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Rent Arrears
Interpretation Guideline 11

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

This Guideline deals with applications based on a tenant's or former tenant's failure to pay rent.

Rent Arrears - Choosing the Correct Application

If the tenant is in possession of the rental unit and the landlord wants an order requiring the tenant to pay rent arrears and the right to evict the tenant from the rental unit if the arrears are not paid, the landlord may complete the *Application to Evict a Tenant for Non-Payment of Rent and to Collect Rent the Tenant Owes* (Form L1) and file it with the LTB. The landlord must give the tenant an N4 *Notice to End your Tenancy for Non-Payment of Rent* before filing the L1 Application. See also Guideline 10 on "Procedural Issues Regarding Eviction Applications".

If the tenant is in possession of the rental unit and the landlord wants an order requiring the tenant to pay the arrears owing, the landlord may file an *Application to Collect Rent the Tenant Owes* (Form L9). If the LTB issues an order on an L9 application and the tenant does not pay the ordered amount, the landlord cannot use that order to evict the tenant.

If the tenant has already moved out of the rental unit and the landlord wants an order requiring the tenant to pay rent arrears, the landlord may file an *Application to Collect Rent the Former*

Tenant Owes (Form L10). The tenant must have moved out of the rental unit on or after [proclamation date]. This application cannot be filed more than one year after the date the tenant moved out.

L1 Applications

Landlord must serve notice of termination

If the tenant owes the landlord arrears of rent, the landlord may serve the tenant with a notice of termination (Form N4). This notice states that the tenant must pay all the arrears of rent by a date specified in the notice, known as a termination date. In accordance with section 43(2)(a) of the Residential Tenancies Act, 2006 (the “RTA"), if the tenant moves out of the unit by the termination date on the N4, the tenancy is terminated on that date. The tenant’s obligation to pay rent to the landlord ends when a tenancy has terminated, and tenant has vacated the rental unit (s.135(1.1) of the RTA).

If the tenant has not voided the notice of termination by paying all the arrears by the termination date and has not moved out of the rental unit on the termination date, the landlord may then file an L1 application with the Board to claim any arrears owing. The tenant must be in possession of the rental unit on the date the landlord files the L1 application.

The Ontario Court of Appeal found in *1162994 Ontario Inc. v. Bakker*, 2004 CanLII 60019 (ON CA), that a tenant is "in possession" of a rental unit where the tenant exercises some "form of control over that unit as demonstrated by factors such as access to, use of, or occupation of the unit. The landlord is expected to be able to provide evidence about efforts made to determine whether the tenant is still in possession of the unit. Such evidence may include:

- Whether the tenant returned keys to the landlord;
- Whether the tenant gave a notice to the landlord or it is otherwise clear that the tenant intends to move out;
- Whether utility service to the unit has been disconnected and the unit has been without gas or electricity for some time prior to the hearing;
- Whether the tenant has actually been observed moving out of the unit by the landlord or others;
- Whether the landlord has changed the locks and/or taken steps to re-rent the unit.

If the tenant has moved out of the rental unit but still owes rent arrears, the landlord should not file an L1 application but may be able to claim rent arrears by filing a L10 application instead.

Calculation of Rent Arrears

Ordering arrears of rent where the tenant is still in possession of the rental unit

If the tenant is still in possession of the unit as of the hearing for the L1 application, the tenant will be ordered to pay: a) rent arrears up to the termination date in the notice of termination; and b) lump sum compensation for use of the rental unit from the termination date in the notice to the order date. The rent deposit and interest owing thereon will be deducted from the arrears and compensation in accordance with subsection 87(4) of *Residential Tenancies Act* (the "RTA"). Daily compensation will then be ordered from the order date until the tenant vacates.

