Quarterly News
A Landlord's Self-Help Centre Publication

More troublesome news for Ontario landlords

Confusion still exists with respect to jurisdiction between Small Claims Court and the Landlord and Tenant Board (Board) when dealing with tenancy issues, as was made evident in the recent Divisional Court decision of *Kisleman v. Klerer,* 2019 ONSC 6668. In this case, approximately eleven months after the tenancy had ended, the landlord (Kisleman) brought a claim against the former tenants (Klerer) for arrears and damages.

Section 87(1) of the *Residential Tenancies Act, 2006* (RTA) clearly outlines that in order for the landlord to be eligible to file an application to the Board for non-payment of rent, the tenant must still be in possession of the rental unit. Additionally, section 89(1) of the RTA states that,

> *A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex* ***and the tenant is in possession of the rental unit****.*

Emphasis added to highlight that the RTA requires the tenant to be in possession of the rental unit when an application for arrears or damages is filed with the Landlord and Tenant Board. It is only if the tenant is still in possession of the rental unit that the LTB has the jurisdiction to deal with the landlord's application. However, in his analysis in paras. 10-12, Judge J. Mulligan referred to *Mackie v. Toronto (City),* 2010 ONSC 3801, *Fong v. Lemieux,* [2016] *O.J. No. 2695*, and *Effrach v. Cherishome Living,* 2015 ONSC 472, and deduced that because the Landlord and Tenant Board has exclusive jurisdiction to resolve landlord and tenant matters, it should be dealt with there. His decision in para 13 concluded that

> *The parties had a landlord and tenant relationship, and in my view, nothing turns on the fact that the action was started after the tenant was no longer in possession. It is clear that disputes of this sort are the daily fare of the Landlord and Tenant Board.*

This application of the RTA by Small Claims Court Judges is problematic for residential landlords in Ontario as they will be left footing the bill for losses suffered as a result of the tenant's actions. If the Landlord and Tenant Board won't deal with the matter because the tenant is no longer in possession, and Small Claims Court won't deal with the matter because the problems arose out of the tenancy, landlords are left without a remedy.

In conclusion, it should be noted that for many years LSHC has lobbied the government to amend the RTA to allow landlords the right to file an application against a former tenant within 1 year of the tenancy ending, similar to the right afforded tenants in section 29(2) of the RTA. An amendment of this nature would streamline the process, bring the rights of landlords and tenants into better balance, and in many cases eliminate the need to file in the Small Claims Court.

The *Kisleman v. Klerer,* 2019 ONSC 6668 decision is precedent setting and will impact the decision-making process in individual cases until it is appealed and overturned. How will landlords navigate this situation? Given there is no recourse available for the collection of monies owed post tenancy other than Small Claims Court, landlords should not be discouraged from utilizing this forum to file claims for monies owed for unpaid utilities, outstanding rent, the repair costs for damages discovered after the tenant vacated, etc.. However, landlords should be aware that if they bring a claim in Small Claims Court and the matter is disputed with the opposing party citing this decision, it is very likely the claim will be dismissed. To try to avoid this situation, landlords are encouraged to be proactive throughout the tenancy by performing regular maintenance inspections on proper notice (i.e. quarterly), and acting immediately to address issues by serving the appropriate LTB forms.

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The material contained in this publication is intended for information purposes only, it is not legal advice.

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LPAT upholds Toronto STR Regulation

The Local Planning Appeal Tribunal (LPAT) upheld the City of Toronto Short-Term Rental Regulation and notified the city of its decision to dismiss the appeal on November 18, 2019.

While the decision was heralded by many as good news, it was not the decision owner of secondary units had hoped for since they will not be permitted to rent their units on a short-term basis, even though their tenant is permitted to.

The LPAT found that Toronto's regulation has a solid basis and planning rationale. Adjudicator Scott Tousaw noted the process had included "consulting widely with industry and public stakeholders".

Toronto council passed the short-term rental regulation in December 2017 to implement a measure of control over the growing short term rental industry. The bylaw permits the occupant to rent up to three rooms of their principal residence on a short-term basis of 28 consecutive days or less; or rent the entire principal residence for up to180 days.

