all or a part of the pet damage deposit to

1 *Residential Tenancy Act,* s. 18(2)
2 RTA, 20(c)
3 RTA, s. 19
4 RTA, s. 38(4)

pay an amount previously awarded by an arbitrator for damage caused by a pet and which was still unpaid at the end of the tenancy[5].

The landlord may apply to an arbitrator to keep all or a portion of the deposit but only to pay for damage caused by a pet. The application must be made within the later of 15 days after the end of the tenancy or 15 days after the tenant has provided a forwarding address in writing.[6]

If a tenant does not give the landlord a forwarding address within one year after the end of the tenancy, the landlord may keep the pet damage deposit[7].

When is a deposit repaid?

As with security deposits, a landlord must return any remaining pet damage deposit and any statutory interest within 15 days after the tenancy ends or the landlord receives the tenant's forwarding address in writing, whichever is later[8].

A landlord does not have to comply with this 15 day rule if the landlord has applied for an arbitrator's order within the 15 days, in which case the landlord can hold the deposit and any statutory interest until the arbitrator's decision. Similarly, a landlord does not have to comply with the 15 day rule if the tenant fails to provide a forwarding address in writing within a year after the end of the tenancy[9].

If a landlord is required to return a pet damage deposit and fails to do so, the tenant may apply to an arbitrator for an order for double the amount of the deposit plus any statutory interest.[10]

Manufactured Home Parks

The *Manufactured Home Park Tenancy Act* does not permit a landlord to require a pet damage deposit. If one is paid, the tenant may deduct the amount of the deposit from rent or recover the amount.

Tenancy Condition Reports

A landlord or a tenant may lose the right to keep or be repaid a pet damage deposit if the rules regarding tenancy condition reports are not followed. See the Residential Tenancy Regulation.

5 RTA, s. 38(3)
6 RTA, s. 38(1)(d)
7 RTA, s. 39
8 RTA, s. 38(1)
9 RTA, s. 39
10 RTA, s. 38(6)

32. Illegal Activities

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.

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* provide that a landlord may terminate a tenancy for illegal activity that meets one or more of the following requirements:

- has caused or is likely to cause damage to the landlord's property
- has adversely affected or likely to adversely affect the quiet enjoyment, security, safety or physical wellbeing of another occupant of the residential property
- has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.[1]

This Guideline is intended to clarify relevant issues such as the meaning of "illegal", what may constitute "illegal activity" and circumstances under which termination of the tenancy should be considered.

The Meaning of Illegal Activity and What Would Constitute an Illegal Activity

The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

For example, it may be illegal to smoke a single marijuana cigarette. However, unless doing so has a significant impact on other occupants or the landlord's property, the mere smoking of the marijuana cigarette would not meet the test of an illegal activity which

1 *Residential Tenancy Act*, s. 47(1)(e); *Manufactured Home Park Tenancy Act*, s. 40(1)(d)

would justify termination of the tenancy.

On the other hand, a very small marijuana grow operation, involving only one or two plants, grown exclusively for personal use, might form the basis for terminating the tenancy if it would jeopardize the landlord's ability to insure his or her property.

A breach of a provision of the Legislation may or may not constitute an illegal activity depending on the severity of the breach in respect of the criteria set out above. For example, not paying one's rent contravenes the Legislation. However, merely not paying rent in and of itself does not constitute an illegal activity. On the other hand, if the tenant went around the residential property harassing the landlord so that he or she could not collect the rent from other tenants, this might constitute illegal harassment and thus be an illegal activity which would warrant terminating the tenancy.

Breaches of criminal statutes, if minor or technical, may not rise to the level of illegal activity under the Legislation. However, more serious breaches of the same statute may rise to that level. For example, a failure to obtain a business license to work at home, so long as this would otherwise not contravene the tenancy agreement, would not be an illegal activity warranting termination of the tenancy. On the other hand, running a brothel in the rental unit would be an illegal activity warranting termination of the tenancy.

Circumstances for Ending the Tenancy

The illegal activity must have some effect on the tenancy. For example, the fact that a tenant may have devised a fraud in the rental unit, written a bad cheque for a car payment, or failed to file a tax return does not create a threat to the other occupants in the residential property or jeopardize the lawful right or interest of the landlord. On the other hand, a methamphetamine laboratory in the rental unit may bring the risk of violence and the risk of fire or explosion and thus may jeopardize the physical safety of other occupants, the landlord, and the residential property.

A tenant may have committed a serious crime such as robbery or physical assault, however, in order for this to be considered an illegal activity which justifies issuance of a Notice to End Tenancy, this crime must have occurred in the rental unit or on the residential property.

If a person permitted in the rental unit or on the residential property engages in an illegal activity, this may be grounds for terminating the tenancy even if the tenant was not involved in the illegal activity. The arbitrator will have to determine whether or not the tenant knew or ought to have known that this person may engage in such illegal activity. The tenant may be found responsible for the illegal activity whether or not the tenant was actually present when the activity occurred, so long as it was in the rental unit or on the residential property. For example, the tenant may know that his or her guest has been arrested for breaking and entering. The guest breaks into the rental unit of another tenant. This may constitute grounds for ending the tenancy for illegal activity. A further example may be where a tenant allows a teenage child of the tenant to have a party in the rental unit or on the residential property while the tenant is away and one of the party guests commits an illegal act in circumstances where supervision would be found to be

warranted and where the tenant knew or ought to have known that such an illegal act could occur in the circumstances (underage drinking, use of drugs, presence of a weapon).

The test of knowledge attributable to the tenant is the "reasonable person" test. If a reasonable person would be expected to know or ought to know that illegal activity might occur, the tenant will be responsible whether or not the tenant actually possessed this knowledge. In other words, willful or inadvertent blindness to the possibility will not save the tenant from the consequences of the guest's illegal activity.

The test for establishing that the activity was illegal and thus grounds for terminating the tenancy is not the criminal standard which is proof beyond a reasonable doubt. A criminal conviction is not a prerequisite for terminating the tenancy. The standard of proof for ending a tenancy for illegal activity is the same as for ending a tenancy for any cause permitted under the Legislation: proof on a balance of probabilities.[2]

Material Breach

Despite the provisions of the Legislation with respect to illegal activities, the parties may agree that one or more specified activities, if conducted in the rental unit or on the residential property may be considered a basis for ending the tenancy. In that event, the ground for ending the tenancy would not be illegal activity. The ground for terminating the tenancy would be material breach of the tenancy agreement. Whether or not the landlord would be successful in ending the tenancy for such specified activity or activities would depend on whether or not an arbitrator were to find that such a breach was both material and that the term of the tenancy agreement which was breached was not itself unconscionable.

2 A balance of probabilities means that the arbitrator finds that the landlord has established that it is more than 50% likely that the event occurred and that it was illegal and that it had the impacts on other occupants, the landlord, or the residential property or manufactured home park set out in the Legislation.

