

52 COVID-19: Repayment Plans and Related Measures

Aug-20

This policy guideline is 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 policy guideline may be revised and new guidelines issued from time to time.

This policy guideline addresses the COVID-19 pandemic and *COVID-19 (Residential Tenancy and Manufactured Home Park Tenancy Act) (No. 2) Regulation* made under the *Emergency Program Act* and the *COVID-19 Related Measures Act*.

A. LEGISLATIVE FRAMEWORK

Section 10.1(1) of the *Emergency Program Act* (EPA) provides that after a declaration of a state of emergency is made, and for the duration of the state of emergency, government may make regulations to prevent, respond to or alleviate the effects of an emergency or a disaster by:

- making an exception to an enactment;
- establishing limits on the application of an enactment;
- establishing powers, duties, functions or obligations that apply in place of or in addition to an enactment;
- establishing conditions in relation to anything done or established under the above bullets.

Section 10.2 of the EPA provides for a regulation specifying that the failure to comply with a provision of a regulation made under section 10.1(1) is to be treated as though it were a failure to comply with the legislation to which that section 10.1(1) regulation relates.

The *COVID-19 Related Measures Act* (“C19 Act”) allows for regulations made under section 10.1 of the EPA to remain in force for up to one year after the C19 Act came into force (July 10, 2020). The *COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act) (No. 2) Regulation* (“C19 Tenancy Regulation”), was made under sections 10.1 and 10.2 of the EPA on August 14, 2020.

Sections 3 and 12 of the C19 Tenancy Regulation provide that a landlord must not give a tenant notice to end a tenancy in respect of **affected rent** that is unpaid under sections 44(1)(a)(ii) and 46 of the *Residential Tenancy Act* (RTA) and sections 37(1)(a)(ii) and 39 of the of the *Manufactured Home Park Tenancy Act* (MHPTA). Notices to end tenancy for affected rent may only be issued when the conditions set out in the C19 Tenancy Regulation have been met.

“Affected rent” means

- rent that becomes due to be paid by a tenant in accordance with a tenancy agreement during the “specified period” between March 18, 2020 and August 17, 2020, and

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- utility charges that become due to be paid by a tenant during the “specified period” between March 18, 2020 and August 17, 2020, if a tenancy agreement requires the tenant to pay utility charges to the landlord.

The “specified period” is the period between March 18, 2020 and August 17, 2020 (as this date was earlier than the date on which the state of emergency expires or is cancelled). If, for example, the tenancy agreement stipulates that rent is paid on the first of each month, then the following rent payments were due within the specified period and are affected rent:

- April 1, 2020
- May 1, 2020
- June 1, 2020
- July 1, 2020
- August 1, 2020

The C19 Tenancy Regulation provides that a landlord must give a tenant a repayment plan if the tenant has unpaid affected rent, unless a **prior agreement** has been entered into and has not been cancelled. If the parties are no longer in a landlord-tenant relationship because the tenancy has ended, a repayment plan would not be required.

A “**prior agreement**” means an agreement between a landlord and a tenant that:

- is in writing;
- was entered into before July 16, 2020 (the date that government announced the repayment framework); and
- addresses affected rent that is overdue after July 16, 2020.

A landlord cannot pursue an eviction for unpaid affected rent unless they have already given a valid repayment plan or there is a valid prior agreement still in effect.

If a landlord and tenant entered into a prior agreement and the prior agreement does not address the full amount of unpaid affected rent, the landlord must give the tenant a repayment plan in respect of the amount of unpaid affected rent that is not addressed in the prior agreement.

A landlord may choose to cancel a prior agreement and give the tenant a repayment plan for the full amount of the unpaid affected rent. A tenant may choose to cancel a prior agreement and give the landlord a repayment plan for the full amount of the unpaid affected rent. A tenant can choose to cancel the prior agreement and replace it with a repayment plan for the full amount of the unpaid affected rent even after a landlord has

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given them a repayment plan for the amount of unpaid affected rent that was not addressed in the prior agreement.

B. REPAYMENT PLANS

Unless a landlord has given a tenant a valid repayment plan for unpaid affected rent, or there is a valid prior agreement relating to the affected rent, the landlord cannot legally end the tenancy on the basis of that unpaid rent.

If the prior agreement does not cover the full amount of unpaid affected rent, the landlord would need to give the tenant a repayment plan for the amount not covered by the prior agreement. Either a landlord or a tenant can unilaterally cancel a prior agreement by giving the other person a repayment plan for the full amount of the unpaid affected rent in accordance with the C19 Tenancy Regulation.

If a tenant fails to pay one or more installments as required by a valid repayment plan or valid prior agreement, the landlord may end the tenancy by giving the tenant a 10 Day Notice to End Tenancy for Unpaid Rent.

Terms of Repayment Plan

The C19 Tenancy Regulation sets out that repayment plans must have the following terms:

1. The repayment period starts on the date the repayment plan is given by the landlord to the tenant and ends on July 10, 2021;
2. The payment of the unpaid affected rent must be in equal installments;
3. Each installment must be paid on the same date that rent is due under the tenancy agreement; and
4. The date of the first installment must be at least 30 days after the date the repayment plan is given by the landlord to the tenant.