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

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

Ordering arrears of rent where the tenant has vacated the rental unit

In some cases, the evidence may establish that the tenant moved out of the rental unit after the application was filed, but before the hearing date. In that case, the Board's order will generally include a determination that the tenancy ended on the date the tenant moved out. Further, the order will generally: (1) end the tenancy effective the date the tenant moved out of the rental unit without ordering enforcement through the Sheriff's Office; and (2) require the tenant to pay arrears up to the date specified in the termination notice, and lump sum compensation for use of the unit from the termination date in the notice to the date the tenancy ended. Unlike orders for arrears and termination where the tenant is in possession of the unit on the hearing date, the order would not provide the tenant with an opportunity to continue the tenancy by paying all of the arrears by a specified date. Moreover, as there is a finding that the tenancy has ended, the tenant's rent deposit and interest owing on it will be deducted from the arrears and compensation ordered to the landlord.

Arrears Less than a Rent Deposit

An N4 notice is not invalid simply because the landlord holds a rent deposit that is greater than the rent owing. The rent deposit can only be applied to the last month of the tenancy. Therefore, the landlord should not apply the deposit to the rent arrears before applying to evict the tenant.

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

Relief from Eviction

Where the Board finds there is unpaid rent during a hearing for an L1 application, the Board must consider whether to delay or refuse the eviction under section 83 of the RTA. In some cases, refusing or delaying the eviction is discretionary; in others, refusing the eviction is mandatory. Even if the eviction claim in the application is refused or delayed, the tenant will be ordered to pay any arrears to the landlord. A payment schedule for the arrears may be imposed upon the tenant under section 204 as a condition of giving relief under section 83. See also Guideline 7 on "Relief from Eviction" for further discussion of this point.

Amount Payable to Prevent an Eviction

Section 74 of the RTA provides tenants with three ways avoiding an eviction for rent arrears after the landlord has filed the L1 application.

Before the order is issued

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

After the order is issued

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

enforceable on the date the order specifies that the Court Enforcement Office (Sheriff) may give possession to the landlord.

If the tenant pays the full amount to the landlord or into the Board's trust account on or before the date the order is enforceable, the order is automatically voided, and the landlord cannot enforce the order with the Court Enforcement Office (Sheriff).

If the tenant pays the amount specified in the order to the Board, staff of the Board will issue a notice to the landlord and tenant acknowledging that the order is void.

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

After the order is enforceable

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

The tenant must file an affidavit with the motion setting out all the payments made by the tenant since the hearing. Payments made prior to the hearing cannot be listed in the affidavit because those payments should be included in the order. If the tenant believes that the order is incorrect because it does not include all the payments that were made before the hearing, the tenant may consider filing a request to review the order.

The Board will hold a hearing on the motion. If the Board determines that the tenant has not paid the arrears and any additional rent owing as of the payment date, any NSF and administration charges and the costs ordered by the Board, the Board will make an order denying the motion and lifting the stay. If the Board determines that the tenant paid the arrears and any additional rent owing as of the payment date, any NSF and administration charges and the costs ordered by the Board, the Board will make an order declaring the eviction order to be void. However, under subsection 74(15), if the Board determines that the landlord has paid a non-refundable amount under the *Administration of Justice Act* for the purpose of enforcing the

order (e.g. sheriff fees), the Board will specify that amount in the motion order and require the tenant to pay that amount into the Board by a specified date.

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

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

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

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

L9 Applications

If a landlord's L9 application is successful the tenant will be ordered to pay arrears of rent owing as of the hearing date, but the order does not terminate the tenancy or result in the tenant's eviction. Therefore, a landlord does not need to give the tenant a notice of termination before filing an L9 application with the Board. The tenant must be in possession of the rental unit on the date the landlord files the L9 application.

Calculation of Rent Arrears

The tenant may be ordered to pay arrears up to the end of the current month in which the hearing is held. In accordance with section 87(1) of the RTA, the Board can order a tenant to pay "arrears of rent". The Board cannot order a tenant to pay rent that has not come due as of the hearing date.

The amount of rent arrears the Board can order a tenant to pay may be affected by section 88(1) of the RTA if the tenant abandoned or vacated the rental unit without providing a valid notice of termination, the parties did not enter into an agreement to terminate the tenancy or landlord did not serve a notice of termination:

If the tenant vacated the rental unit after giving the landlord a notice of termination that was not in accordance with the RTA, arrears of rent are owing for the period that ends on the earliest

termination date that could have been specified in the notice, had the tenant given a notice in accordance with the RTA.