33. Ending a Manufactured Home Tenancy Agreement – Landlord use of Property

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.

The *Manufactured Home Park Tenancy Act* allows the landlord to end a tenancy agreement for landlord use only if the landlord intends, in good faith, to convert all or a significant part of the manufactured home park to a non-residential use or a residential use other than a manufactured home park. The landlord must have all the necessary permits and approvals required by law before the notice to end is issued.

This provision is intended to protect the security of tenure of tenants while permitting the landlord to take advantage of legitimate business ventures. A landlord cannot use this provision to end tenancies unless the landlord is legitimately redeveloping all or a significant portion of the park or converting it to another type of tenure – it is not sufficient, for example, for the landlord to cease renting the space for a period of six months or put it to some other use within the park (e.g. to house a caretaker or provide parking for existing tenants).

"Significant part" is not defined in the Act or the Manufactured Home Park Tenancy Regulation, and the word "significant" does not have a precise meaning in law. The definition of "significant" includes "consequential", "considerable", "material", "noticeable" and "important"[1]. In making a determination under this provision, an arbitrator will consider both the size of the development, and its size in relation to the park as a whole. A landlord cannot use this provision to end an individual tenancy under this part unless the park contains only one site that is rented, or the site is the only occupied site in a portion of the park that the landlord intends to develop.

A landlord cannot end a tenancy on a site that will not form part of the new development, unless the site must be vacated in order that the development can proceed and there is no other viable alternative.

The allocation of available vacant sites, if any, to tenants whose tenancies are being ended may be one of the factors that an arbitrator would consider in determining the good faith of the landlord[2].

1 See **Stelco Inc. v Ontario** (1994)115 DLR(4th)437 @ 439, Ontario Court – General Division, approved on Appeal(1995)126 DLR(4th)767, and **R v Dupuis** (1998) 174 Sask. R 17
2 See also Policy Guideline 2 – "Ending a Tenancy Agreement – 'Good Faith' Requirement".

34. Frustration

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 contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms. A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The *Frustrated Contract Act* deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the *Frustrated Contracts Act*, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

35. Transition – Security Deposits

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.

The *Residential Tenancy Act*[1] provides "(i)f a landlord holds a security deposit in accordance with the former Act, the security deposit is deemed to be held in accordance with this Act and the provisions of this Act respecting security deposits apply". The former Act required that a landlord either file a claim against or return a security deposit, plus interest, within 15 days of the end of a tenancy, except for an amount the tenant agreed in writing the landlord could deduct, or an amount previously ordered by an arbitrator.

The Act[2] further provides that arbitrations started under the former Act, or applications for arbitration made under the former Act, must be conducted under the former Act.

The Act was proclaimed on January 1, 2004. A claim regarding a security deposit filed on or before December 31, 2003, is conducted under the former Act and all the provisions regarding security deposits under that Act apply.

A landlord who held a deposit on a tenancy that ended on or before December 16, 2003, who neither returned nor filed a claim against that deposit by December 31, 2003, was not holding the deposit in accordance with, but rather contrary to the provisions of, the former Act on January 1, 2004. Therefore, the deeming provision does not apply and any claim regarding that deposit is conducted in accordance with the law that was in effect at the time the 15 day time period elapsed and the tenant's right to the return of the deposit crystallized. If the 15 day period elapsed on or before December 31, 2003, the tenant has 2 years from the end of the tenancy to file a claim for the return of the deposit. The tenant is not entitled to the return of double the deposit for the landlord's failure to comply with the provisions of the former Act.

A landlord who held a deposit on a tenancy that ended on or after December 17, 2003, who had not returned or filed a claim against that deposit when the Act was proclaimed on January 1, 2004, held the deposit in accordance with the Act at the time of proclamation. The deeming provision and the provisions of the Act regarding security deposits apply. Under the Act, the landlord has 15 days from the later of the date the tenancy ends or the tenant provides a forwarding address in writing to file a claim against or return the deposit. Until the tenant provides a forwarding address, even though the tenancy ended under the former Act, the landlord is not required to claim against or return the deposit. If the tenant does not provide a forwarding address within 1 year of the end of the tenancy, the landlord may keep the deposit.

If the tenancy ended on or after December 17th, the landlord held the deposit at January 1st, and the tenant has provided a forwarding address in writing, the landlord must make a claim against or return the deposit plus interest within 15 days of the later of the date

1 *Residential Tenancy Act*, section 103
2 RTA, section 101

the tenancy ended or the forwarding address was provided. If the landlord fails to do so, the tenant is entitled to the return of double the deposit. The tenant has 2 years from the end of the tenancy to make that claim.

The Act[3] states that the requirement for a start of tenancy condition inspection does not apply to a tenancy that started before January 1, 2004. If a tenancy ended before January 1, 2004, the landlord was not required to conduct an end of tenancy condition inspection and the tenant was not required to attend one. As the requirement did not exist, the landlord has not lost the right to claim against the deposit for damage if an end of tenancy inspection was not conducted, and the tenant has not lost the right to the return of the deposit for failure to attend an end of tenancy inspection, even though the landlord may have continued to hold the deposit in accordance with the former Act on January 1, 2004.

3 Section 100

36. Extending a Time Period

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.

The *Residential Tenancy Act*[1] and the *Manufactured Home Park Tenancy Act*[2] provide that an arbitrator may extend or modify a time limit established by these Acts ***only in exceptional circumstances.*** An arbitrator may not extend the time limit to apply for arbitration beyond the effective date of a Notice to End a Tenancy and may not extend the time within rent must be paid without the consent of the landlord.

Exceptional Circumstances

The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.

Some examples of what might not be considered "exceptional" circumstances include:

- the party who applied late for arbitration was not feeling well
- the party did not know the applicable law or procedure
- the party was not paying attention to the correct procedure
- the party changed his or her mind about filing an application for arbitration
- the party relied on incorrect information from a friend or relative

Following is an example of what could be considered "exceptional" circumstances, depending on the facts presented at the hearing:

- the party was in the hospital at all material times

The evidence which could be presented to show the party could not meet the time limit due to being in the hospital could be a letter, on hospital letterhead, stating the dates during which the party was hospitalized and indicating that the party's condition prevented their contacting another person to act on their behalf.

The criteria which would be considered by an arbitrator in making a determination as to whether or not there were exceptional circumstances include:

- the party did not wilfully fail to comply with the relevant time limit
- the party had a bona fide intent to comply with the relevant time limit
- reasonable and appropriate steps were taken to comply with the relevant time limit
- the failure to meet the relevant time limit was not caused or contributed to by the conduct of the party
- the party has filed an application which indicates there is merit to the claim
- the party has brought the application as soon as practical under the circumstances

1 *Residential Tenancy Act*, section 66.
2 *Manufactured Home Park Tenancy Act*, section 59.