For example, if the landlord gave the tenant a repayment plan on August 22, 2020, the repayment period starts on that day. If the tenancy agreement stipulates that rent is due on the first of each month, the first installment payment would be due on October 1, 2020. Each installment would be due on the first of each month thereafter, and the last installment would be due on July 1, 2021. This means the tenant would pay the unpaid affected rent over 10 installments. If there was \$2,000 of unpaid affected rent, each equal installment would be \$200.

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If the amount of unpaid affected rent is not evenly divisible by the number of installment periods, the amount should be rounded to the nearest cent.

The C19 Tenancy Regulation requires that the repayment plan be in writing and include:

- The date the repayment period starts;
- The total amount of affected rent that is unpaid;
- The date on which each installment must be paid; and
- The amount that must be paid in each installment.

If a repayment plan does not comply with the terms and requirements set out above, it has no effect. If a repayment plan has no effect, it cannot form the basis for a 10 Day Notice to End Tenancy for Unpaid Rent and it cannot cancel a prior agreement. A repayment plan will only take effect when the landlord or tenant, who is giving the repayment plan, gives it to the other person and it complies with the requirements and terms.

Amending Terms

A landlord and tenant may mutually agree in writing to amend the terms of a repayment plan but only as follows:

- The landlord and tenant may agree to extend the repayment period. For example, a landlord and tenant could agree to extend the repayment period beyond July 10, 2021 and have it last until September 1, 2021, so that the tenant will pay the affected rent over more installments.
- A landlord and tenant cannot agree to a shorter repayment period. For example, a landlord and tenant cannot agree that the repayment period will end on June 1, 2021. A tenant can, however, still pay more than what is required under the terms of the repayment plan at any time.
- A landlord and tenant may agree to change the amount payable in each installment if the amount payable in earlier installments is less than the amount payable in later installments. For example, if there was \$2,000 of unpaid affected rent to be paid over 10 installments, a landlord and tenant could agree to “backload” the repayment plan by making the first 3 installment payments \$100 and the last 7 installment payments \$242.86.
- A landlord and tenant cannot agree to “frontload” the repayment plan by increasing the earlier installment payments and decreasing the later installments.

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Each installment payment must be equal to or greater than the preceding installment payment.

- A landlord and tenant may agree to change the due dates of installments as long as the date the first payment is due is at least 30 days after the date the landlord gives the repayment plan to the tenant. For example, if a tenancy agreement stipulates that rent is due on the first of each month, the landlord and tenant may agree that the installment payments are due on the 20th of each month instead. If the landlord gave the tenant a repayment plan on August 22, 2020, the first installment would then be due on October 20, 2020 instead. There would then only be 9 installments as the last installment would be due on June 20, 2021 (unless the landlord and tenant also agreed to extend the repayment period). If the landlord and tenant agreed that installment payments were due on the 20th of each month and the landlord gave the tenant the repayment plan on August 18, 2020, then the first installment would be due on September 20, 2020.

Giving the Repayment Plan

A repayment plan must be given to a landlord or tenant in one of the following ways:

- by leaving a copy with the person;
- if the person is a landlord, by leaving a copy with an agent of the landlord;
- by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- as ordered by an arbitrator on application.

C. NOTICES TO END TENANCY FOR UNPAID AFFECTED RENT

A landlord must not give a tenant a 10 Day Notice to End Tenancy for unpaid affected rent unless the landlord has previously given the tenant a valid repayment plan or there is a valid prior agreement, and

- the tenant fails to pay an installment on the date it is due as set out in the applicable repayment plan, or
- the tenant fails to make a payment as set out in a prior agreement that was not cancelled by the landlord or tenant.

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A tenant who fails to pay an installment in a repayment plan or a prior agreement and who receives a 10 Day Notice to End Tenancy may, within 5 days after receiving the notice,

- pay the installment that was due, in which case the notice has no effect, or
- dispute the notice by making an application for dispute resolution.

Otherwise, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

If a tenant fails to pay rent that is not affected rent when it is due (e.g., rent due on September 1, 2020), the landlord may give the tenant a 10 Day Notice to End Tenancy in accordance with section 46 of the RTA and section 39 of the MHPTA.

If the tenancy has ended and the landlord wants to pursue an amount of unpaid affected rent, the landlord does not have to give the tenant a repayment plan. The landlord may apply to the RTB for a monetary order (See also Sections E and F).

A 10 Day Notice to End Tenancy that is given to a tenant in relation to affected rent when the tenant has not missed an installment for an effective repayment plan (or a payment under a prior agreement that is in force) is of no effect. An Order of Possession will not be granted to a landlord in these circumstances.