If the tenant abandoned or vacated the rental unit without giving any notice, arrears of rent are owing for the period that ends on the earliest termination date that could have been specified in a notice of termination had the tenant, on the date that the landlord knew or ought to have known that the tenant had abandoned or vacated the rental unit, given notice of termination in accordance with the RTA.

In such circumstances the Member will also consider whether the landlord took reasonable steps to minimize their losses as required by sections 16 and 88(4) of the RTA. This usually involves determining whether the landlord tried to re-rent the rental unit as soon as they became aware that the tenant vacated the rental unit or was intending to vacate the rental unit.

If the landlord has re-rented the unit, the Board will not order the tenant to pay rent arrears for the same period that the landlord is collecting rent from the new tenants.

If the landlord is holding a rent deposit it is not usually deducted from the arrears in an L9 order because the tenancy is not being terminated. However, if the Board determines in the L9 order that the tenancy has already been terminated it may deduct the rent deposit from the arrears awarded to the landlord. Section 106(10) of the RTA states that a rent deposit must be applied to the last rental period before the tenancy terminated.

If the tenant has moved out of the rental unit but still owes rent arrears, the landlord should not file an L9 application but may be able to claim rent arrears by filing a L10 application instead.

L10 Applications

A landlord may file this application if the former tenant owes rent arrears and moved out of the rental unit on or after [proclamation date]. This application cannot be filed more than one year after the date the former tenant moved out. If the landlord's L10 application is successful, the former tenant will be ordered to pay arrears of rent and/or compensation for each day the former tenant lived in the rental unit after the tenancy was terminated by a notice of termination or an agreement to terminate the tenancy.

Calculation of Rent Arrears

In accordance with section 43(2)(a) of the RTA, if a landlord gives the tenant a notice of termination and the tenant moves out of the unit by the termination date on the notice, the tenancy is terminated on that date. The tenant's obligation to pay rent to the landlord ends when a tenancy has terminated, and tenant has vacated the rental unit (s.135(1.1) of the RTA).

The amount of rent arrears the Board can order a former tenant to pay may be affected by section 88(1) of the RTA if the tenant abandoned or vacated the rental unit without providing a valid notice of termination, the parties did not enter into an agreement to terminate the tenancy or landlord did not serve a notice of termination:

> If the tenant vacated the rental unit after giving the landlord a notice of termination that was not in accordance with the RTA, arrears of rent are owing for the period that ends on the earliest termination date that could have been specified in the notice, had the tenant given a notice in accordance with the RTA.
>
> If the tenant abandoned or vacated the rental unit without giving any notice, arrears of rent are owing for the period that ends on the earliest termination date that could have been specified in a notice of termination had the tenant, on the date that the landlord knew or ought to have known that the tenant had abandoned or vacated the rental unit, given notice of termination in accordance with the RTA.

In such circumstances the Board Member will also consider whether the landlord took reasonable steps to minimize their losses as required by sections 16 and 88(4) of the RTA. This usually involves determining whether the landlord tried to re-rent the rental unit as soon as they became aware that the tenant vacated the rental unit or was intending to vacate the rental unit.

If the landlord has re-rented the unit, the Board will not order the former tenant to pay rent arrears for the same period that the landlord is collecting rent from the new tenants.

If the landlord is still holding a rent deposit collected from the former tenant the Board order may deduct the rent deposit from the arrears awarded to the landlord. Section 106(10) of the RTA states that a rent deposit must be applied to the last rental period before the tenancy terminated.

Landlord must serve the L10 Application

Unlike L1 and L9 applications which are given to the tenants by the Board, section 189.0.1 of the RTA states that a landlord who has filed a L10 application is responsible for giving the application and notice of hearing to each former tenant at least 30 days before the hearing.