Notice to End

Application for Arbitration Filed After Effective Date

An arbitrator may not extend the time limit to apply for arbitration to dispute a Notice to End if that application for arbitration was filed after the effective date of the Notice to End.

For example, if a Notice to End has an effective date of 31 January and the tenant applies to dispute said Notice to End on 1 February, an arbitrator has no jurisdiction to hear the matter ***even where the tenant can establish grounds that there were exceptional circumstances.*** In other words, once the effective date of the Notice to End has passed, there can be no extension of time to file for arbitration.

Application to Extend the Time to Pay Rent

An arbitrator has no jurisdiction to extend the time within which a tenant may pay overdue rent unless one of the following has occurred:

1. The landlord specifically consents to the extension of time being considered and granted.
2. The tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an arbitrator's order.

A landlord has no legal obligation to agree to extend the time to pay the rent. Any such agreement must be voluntary.

The procedure which follows after the landlord has consented to the arbitrator's hearing an application to extend the time to pay the rent is a settlement procedure. The tenant provides information which will allow the landlord to determine whether or not this is an appropriate case for an extension of time. If the landlord and tenant come to a voluntary agreement, the arbitrator will make the appropriate orders.

If a tenant applies for an extension of time and the landlord consents to having the matter heard, the arbitrator will take evidence including information about the tenant's ability to pay the overdue rent and as to when the tenant will pay the overdue rent. If the landlord concurs in the tenant's proposal for a payment plan, the arbitrator may make an order extending the time to pay the rent in accordance with the agreement of the parties.

If the landlord has applied for an Order of Possession and a monetary order for the outstanding rent, the arbitrator may issue conditional orders if these are agreed to by the parties as part of their settlement agreement. These orders are final and binding and enforceable in Court.

37. Rent Increases

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.

This guideline deals with rent increases permitted under the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* (the Legislation).

The Legislation permits a landlord to impose a rent increase up to the amount
(a) calculated in accordance with the regulations, or
(b) ordered by a dispute resolution officer on application[1].

A tenant's rent cannot be increased unless the tenant has been given proper notice in the approved form at least 3 months before the increase is to take effect. The tenant's rent can only be increased once every 12 months. A rent increase that falls within the limit permitted by the applicable Regulation[2] cannot be disputed at a dispute resolution proceeding.

Rent Increase Calculated in Accordance with the Residential Tenancy Regulation ("Annual Rent Increase")

A landlord may impose an Annual Rent Increase up to, but not greater than, the percentage amount calculated as follows:

inflation rate + 2%

The allowable percentage rent increase for each calendar year will be available on the Residential Tenancy Branch website in September of the previous year, when the numbers to calculate the all-items Consumer Price Index (CPI) become available.

The "inflation rate" is defined in the regulations and means the 12 month average percent change in the all-items CPI for British Columbia (BC) ending in the July that is most recently available for the calendar year for which a rent increase takes effect. The Residential Tenancy Branch publishes the inflation rate for the year on the Branch website, (www.rto.gov.bc.ca) under the heading "News".

As the Act specifies that the rent increase **cannot exceed** the percentage amount, a landlord should not round up any cents left in calculating the allowable increase. For example, if the base rent is $800 and the maximum allowable increase is $36.80, the landlord can issue a Notice of Rent Increase for a new rent of up to $836.80, but not $837.

Rent Increase Calculated in Accordance with the Manufactured Home Park Tenancy Regulation ("Annual Rent Increase")

A landlord may impose an Annual Rent Increase up to, but not greater than, the amount

1 *Residential Tenancy Act,* section 43(3), *Manufactured Home Park Tenancy Act*, section 36(3)
2 Residential Tenancy Regulation, section 22; Manufactured Home Park Tenancy Regulation, section 32

calculated as follows:

inflation rate + 2% + proportional amount[3]

The allowable percentage rent increase (inflation rate + 2%) for each calendar year will be available on the Residential Tenancy Branch website in September of the previous year, when the numbers to calculate the all-items Consumer Price Index (CPI) become available.

The "inflation rate" is defined in the regulations and means the 12 month average percent change in the all-items CPI for British Columbia (BC) ending in the July that is most recently available for the calendar year for which a rent increase takes effect. The Residential Tenancy Branch publishes the inflation rate for the year on the Branch website, (www.rto.gov.bc.ca) under the heading "News".

The "proportional amount" is the sum of the change in local government levies and the change in utility fees divided by the number of manufactured home sites in the manufactured home park.

The "change in local government levies" is the local government levies for the 12-month period ending at the end of the month before the month in which notice under section 35(2) of the Act was given, less the local government levies for the previous 12-month period. The formula for the change in local government levies is:

this year's levies – last year's levies

The "change in utility fees" is the utility fees for the 12-month period ending at the end of the month before the month in which notice under section 35(2) of the Act was given, less the utility fees for the previous 12-month period. The formula for the change in utility fees is:

this year's fees – last year's fees

The term "local government levies" means the sum of the payments respecting a manufactured home park made by the landlord for property tax values, and municipal fees under section 194 of the *Community Charter*.

The term "utility fees" means the sum of the payments respecting a manufactured home park made by the landlord for the supply of electricity, natural gas, water, telephone services or coaxial cable services provided by the following:

a) a public utility as defined in section 1 of the *Utilities Commission Act*;
b) a gas utility as defined in section 1 of the *Gas Utility Act*;
c) a water utility as defined in section 1 of the *Water Utility Act*;
d) a corporation licensed by the Canadian Radio-television and Telecommunications Commission for the purposes of that supply.

Expenses that do not meet the definition of "local government fees" and "utility fees" cannot be included when calculating a rent increase. If electricity is generated by diesel fuel, for example, a landlord may not include the increased cost of diesel fuel. The fees must be paid to a local government or a regulation utility in order to be included.

3 Effective July 18, 2007

As the Act specifies that the rent increase **cannot exceed** the calculated amount, a landlord should not round up any cents left in calculating the allowable increase. For example, if the base rent is $800 and the maximum allowable increase is $36.80, the landlord can issue a Notice of Rent Increase for a new rent of up to $836.80, but not $837.

Tenant May Agree to a Rent Increase Greater than the Prescribed Amount

A landlord who desires to increase a tenant's rent by more than the amount of the allowed annual rent increase can ask the tenant to agree to an increase that is greater than that allowed amount. If the tenant agrees in writing to the proposed increase, the landlord is not required to apply to a dispute resolution officer for approval of that rent increase. The landlord must still follow requirements regarding the timing and notice of rent increases.

The tenant's written agreement to a proposed rent increase must clearly set out the agreed rent increase (for example, the percentage increase and the amount in dollars), and the tenant's agreement to that increase. It is recommended the landlord attach a copy of the agreement to the Notice of Rent Increase given to the tenant.