The by-law also requires short-term rental operators/hosts to register with the city and pay an annual registration fee of $50. The short-term rental company (i.e. Airbnb, VRBO, Flipkey, etc.) must pay the city a $5,000 licensing fee and a booking fee of $1 for every night booked.
The bylaw can be found at: https://www.toronto.ca/legdocs/municode/toronto-code-547.pdf

The City of Toronto subsequently implemented the Municipal Accommodation Tax (MAT) which requires operators of short term rentals to collect a hospitality tax at the rate of 4%.

Leave to Appeal has been sought by several commercial landlords that operate multiple short-term rental units and who were parties to the LPAT. However, the lone secondary unit landlord who was a party to the LPAT appeal is not participating in this process. The Divisional Court will determine whether an appeal may proceed on the claim that the LPAT decision contained errors in law. The appellants claim that the Local Planning Appeal Tribunal failed to:

- make a determination on the impact short term rentals would have on housing affordability, and
- specify how provisions of the city's new short term rental by-law apply to short term rentals, not in the owner's principal residence, that were permitted under the old by-law.

If leave is granted, the Divisional Court could either reject the LPAT decision entirely or order LPAT to consider the argument raised by the landlords.

In the meantime, the City of Toronto has announced it is moving ahead with regulation despite the potential appeal and will implement the bylaw adopted by City Council. Once the licence and registration system is built, short-term rental companies will be required to obtain a licence and operators will be required to register with the City and pay the MAT of four per cent,
https://www.toronto.ca/community-people/housing-shelter/rental-housing-standards/short-term-rentals/.

Is my tenant required to follow municipal by-laws?

Being a residential landlord in Ontario can be a complex task since there are various laws and regulations that landlords must follow aside from the Residential Tenancies Act (RTA). Although the RTA is the main legislation enacted by the provincial government to regulate tenancies in Ontario, laws enacted by the municipal government also apply to residential tenancies. These municipal regulations are called 'by-laws'. The purpose of the by-laws is to regulate a particular area within the jurisdiction of the corresponding municipality. A significant number of issues residential landlords have with their tenants are governed by the local municipality of where the rental units are located. As such, these issues may be regulated differently depending on the geographical location in which your rental property is located.

Some examples of common issues regulated by municipal by-laws are related to pets, noise, overcrowding, and commercial activity.

- Pets: By-laws dictate the number of pets tenants can have in the rental unit.
- Noise: By-laws define the meaning of noise, what is considered to be nuisance and during which times it is not permitted.
- Overcrowding: By-laws stipulate how many people are allowed to occupy a property according to the square footage of the property in question.
- Commercial activity: By-laws determine what areas are zoned for commercial activity or to run a business.

In order to avoid any unnecessary disputes with your tenant, you should first find out if the alleged offending act is against the municipal by-laws. Please contact the municipality where your property is located to obtain more information about their by-laws.

If your tenant is violating the by-laws, you may be able to end the tenancy. To obtain legal advice about whether or not you can serve a notice of eviction based on a by-law violation, contact a legal service provider.

Cancellation of future funding cuts to Legal Aid announced

Attorney General Doug Downey has announced the Province's planned successive funding cuts to Legal Aid Ontario, an additional $31 million in 2020-21 and $164 million in 2021-22, have been cancelled. However, the 2019-20 funding cut of $133 million which triggered deep cuts across Legal Aid Ontario programs including the community legal clinic system will stand.

Smarter Stronger Justice Act

The Province has introduced Bill 161, *Smarter and Stronger Justice Act, 2019,* an omnibus bill that will amend more than 20 different laws including the *Legal Aid Service Act* (LASA).

Proposed amendments to LASA aim to modernize the legislation and provide Legal Aid Ontario with the independence and authority to make rules and change policies and regulations. It will also implement processes which require Legal Aid Ontario to consult with legal stakeholders and the public before making changes that affect the legal aid system.

LASA will continue to recognize independent community clinics, poverty law, that clinics are governed by boards of directors drawn from the communities, that clinics assess the needs of their communities and determine services to meet those needs.

Increasing the rent in 2020?