Agreements entered between July 16 to August 17, 2020

If a landlord and tenant entered into an agreement between July 16, 2020 and August 17, 2020 (the end date of the “specified period”), which addressed unpaid affected rent, the landlord cannot legally end the tenancy on the basis that the tenant has breached the agreement. A landlord must give the tenant a repayment plan in order to be able to end the tenancy in relation to unpaid affected rent.

D. NOTICES TO END TENANCY FOR CAUSE

The C19 Tenancy Regulation provides that a landlord must not give a tenant a One Month Notice to End Tenancy for Cause under section 47 of the RTA or section 40 of the MHTPA in respect of a reason that relates to affected rent being unpaid, including one or more of the following reasons:

- One or more payments of the affected rent are late. For example, if the tenancy agreement stipulates that rent is due on the first of each month, and the tenant paid their rent late for the months of April, May, June and July 2020, the landlord cannot end the tenancy for late payment of rent during those months.

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A landlord can, however, give a notice to end tenancy for cause if the tenant is repeatedly late in making installment payments under a repayment plan or prior agreement.

- The tenant has jeopardized a lawful right or interest of the landlord and the lawful right or interest of the landlord is the right or interest to receive the affected rent.
- The tenant put the landlord's property at significant risk by not paying the affected rent.
- The tenant breached a material term of the tenancy agreement and the material term is the payment of the affected rent.
- The tenant has not complied with an order of the director, and that order is a monetary order for the affected rent.

A One Month Notice to End Tenancy that is given for one of these reasons or otherwise is related to affected rent being unpaid is of no effect. An Order of Possession will not be granted to a landlord in these circumstances.

E. APPLICATIONS FOR MONETARY ORDERS FOR UNPAID AFFECTED RENT MADE BEFORE JULY 31, 2020

If a valid repayment plan has been given to a tenant and the tenant is in good standing because:

- the first payment has not come due, or
- the tenant is paying the installments as required,

an arbitrator may grant a monetary order but it will be subject to the terms of the repayment plan. The order will set out that the tenant must pay the unpaid affected rent in accordance with the repayment plan.

If a landlord and tenant have entered into a valid prior agreement and the tenant is in good standing, as set out above, then unless there are exceptional circumstances, an arbitrator will not grant a monetary order subject to the terms of the prior agreement. This is because the prior agreement can unilaterally be cancelled at any time by either party.

If a tenancy has ended prior to a repayment plan being given, or ends after a repayment plan has been given or there is a prior agreement and the tenant has failed to pay an installment, the arbitrator may grant a monetary order that the unpaid affected rent be paid in full as of the date of the order.

Where a landlord is required to give a repayment plan but no valid repayment plan has been given and no valid prior agreement exists, the arbitrator may assist the parties in

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completing a repayment plan that meets the requirements of the C19 Tenancy Regulation or dismiss the application without leave to reapply.

F. APPLICATIONS FOR MONETARY ORDERS FOR UNPAID AFFECTED RENT MADE ON OR AFTER JULY 31, 2020

If no valid repayment plan has been given to a tenant, or a valid repayment plan has been given to a tenant or a landlord and tenant have a valid prior agreement in place and the tenant is in good standing because:

- the first payment has not come due, or
- the tenant is paying the installments as required,

then an arbitrator may dismiss the application with leave to reapply, until such time as the tenancy ends and the tenant has failed to pay, at least, one installment.

July 31, 2020 is when *COVID-19 (Residential Tenancy and Manufactured Home Park Tenancy Act) Regulation* came into effect. This regulation established the repayment plan scheme that has been continued under the C19 Tenancy Regulation. Applications for monetary orders for unpaid affected rent made after this time when a tenant is in good standing under the terms of the C19 Tenancy Regulation are generally considered to be an attempt to circumvent the C19 Tenancy Regulation. This can qualify as an abuse of the dispute resolution process.

G. EXISTING MONETARY ORDERS FOR UNPAID AFFECTED RENT

If a landlord has received a monetary order for an amount of affected rent that is unpaid, a tenant's failure to comply with the monetary order is not a basis for eviction under the grounds of a One Month Notice to End Tenancy for Cause (see Section D). A tenant cannot be evicted due to unpaid affected rent until a landlord has given the tenant a repayment plan for the total amount of affected rent (unless there is a valid prior agreement) and the tenant failed to make an installment payment.

Enforcement of monetary orders that are less than \$35,000 is within the exclusive jurisdiction of the British Columbia Provincial Court. It is separate from the repayment plan legislation but some enforcement steps that a landlord takes may be considered by an arbitrator on an application for dispute resolution or for an application for an order of possession in relation to a repayment plan.

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H. COMPLIANCE AND ENFORCEMENT

Failure to comply with a provision in the C19 Regulation is treated in the same way as failing to comply with the RTA or MHPTA and may result in compliance and enforcement action being taken against a landlord or tenant including levying Administrative Penalties of up to \$5,000 per day.

I. CHANGES TO POLICY GUIDELINE

Section	Change	Notes	Effective Date
All	New	New	August 14, 2020

Change notations
 am = text amended or changed
 del = text deleted
 new = new section added