Payment of a rent increase in an amount more than the allowed annual increase does not constitute a written agreement to a rent increase in that amount.

Additional Rent Increase under the Residential Tenancy Act

The Residential Tenancy Act allows a landlord to apply to a dispute resolution officer for approval of a rent increase in an amount that is greater than the basic Annual Rent Increase. The policy intent is to allow the landlord to apply for dispute resolution only in "extraordinary" situations. The Residential Tenancy Regulation[4] sets out the limited grounds for such an application. A landlord may apply for an additional rent increase if one or more of the following apply:

(a) after the allowable Annual Rent Increase, the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit;

(b) the landlord has completed significant repairs or renovations to the residential property in which the rental unit is located that

  (i) could not have been foreseen under reasonable circumstances, and

  (ii) will not recur within a time period that is reasonable for the repair or renovation;

(c) the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the residential property;

(d) the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the residential property, if the financing costs could not have been foreseen under reasonable circumstances;

4 RT Reg, s. 23

(e) the landlord, as a tenant, has received an additional rent increase under this section for the same rental unit.

An additional rent increase under paragraphs (a) or (e) can apply to a single unit. If the landlord applies for an increase under paragraph (b), (c), or (d), the landlord must make a single application to increase the rent for all rental units in the residential property by an equal percentage. If one or more tenants of rental units in the residential property agree in writing to the proposed increase, the landlord must include those rental units in calculating the portion of the rent increase that will apply to each unit, however the tenants need not be named and served on the Application for Additional Rent Increase (AARI).

A landlord cannot carry forward any unused portion of an allowable rent increase or an approved additional increase that is not issued within 12 months of the date the increase comes into effect without a dispute resolution officer's order.

Additional Rent Increase under the Manufactured Home Park Tenancy Act

The Manufactured Home Park Tenancy Act allows a landlord to apply to a dispute resolution officer for approval of a rent increase in an amount that is greater than the basic Annual Rent Increase. The Manufactured Home Park Tenancy Regulation[5] sets out the limited grounds for such an application. A landlord may apply for an additional rent increase if one or more of the following apply:

(a) after the allowable Annual Rent Increase, the rent for the manufactured home site is significantly lower than the rent payable for other manufactured home sites that are similar to, and in the same geographic area as, the manufactured home site;

(b) the landlord has completed significant repairs or renovations to the manufactured home park in which the manufactured home site is located that

  (i) are reasonable and necessary, and

  (ii) will not recur within a time period that is reasonable for the repair or renovation;

(c) the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the manufactured home park;

(d) the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the manufactured home park, if the financing costs could not have been foreseen under reasonable circumstances;

(e) the landlord, as a tenant, has received an additional rent increase under this section for the same manufactured home site.

An additional rent increase under paragraphs (a) or (e) can apply to a single manufactured home site. If the landlord applies for an increase under paragraph (b), (c), or (d), the landlord must make a single application to increase the rent for all sites in the manufactured home park by an equal percentage. If one or more tenants of sites in the

5 MHPT Reg, s. 33

manufactured home park agree in writing to the proposed increase, the landlord must include those sites in calculating the portion of the rent increase that will apply to each site, however the tenants need not be named and served on the Application for Additional Rent Increase (AARI).

A landlord cannot carry forward any unused portion of an allowable rent increase or an approved additional increase that is not issued within 12 months of the date the increase comes into effect without a dispute resolution officer's order.

Application for Additional Rent Increase

Unless a tenant agrees to a rent increase of an amount that is greater than the prescribed amount, a landlord must apply for dispute resolution for approval to give the additional rent increase. The landlord must properly complete the application. The rent increase identified on the AARI must be the total proposed rent increase, which is the sum of the annual rent increase + the additional rent increase:

Proposed rent increase = annual rent increase + additional rent increase

The application will be considered by the dispute resolution officer in relation to the circumstance(s) identified as applicable to each application. Select items relevant to each circumstance are discussed below.

In order to ensure that an additional rent increase is issued in accordance with the Legislation, and cannot be disputed by a tenant, the landlord should either obtain the tenant's consent, in writing, or apply for the increase before issuing the first Notice of Rent Increase that will include the additional rent increase. If the application results from significant repairs or renovations, or a financial loss resulting from an increase in operating expenses or financing costs, the application should be made before the first Notice of Rent Increase for the calendar year is issued.

Each tenant named on the application must be served with a copy of the Application and hearing package. The landlord is required to provide affected tenants with copies of the evidence used in support of the Application for Additional Rent Increase, including relevant invoices, financing records, and financial statements if applicable. **The landlord has the burden of proving any claim for a rent increase of an amount that is greater than the prescribed amount.** The tenants will have an opportunity to appear at the hearing of the application, question the landlord's evidence, and submit their own evidence.

In considering an Application for Additional Rent Increase, the dispute resolution officer must consider the following factors. The dispute resolution officer will determine which factors are relevant to the application before him or her:

- the rent payable for similar rental units in the property immediately before the proposed increase is to come into effect;
- the rent history for the affected unit for the preceding 3 years;
- any change in a service or facility provided in the preceding 12 months;

- any relevant and reasonable change in operating expenses and capital expenditures in the preceding 3 years, and the relationship of such a change to the additional rent increase applied for;
- a relevant submission from an affected tenant;
- a finding by a dispute resolution officer that the landlord has failed to maintain or repair the property in accordance with the Legislation[6];
- whether and to what extent an increase in costs, with respect to repair or maintenance of the property, results from inadequate repair or maintenance in the past;
- whether a previously approved rent increase, or portion of a rent increase, was reasonably attributable to a landlord's obligation under the Legislation that was not fulfilled;
- whether a dispute resolution officer has set aside a notice to end a tenancy within the preceding 6 months; and
- whether a dispute resolution officer has found, in a previous application for an additional rent increase, that the landlord has submitted false or misleading evidence, or failed to comply with a dispute resolution officer's order for the disclosure of documents.

A dispute resolution officer's examination and assessment of an AARI will be based significantly on the dispute resolution officer's reasonable interpretation of:

- the application and supporting material;
- evidence provided that substantiates the necessity for the proposed rent increase;
- the landlord's disclosure of additional information relevant to the dispute resolution officer's considerations under the applicable Regulation[7]; and
- the tenant's relevant submission.

Evidence regarding lack of repair or maintenance will be considered only where it is shown to be relevant to whether an expenditure was the result of previous inadequate repair or maintenance. A tenant's claim about what a landlord has not done to repair and maintain the residential property may be addressed in an application for dispute resolution about repair and maintenance.

Significantly lower rent[8]

The landlord has the burden and is responsible for proving that the rent for the rental unit is significantly lower than the current rent payable for similar units in the same geographic area. An additional rent increase under this provision can apply to a single unit, or many units in a building. If a landlord wishes to compare all the units in a building to rental units in other buildings in the geographic area, he or she will need to provide evidence not only of rents in the other buildings, but also evidence showing that the state of the rental units and amenities provided for in the tenancy agreements are comparable.