Section 191(1.0.1) of the RTA and Rule of Procedure 3.3 permit landlords to use the following methods to serve this type of application:

- handing the document(s) to the (former) tenant(s).
- handing the document(s) to an adult person at the (former) tenant(s)'s current residence. The address used must be identified.
- sending the document(s) by mail to the (former) tenant(s) current residence. The address used must be identified.
- sending the document(s) by courier to the (former) tenant(s) current residence. The address used must be identified.
- leaving it at the place where mail is ordinarily delivered, sliding it under the door or putting it through a mail slot in the door at the (former) tenant(s)'s current residence. The address used must be identified.

If the landlord indicates that they served the application and notice of hearing by sending it to the former tenant's current residence and the tenant is not present at the hearing, the landlord may be asked by the Member how they determined the former tenant's current residence.

In accordance with Rules of Procedure 3.4, if the landlord is unable to serve the former tenant using any of the methods contained in section 191(1.0.1) of the RTA and Rule of Procedure 3.3, the landlord may ask the LTB to permit an alternative method of service by submitting a *Request to use Alternative Service.* For example, if the landlord knows the former tenant's place of work the landlord may ask to serve to that address, or if the landlord is communicating with the former tenant by email the landlord may ask permission to serve by email. This request must be submitted at least 30 days before the hearing. The request should explain why the landlord has been unable to serve the former tenant using any of the methods contained in section 191(1.0.1) of the RTA and Rule of Procedure 3.3 and why the landlord believes that the former tenant will receive the documents using the proposed alternative method.

After giving each former tenant with a copy of the L10 application and notice of hearing, the person who served the documents must complete a *Certificate of Service – Serving a Former Tenant or Tenant No Longer in Possession of the Rental Unit* and submit it to the Board at least 20 days before the hearing. If the Board does not receive the *Certificate of Service,* it may cancel the hearing and close the application.

When completing a L10 application, the landlord should the former tenant's current residence, if known. The LTB needs this information so it can provide the former tenant with a copy of the order it will issue after the hearing.

Additional Issues for All Rent Arrears Applications

Amending Applications

In accordance with Rule of Procedure 15.4, the LTB may grant a request made at the hearing to amend an application if satisfied the amendment is appropriate, would not prejudice any party and is consistent with a fair and expeditious proceeding.

During a hearing for an L1 application, a Member may determine that the N4 notice is defective and therefore the Board cannot issue an order terminating the tenancy. In these circumstances, the landlord may be given the opportunity at the hearing to amend the L1 application and make it an L9 application instead. As discussed above, a landlord does not need to serve a tenant with a notice of termination in order to proceed an L9 application because the resulting order does not terminate the tenancy.

At a hearing for an L1 or L9 application, the Member may determine that the tenant moved out of the rental unit before the landlord filed the application. In these circumstances, the landlord may be given the opportunity at the hearing to amend the L1 or L9 application and make it a L10 application instead. However, in deciding whether to grant the amendment request, the Member must consider whether the former tenant: (1) is at the hearing; (2) was served with the application and notice of hearing using one of the approved methods for L10 applications; or (3) the Member is satisfied that the former tenant is aware of the hearing and the landlord's rent arrears claims.

Non-Sufficient Funds Charges

Under section 87(5) of the RTA, where a landlord applies for an order for the payment of arrears of rent, the application may include a claim for the amount of NSF charges paid to a financial institution in respect of cheques tendered to the landlord by the tenant or former tenant, plus the landlord's administrative charges in respect of those cheques. The administrative charges are limited to a maximum of $20.00 per cheque per section 17 of Regulation 516/06.

These charges, if claimed, will normally be awarded if proven by landlord. If the order also terminates the tenancy, the tenant will have to pay these amounts in addition to the other amounts payable in order to avoid eviction. See also the section above on “Amount Payable to Prevent an Eviction”.

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

Rent Deposits

A landlord may require a tenant to pay a rent deposit of no more than one month's rent, so long as the landlord does so on or before entering into the tenancy agreement in accordance with subsection 106(1) of the RTA. If the tenant does not provide a rent deposit, the Board cannot order the tenant to pay one. It follows that if the landlord claims a rent deposit on the N4 of termination it will invalidate the notice.

Utilities Charges

“Utilities” are defined in the RTA as heat, electricity and water.