6 RTA, s. 32; MHPTA, s. 26
7 RT Reg, s. 23; MHPT Reg, s. 33
8 RT Reg, s. 23(1)(a); MHPT Reg, s. 33(1)(a)

The rent for the rental unit may be considered "significantly lower" when (i) the rent for the rental unit is considerably below the current rent payable for similar units in the same geographic area, or (ii) the difference between the rent for the rental unit and the current rent payable for similar units in the same geographic area is large when compared to the rent for the rental unit. In the former, $50 may not be considered a significantly lower rent for a unit renting at $600 and a comparative unit renting at $650. In the latter, $50 may be considered a significantly lower rent for a unit renting at $200 and a comparative unit renting at $250.

"Similar units" means rental units of comparable size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community.

The "same geographic area" means the area located within a reasonable kilometer radius of the subject rental unit with similar physical and intrinsic characteristics. The radius size and extent in any direction will be dependant on particular attributes of the subject unit, such as proximity to a prominent landscape feature (e.g., park, shopping mall, water body) or other representative point within an area.

Additional rent increases under this section will be granted only in exceptional circumstances. It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units in the residential property at a higher rate. However, if a landlord has kept the rent low in an individual one-bedroom apartment for a long term renter (i.e., over several years), an Additional Rent Increase could be used to bring the rent into line with other, similar one-bedroom apartments in the building. To determine whether the circumstances are exceptional, the dispute resolution officer will consider relevant circumstances of the tenancy, including the duration of the tenancy, the frequency and amount of rent increases given during the tenancy, and the length of time over which the significantly lower rent or rents was paid.

The landlord must clearly set out all the sources from which the rent information was gathered. In comparing rents, the landlord must include the Allowable Rent Increase and any additional separate charges for services or facilities (e.g.: parking, laundry) that are included in the rent of the comparable rental units in other properties. In attempting to prove that the rent for the rental unit is significantly lower than that for similar units in the same geographical area, it is **not** sufficient for the landlord to solely or primarily reference Canada Mortgage and Housing Corporation (CMHC) statistics on rents. Specific and detailed information, such as rents for all the comparable units in the residential property and similar residential properties in the immediate geographical area with similar amenities, should be part of the evidence provided by the landlord.

The amount of a rent increase that may be requested under this provision is that which would bring it into line with comparable units, but not necessarily with the highest rent charged for such a unit. Where there are a number of comparable units with a range of rents, a dispute resolution officer can approve an additional rent increase that brings the subject unit(s) into that range. For example, a dispute resolution officer may approve an additional rent increase that is an average of the applicable rental units considered. An application must be based on the projected rent after the allowable rent increase is

added. Such an application can be made at any time before the earliest Notice of Rent Increase to which it will apply is issued.

Significant repairs or renovations

In conventional tenancies[9], a landlord's completion of a repair or renovation is a circumstance under which he or she can apply for an additional rent increase if: (1) the repair or renovation is significant; (2) the repair or renovation could not have been foreseen under reasonable circumstances; and (3) the repair or renovation will not reoccur within a time period that is reasonable for the repair or renovation.

In manufactured home park tenancies[10], a landlord's completion of a repair or renovation is a circumstance under which he or she can apply for an additional rent increase if: (1) the repair or renovation is significant; (2) the repair or renovation is reasonable and necessary; and (3) the repair or renovation will not reoccur within a time period that is reasonable for the repair or renovation.

A repair or renovation may be considered "significant" when (i) the expected benefit of the repair or renovation can reasonably be expected to extend for at least one year, and (ii) the repair or renovation is notable or conspicuous in effect or scope, or the expenditure incurred on the repair or renovation is of a noticeably or measurably large amount.

In order for a capital expense for a significant repair or renovation to be allowed in an AARI for a conventional tenancy, the landlord must show that the repair or renovation could not have been foreseen under reasonable circumstances and will not reoccur within a time period that is reasonable for the repair or renovation. An example of work that could not have been foreseen under reasonable circumstances is repairs resulting from a ruptured water pipe or sewer backup even though adequate maintenance had been performed. Another example is capital work undertaken by a municipality, local board or public utility for which a landlord is obligated to pay (e.g., sewer system upgrade, water main installation), unless the work is undertaken because of the landlord's failure to do the work. An example of work that could have been foreseen under reasonable circumstances, and for which a rent increase would not be allowed, is a new roof.

In order for a capital expense for a significant repair or renovation to be allowed in an AARI for a manufactured home park tenancy, the landlord must show that the repair or renovation was reasonable and necessary, and will not reoccur within a time period that is reasonable for the repair or renovation. A repair or renovation may be considered "reasonable" when (i) the repair or renovation, (ii) the work performed to complete the repair or renovation, and (iii) the associated cost of the repair or renovation, are suitable and fair under the circumstances of the repair or renovation. A repair or renovation may be considered "necessary" when the repair or renovation is required to (i) protect or restore the physical integrity of the manufactured home park, (ii) comply with municipal or provincial health, safety or housing standards, (iii) maintain water, sewage, electrical, lighting, roadway or other facilities, (iv) provide access for persons with disabilities, or

9 RT Reg, s. 23(1)(b)
10 MHPT Reg, s. 33(1)(b)

(v) promote the efficient use of energy or water.

Where an expenditure incurred on the repair or renovation has been, is anticipated to be, or will be reimbursed or otherwise recovered (e.g., by grant or other assistance from a government, by an insurance claim), a rent increase will not be ordered.

The attached Table 1: 'Useful Life of Work Done or Thing Purchased' is a guide for determining the useful life of work done or thing purchased for the purpose of this provision. If, when a thing is purchased it has previously been used, the useful life of the thing will be determined taking into account the length of time of that previous use. If the work done or thing purchased does not appear in the Table, the useful life of the work or thing will be determined with reference to items with similar characteristics that do appear in the Table. If the useful life of work done or thing purchased cannot be determined because the work or thing does not appear in the Table and no item with similar characteristics appears in the Table, the useful life of the work or thing will be what is generally accepted as the useful life of such work or thing.

In considering a landlord's capital expense for a significant repair or renovation, the dispute resolution officer will consider only those expenditures which have not been included in full or in part in a previous rent increase given to the tenant before the subject proposed rent increase. A landlord can apply for an additional rent increase on significant repairs that were done before the Legislation came into effect if the landlord hasn't previously had an opportunity to obtain an increase for those repairs. For example, if the rent increase the landlord gave (or could have given) to take effect in 2003 was for a fiscal year that ended in March 2002, and the repairs were done in September 2002, then the landlord could request an additional rent increase in 2004 for the cost of those repairs.

An application can be made at any time after the landlord has made the repairs or renovations and is able to provide proof of their cost. The landlord does not have to have completed paying for the repairs or renovations. A landlord could complete a major renovation project in phases, and seek an additional rent increase at the completion of each phase. However, the additional rent increase must apply equally to all rental units in the building.

The landlord must provide documentary evidence (e.g. invoices) of the costs of those repairs or renovations, and must also be prepared to show why those costs could not have been foreseen (conventional tenancy) or are reasonable and necessary (manufactured home park tenancy), and that they will not recur within a reasonable time period.

Financial loss

"Financial loss" means the amount by which the total costs that have been experienced by a landlord in respect of a residential property for an annual accounting period exceed the revenue for the same period. Proof of financial loss normally consists of an audited or certified financial statement that (i) summarizes the financial condition of the landlord, (ii) includes a balance sheet, (iii) includes a statement of profit and loss, and (iv) is signed by an individual authorized to sign audited financial statements in the Province of

British Columbia, certified by a professional accountant, or accompanied by a sworn affidavit of the landlord that the financial statements are true.

If an application is made on the basis of a financial loss, the landlord is not required to provide tenants with more than an audited financial statement at the time of application. If an audited financial statement(s) is not available, the landlord must provide before or at the hearing sufficient evidence (for example, all relevant financial records supporting the application) to prove the financial loss. It is in the landlord's best interest to provide this evidence in sufficient time before the hearing to allow the dispute resolution officer and tenants to thoroughly review the evidence in advance of the hearing. In considering an application under this section, the dispute resolution officer may order that the landlord must provide to the dispute resolution officer and tenants an audited financial statement as proof of the financial condition of the landlord. An example of when a dispute resolution officer may make an order for an audited financial statement is the landlord has more than one corporate entity involved with the residential property.

The landlord can request an increase sufficient to cover the loss experienced as a result of the increase in operating or financing costs. The additional rent increase must apply equally to all rental units in the building. The application cannot be made until after the fiscal year end of the rental property, in order that the landlord is able to show the financial loss incurred.

If an application results from a significant increase in operating expenses[11], the landlord must show what costs have increased, provide documentary evidence of the increase in costs (e.g. invoices for the most recent and the preceding year), and the impact on the landlord's financial position. "Operating expenses" includes utility charges (including heat, hydro, water), municipal taxes (including property and school taxes), recycling, sewer and garbage fees payable to the local government or other party, insurance premiums, routine repair and maintenance (including interior painting done on a regular schedule), reasonable management fees for the management of the residential property, and the cost of leasing land for purposes directly related to the operation and use of the residential property. Expenses that are not operating expenses include expenses that are not related to the normal or usual operation of the residential property, non-recurring expenses, capital expenses, fines or penalties levied for failure to meet an obligation, financing costs (including interest expenses and mortgage interest), capital cost allowance or depreciation, and income taxes. A capital expense means an expenditure for a repair, renovation, or new addition that has a lasting and long term benefit to the residential property (including a roof, an appliance, carpets and exterior painting), and consists of the net cost to the landlord after an allowance for trade-in, if any.

"Extraordinary" means going beyond what is usual or regular, or exceptional to a marked extent. The landlord must prove the financial loss has incurred from an extraordinary increase in the operating expenses of the residential property. The extraordinary increase in operating expenses may be incurred over the landlord's most recent annual accounting period, or it may be an increase accumulated over previous accounting

11 RT Reg, s. 23(1)(c); MHPT Reg, s. 33(1)(c)

periods and resulting in the financial loss in the most recent accounting period. If, over the preceding years, a landlord has simply failed to give rent increases to capture rising operating expenses, the landlord is not allowed to recapture those previously forsaken expenses.

If an application results from an increase in financing costs[12], the landlord must prove that he or she has incurred a financial loss for the financial costs of purchasing the residential property. The landlord must provide evidence of the new financing costs, the previous financing costs, and the impact on the landlord's financial position. The landlord must prove the financing costs incurred are usual or regular. The landlord must also explain why the financing costs could not have been foreseen under reasonable circumstances. The financial loss must be incurred by a landlord acting reasonably in entering into the agreement or debt with the subject financing costs. "Financing costs" means the interest and amortization rates attributable to the purchase of the residential property made in good faith and at arm's length. The attached Table 2: 'Chartered Bank Administered Interest Rates' provides a guide for determining appropriate interest rates attributable to purchasing residential property. A landlord incurring financial costs that are unusual or irregular (for example, when compared with Table 2) will be determined as not acting reasonably, unless the landlord provides clear evidence to the contrary.

In considering a landlord's financing costs, a dispute resolution officer will not consider an increase in financing costs that is the result of a new loan or a change in the principal or term of the existing loan for the purchase of the residential property. Where there has been a reduction in the principal of a loan because of a payment against the principal other than through regular blended payments of principal and interest, the dispute resolution officer will consider any change in financing costs on the basis of the amount of the principal of the loan after the reduction. This provision is not applicable to other costs or losses associated with the property purchase, including the direct costs of purchasing the property.

Landlord has received an additional rent increase

If a tenant receives a rent increase that includes an additional rent increase granted by a dispute resolution officer in accordance with the Legislation, and that tenant is subletting the rental unit to a subtenant, the tenant may request an increase under the applicable Regulation[13]. The intent of an application under this provision is to pass along the rent increase received from the original landlord to the subtenant. In these circumstances, it is sufficient to provide a copy of the dispute resolution officer's decision and order granting the original increase, and the resulting Notice of Rent Increase.

A tenant who is subletting the rental unit to a subtenant can make an application at any time after the tenant receives notice of the Application for Additional Rent Increase on his or her own tenancy, and ask that it be heard together with the "head" application. If the tenant does not wish the two matters to be scheduled together, the tenant's application cannot be heard until a decision is issued on the landlord's application.

12 RT Reg, s. 23(1)(d); MHPT Reg, s. 33(1)(d)
13 RT Reg, s. 23(1)(e); MHPT Reg, s. 33(1)(e)

A dispute resolution officer may hear a tenant's application under this provision before the tenant is issued the Notice of Rent Increase that pertains to the additional rent increase sought by the landlord. In those circumstances, the dispute resolution officer should consider allowing an additional increase of "the lesser of the percentage increase granted to the landlord or the actual increase issued to the tenant".

Dispute Resolution Officer's Powers on an Application for Additional Rent Increase

In considering an application for additional rent increase, a dispute resolution officer may:

- grant the application, in whole or in part;
- refuse the application;
- order that the increase granted be phased in over a period of time; or,
- order that the effective date of the increase is conditional on the landlord's compliance with a dispute resolution officer's order respecting the residential property.

A dispute resolution officer may order the landlord to supply any financial records the dispute resolution officer considers necessary to properly consider the application, may issue a summons for such records, or may refuse the application if inadequately supported.