In most circumstances, unpaid utility costs are not considered to be “rent arrears” and therefore cannot be claimed in an N4 notice of termination or an L1 or L9 application filed with the Board.

However, if the landlord incurred expenses because the tenant did not pay utility costs that they were supposed to pay under the terms of the tenancy agreement, the landlord can seek an order for these expenses using a Form L2 Application. The Board can order the tenant to pay the landlord’s expenses relating to utility costs. If the tenant has already moved out of the rental unit, the landlord can claim expenses they incurred because the former tenant did not pay utility costs using a Form L10 Application.

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

The landlord and tenant may instead agree at the beginning of the tenancy that utilities will not be included in the rent, and that the tenant will be responsible for paying all utility costs directly to the utility company. In this case the tenant’s payments made directly to the utility company are not rent, and even if the tenant fails to pay the bill, the landlord cannot claim the unpaid

amount as rent arrears in an N4 notice of termination. Including unpaid utility costs on an N4 will likely invalidate the notice.

Alternatively, the landlord and tenant may agree at the beginning of the tenancy that the tenant will pay a certain percentage of the utility expenses to the landlord. For example, a residential complex has two separate units but only one hydro meter, and each tenant has agreed to pay the landlord 50% of the hydro charges. As the amount each tenant owes for hydro will fluctuate on a regular basis depending upon usage and changes to the rate, the amount owing by the tenants is not considered to be “rent”. This is because section 116 and 119 of the RTA provide that a landlord can only increase the rent once every 12 months and must serve a notice of rent increase using a Board approved form at least 80 days in advance. Including unpaid utility costs on an N4 will likely invalidate the notice. However, as discussed above, the landlord can claim expenses they incurred because the tenant did not pay utility costs using a Form L2 Application, or a Form L10 application if the tenant has already vacated the rental unit.

In the case of a building containing not more than six rental units where the landlord supplies a utility to each of the rental units in the building, the tenancy agreement may require the tenant to reimburse the landlord for a portion of the cost of the utility in accordance with the rules made under Ontario Regulation 394/10. In any such case, the utility is not considered a service that falls within the definition of "rent".

Other Non-Rent Charges

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

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

May a Guarantor be Ordered to Pay Rent Arrears

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

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

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

Tenant Issues Raised during Rent Arrears Hearings

Under section 82 of the RTA, during any hearing about rent arrears, a tenant or former tenant may raise any issue that could be the subject of a tenant application, such as maintenance problems or harassment, The tenant must give the landlord and Board a written description of each issue at least 7 days before the hearing. The tenant should include details such as a description of the issue, when it began, and when the landlord became aware of the issue. The Board has a s.82 disclosure form which can be used to provide this information, but tenants do not have to use it. The tenant must also give a copy of all their supporting evidence to the landlord and the Board at least 7 days before the hearing.

After reviewing the evidence and issues the tenant intends to raise at the hearing under section 82 of the RTA, the landlord may decide that they want to submit their own evidence to address these issues. The landlord must provide to all other parties and the Board any responding material, including documents, pictures and other arguably relevant evidence the landlord intends to rely at least 5 days before the scheduled hearing.

If a tenant wants to raise issues under s.82 but has not provided the landlord and the Board with the required details about the issues and the supporting evidence at least 7 days before the hearing, the tenant will not be permitted to raise the issues under s.82 unless the tenant provides an explanation satisfactory to the Board explaining why the tenant could not comply with these requirements. If the Board is not satisfied with the tenant's explanation, the issues may still be considered by the Board when deciding whether to delay or refuse the eviction under section 83 of the RTA. See Guideline 7 on "Relief from Eviction" for further discussion of this point. The tenant may also file their own application in order to have the Board consider the tenant's issues.

The landlord will have an opportunity to respond to the tenant's section 82 issues at the hearing.

If the Board finds in favour of the tenant, the Board may award any remedy that could be awarded as a result of a tenant application, such as ordering the landlord to fix something or

granting the tenant a rent abatement. If the Board determines that the tenant is entitled a rent abatement, it will be deducted from any rent arrears owing to the landlord.

Effective as of [date]
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