The dispute resolution officer's order will set out the amount of the maximum allowed increase. That amount includes the annual rent increase and any additional amount granted and, if applicable, the amount to be phased in over multiple years. A dispute resolution officer's refusal of the application will result in an order for the amount of the Annual Rent Increase.

Negotiated Agreement

If all the parties to the dispute resolution (or representatives of those parties) attend the hearing and negotiate an agreement that results in the dispute resolution officer recording that agreement, in the absence of circumstances that render the agreement invalid – such as fraud, duress or misrepresentation – the parties are bound by the agreement.

If all the parties or the parties' representatives do not attend the hearing, the dispute resolution officer must presume that the tenants not in attendance have no comment other than that, if any, provided by written submission. The dispute resolution officer will give opportunity to parties in attendance to respond to the submission in accordance with Rule 8.5 of the Dispute Resolution Rules of Procedure. Where only some of the tenants named on the landlord's application attend or are represented at the hearing, the landlord still has the burden of proving his or her claim for the proposed rent increase for the remaining tenants. There is no provision in the Legislation or Dispute Resolution Rules of Procedure for a dispute resolution officer to make default orders against respondents who do not attend hearings. Where appropriate, the dispute resolution officer may adjourn the hearing to give those tenants who are not present or represented at the hearing the opportunity to agree to the negotiated settlement.

Phased Increases

A dispute resolution officer's decision to order an increase phased in over a period of time will be determined in the context of the particular application. Examples in which a phased increase may be considered are (i) where an application justifies a rent increase of an amount that is significant in relation to the current rent amount, and (ii) the increase is associated with a significant repair or renovation of which the expected benefit of the repair or renovation has a lasting and long-term benefit to the rental unit or residential property. In the latter example, the period of the expected benefit is determined in association with the reasonable life expectancy of the repair or renovation.

An order for a phased-in increase applies to the existing tenant and any assignee of the tenancy agreement from the tenant. New tenants under new tenancy agreements cannot rely on phased increases previously ordered for that rental unit.

Notices of Rent Increase

If a landlord applies for an additional rent increase and the application is successful in full or in part,

(a) the landlord may give a notice of rent increase to one or all tenants of rental units in the residential property for a rent increase of an amount up to that ordered; and

(b) the landlord may give a notice of rent increase to one or all other tenants agreeing to an additional rent increase in writing, for a rent increase of an amount up to the amount agreed.

If a landlord applies for an additional rent increase and the application is not successful,

(a) the landlord may give a notice of rent increase to one or all tenants of rental units in the residential property for a rent increase of an amount up to that calculated under the applicable Regulation[14]; and

(b) the landlord may give a notice of rent increase to one or all tenants agreeing to an additional rent increase in writing, for a rent increase of an amount up to the amount agreed.

The Regulations provide that where a landlord has not fully applied an approved rent increase within 12 months of the date the increase comes into effect, the unused portion cannot be carried forward or added to another rent increase, unless a dispute resolution officer orders otherwise[15].

Disputing a Proposed Rent Increase

A tenant cannot dispute a rent increase that does not exceed the percentage permitted as an Annual Rent Increase[16], an amount the tenant has agreed to in writing, or an amount ordered by a dispute resolution officer as an Additional Rent Increase[17]. A

14 RT Reg, s. 22(2); MHPT Reg, s. 32(2)
15 RT Reg, s. 23(5); MHPT Reg, s. 33(5)
16 RT Reg, s. 22; MHPT Reg, s. 32
17 RT Reg, s. 23; MHPT Reg, s. 33

tenant is not required to pay an additional rent increase until served with the Notice of Rent Increase and a copy of the dispute resolution officer's order granting the additional rent increase.

A tenant will receive notice of a landlord's application for an additional rent increase, and will have an opportunity to provide evidence, however they may also choose to be represented by one or more of the tenants named as they are now in a joined application.

If a landlord collects a rent increase that does not comply with the Legislation, the tenant may deduct the increase from rent, or may apply for a monetary order for the amount of excess rent collected. In those circumstances, the landlord may issue a new 3 month Notice of Rent Increase, as the original notice did not result in an increased rent.

Table 1:
Useful Life of Work Done or Thing Purchased*

ASSET		Useful life in years
PARKING LOT, DRIVEWAYS AND WALKWAYS		
	i. Asphalt, Concrete	15
	ii. Gravel	10
	iii. Interlocking Brick	20
	iv. Repairs	5
FENCES		
	i. Concrete	20
	ii. Metal, Steel, Chain Link	25
	iii. Wood	15
ROOFS		
	i. Sloped (Asphalt Shingles)	15
	ii. Flat	20
	iii. Repairs	5
CONCRETE		
1.	Concrete Floor (Slab), Rebar Repairs	10
2.	Curbs	15
3.	Foundation Walls	20
4.	Stairs and porches	10
5.	Retaining Walls	25
MASONRY		
	i. Replacement	20
	ii. Repairs	15
METALS		
1.	Balcony Railings, Steel	15
WOOD AND PLASTICS		
1.	Balcony Railings, Wood	10
2.	Decks and Porches	20
3.	Retaining Walls, Wood	15
DOORS AND WINDOWS		
1.	Doors	20
2.	Garage Door and Operator	10
3.	Lock Replacement, Building	20
4.	Windows	15

***** Intended as a general guide.

DOORS AND WINDOWS (con't)		
5.	Window Framing	
	i. Wood	15
	ii. Aluminium	20
SIDING		
	i. Aluminium, Steel	25
	ii. Cedar, Masonite, Stucco	20
THERMAL AND MOISTURE PROTECTION		
1.	Eavestroughs, Downpipes	20
2.	Waterproofing	
	i. Membrane	15
	ii. Sealer	5
3.	Insulation	20
FINISHES		
1.	Carpets	10
2.	Flooring	
	i. Tile	10
	ii. Hardwood, Parquet	20
3.	Gypsum Board	20
4.	Painting	
	i. Exterior	8
	ii. Interior	4
5.	Panelling	20
MISCELLANEOUS		
1.	Elevator	20
2.	Landscaping	15
3.	Locker	15
4.	Mailbox	15
5.	Playground Equipment (swings, etc.)	10
6.	Satellite Dish	10
7.	Sauna	15
8.	Steel Television Antennae	15
9.	Storage	20
10.	Swimming Pool	15
11.	Whirlpool, Jacuzzi	15

FURNISHINGS		
1.	Appliances	
	i. Clothes Washer / Dryer	15
	ii. Dishwasher	10
	iii. Microwave	10
	iv. Refrigerator	15
	v. Stove	15
2.	Cabinets, Counters: Bath, Kitchen	25
3.	Drapes, Venetian Blinds	10
4.	Furniture	10
MECHANICAL		
1.	Heating Systems	15
2.	Ventilation	
	i. Sanitary Exhaust	
	A. Central systems	20
	B. Individual systems	15
	ii. Insulation	25
	iii. Air Conditioning	20
	A. Incremental units	15
	B. Sleeve, Window units	15
	iv. Furnace	
	A. Electric, Forced Air	25
	B. Oil, Gas, Forced Air	25
	C. Oil, Gas, Wall or Floor	20
	xii. Hot Water Tanks	
	A. Commercial	20
	B. Domestic	10
3.	Mechanical	
	i. Culvert (Metal, Concrete)	25
	ii. Lawn Sprinklers (Underground)	10
	iii. Plumbing Fixtures	
	A. Faucets	15
	B. Tubs, Toilets, Sinks	20
	iv. Sanitary Systems	25
	v. Septic Tank and Tile Bed	20
	vi. Storm System	25

MECHANICAL (con't)		
	vii. Water Treatment	20
	viii. Wells and Water System	20
ELECTRICAL		
1.	Generator	25
2.	Fire Alarms, Smoke Detectors	15
3.	Fire Extinguishers	10
4.	Intercom	15
5.	Light Fixtures	15
6.	Panel and Wiring	15
7.	Power Line	25
8.	Rewiring	25
9.	Temperature Control	
	i. Electric	15
	ii. Pneumatic	15
10.	Transformer	25

Table 2:
Chartered Bank Administered Interest Rates

	Monthly Series:			
Date	**Series Name**			
	CONVENTIONAL MORTGAGE – 1 YEAR	**CONVENTIONAL MORTGAGE – 3 YEAR**	**CONVENTIONAL MORTGAGE – 5 YEAR**	**PRIME BUSINESS**
31 Mar 1999	6.45	6.80	6.95	6.75
30 Apr 1999	6.30	6.75	6.95	6.50
31 May 1999	6.30	7.00	7.30	6.25
30 Jun 1999	6.75	7.45	7.70	6.25
31 Jul 1999	7.05	7.60	7.75	6.25
31 Aug 1999	7.05	7.75	7.80	6.25
30 Sep 1999	6.80	7.55	7.70	6.25
31 Oct 1999	7.35	8.05	8.25	6.25
30 Nov 1999	7.35	8.05	8.25	6.50
31 Dec 1999	7.35	8.05	8.25	6.50
31 Jan 2000	7.60	8.30	8.55	6.50
29 Feb 2000	7.60	8.30	8.55	6.75
31 Mar 2000	7.70	8.15	8.35	7.00
30 Apr 2000	7.70	8.15	8.35	7.00
31 May 2000	8.30	8.55	8.75	7.50
30 Jun 2000	8.10	8.30	8.45	7.50
31 Jul 2000	7.90	8.10	8.25	7.50
31 Aug 2000	7.90	8.10	8.25	7.50
30 Sep 2000	7.90	8.10	8.25	7.50
31 Oct 2000	7.90	8.10	8.25	7.50
30 Nov 2000	7.90	8.10	8.25	7.50
31 Dec 2000	7.70	7.80	7.95	7.50
31 Jan 2001	7.40	7.55	7.75	7.25
28 Feb 2001	7.20	7.55	7.75	7.25
31 Mar 2001	6.70	6.95	7.25	6.75
30 Apr 2001	6.80	7.10	7.50	6.50
31 May 2001	6.70	7.30	7.75	6.25
30 Jun 2001	6.70	7.30	7.75	6.25
31 Jul 2001	6.45	7.30	7.75	6.00
31 Aug 2001	6.20	7.15	7.60	5.75

(con't)	CONVENTIONAL MORTGAGE – 1 YEAR	CONVENTIONAL MORTGAGE – 3 YEAR	CONVENTIONAL MORTGAGE – 5 YEAR	PRIME BUSINESS
30 Sep 2001	5.45	6.70	7.15	5.25
31 Oct 2001	4.90	6.15	6.90	4.50
30 Nov 2001	4.60	5.75	6.85	4.00
31 Dec 2001	4.60	5.75	6.85	4.00
31 Jan 2002	4.55	6.05	7.00	3.75
28 Feb 2002	4.55	5.75	6.85	3.75
31 Mar 2002	5.30	6.60	7.30	3.75
30 Apr 2002	5.40	6.75	7.45	4.00
31 May 2002	5.55	6.75	7.40	4.00
30 Jun 2002	5.55	6.60	7.25	4.25
31 Jul 2002	5.35	6.40	7.05	4.50
31 Aug 2002	5.35	6.15	6.80	4.50
30 Sep 2002	5.30	6.05	6.70	4.50
31 Oct 2002	5.30	6.20	7.00	4.50
30 Nov 2002	4.90	6.00	6.70	4.50
31 Dec 2002	4.90	6.00	6.70	4.50
31 Jan 2003	4.90	6.00	6.45	4.50
28 Feb 2003	4.90	6.00	6.60	4.50
31 Mar 2003	5.35	6.25	6.85	4.75
30 Apr 2003	5.35	6.25	6.65	5.00
31 May 2003	5.05	5.60	6.15	5.00
30 Jun 2003	4.85	5.20	5.80	5.00
31 Jul 2003	4.55	5.45	6.20	4.75
31 Aug 2003	4.55	5.70	6.35	4.75
30 Sep 2003	4.55	5.80	6.30	4.50
31 Oct 2003	4.55	5.80	6.40	4.50
30 Nov 2003	4.75	5.90	6.50	4.50
31 Dec 2003	4.75	5.90	6.45	4.50
31 Jan 2004	4.30	5.40	6.05	4.25
29 Feb 2004	4.30	5.20	5.80	4.25
31 Mar 2004	4.30	5.10	5.70	4.00
30 Apr 2004	4.45	5.55	6.15	3.75
31 May 2004	4.55	5.80	6.50	3.75
30 June 2004	4.70	6.10	6.70	3.75

(con't)	CONVENTIONAL MORTGAGE – 1 YEAR	CONVENTIONAL MORTGAGE – 3 YEAR	CONVENTIONAL MORTGAGE – 5 YEAR	PRIME BUSINESS
31 July 2004	4.60	5.90	6.55	3.75
31 Aug 2004	4.40	5.70	6.30	3.75
30 Sept 2004	4.80	5.80	6.30	4.00
31 Oct 2004	4.90	5.85	6.40	4.25
30 Nov 2004	Not yet available			

38. Repeated Late Payment of Rent

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.

The *Residential Tenancy Act*[1] and the *Manufactured Home Park Tenancy Act*[2] both provide that a landlord may end a tenancy where the tenant is repeatedly late paying rent.

Three late payments are the minimum number sufficient to justify a notice under these provisions.

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

1 *Residential Tenancy Act*, section 47(1)(c)
2 *Manufactured Home Park Tenancy Act*, section 40(1)(a)