The guideline amount for rent increases taken in 2020 is **2.2%**, unless the unit is exempt per s. 6.1 of the RTA. Landlords are permitted to increase the rent once every 12 months for sitting tenants using the prescribed LTB Form N1 - Notice of Rent Increase and must provide a minimum of 90 days' notice of the rent increase.

LSHC's new Learning Modules will guide you through the completion of many frequently used LTB forms, including the N1-Notice of Rent Increase, found at: https://landlordselfhelp.com/landlord-learning-modules/. We have posted the audio version of the Learning Modules to our Sound Advice directory in case that is your preference: https://landlordselfhelp.com/podcast/n1-notice-of-rent-increase/

What is RentSafe TO

RentSafe TO is the municipal bylaw enforcement program that ensures building owners comply with property and maintenance standards. The program regulates multi-residential properties that are 3 or more storeys and contain 10 or more units.

RentSafe TO was implemented on July 1, 2017 under Chapter 354 of the Municipal Code to ensure renters have a suitable place to call home that is safe and well-maintained. Owners are required to register with RentSafe TO and renew annually, the registration fee is based on the number of units, currently $11.02 per unit.

The program is the alternative to a landlord licensing system and requires that an evaluation of every apartment building in Toronto is conducted at least once every three years. The evaluation includes inspection of the following:

- Common areas and building grounds
- Amenities, i.e. swimming pools and recreational areas
- Elevators
- Garbage and recycling management
- Lighting
- Mechanical systems such as heating and ventilation
- Parking facilities and garages
- Security systems
- Structure
- Overall cleanliness of the building and common areas.

A report of the inspection findings is provided to the building owner and a building evaluation score is determined. The evaluation score determines whether a full building audit is required. Costs and fines for the program and non-compliance include:

- Building Evaluation, once every three years, no cost;
- Audit - if required, administration fee $1870.33 plus inspection fee of $113.05 per hour (minimum one hour);
- General fines range between $100 and $1000;
- Court Summons, if convicted fines can be up to $100,000;
- Continuing fine of $10,000 per day; and
- Escalating fines to a maximum of $100,000

Visit RentSafe TO: https://www.toronto.ca/community-people/housing-shelter/rental-housing-standards/apartment-building-standards/rentsafeto-for-building-owners/

Monetary jurisdiction increases for Small Claims Court

The Province has announced the monetary jurisdiction for the Small Claims Court will increase from $25,000 to $35,000 effective January 1, 2020. Applicants that have a claim that has been filed in Superior Court in the amount of $35,000 or less may request it be transferred to Small Claims Court if the parties agree or the court makes an order. Attorney General Doug Downey also remarked that the increase will allow more people to file and respond to claims using less expensive representation, such as paralegals, law students and through self-representation. For complete details on the monetary jurisdiction and links to helpful Small Claims Court information and resources, visit https://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/.

Landlords typically file claims with the Small Claims Court to recover unpaid amounts owed by a former tenant. This often includes unpaid utilities, unpaid rent, and damage to the premises discovered after the tenant has vacated.

The monetary jurisdiction of the Landlord and Tenant Board is established under Section 207 of the *Residential Tenancies Act*, subsection (1) states *"the Board may, where it otherwise has the jurisdiction, order the payment to any given person of an amount of money up to the greater of $10,000 and the monetary jurisdiction of the Small Claims Court."* Therefore the LTB monetary jurisdiction will also increase to $35,000 on January 1, 2020.

Self-Help TIPS

In this issue of the **Self-Help Tips** we discuss the importance of ensuring your rental unit is legal before buying or renting. We encourage you to thoroughly research the laws and regulations that will govern you and your rental property.

Legal Unit

In addition to the guidelines set by the *Residential Tenancies Act, 2006* (RTA), you must also comply with provincial and municipal regulations; these include, but are not limited to, the *Fire Code*, the *Building Code Act*, and the *Planning Act*. By following the process defined by the local municipality, landlords can ensure their rental units comply with zoning requirements and meet established health, safety, property and maintenance standards. As a landlord, meeting compliance requirements will provide greater peace of mind, and reduce the risk and potential for liability.

Bylaw Requirements

It is very important that you find out what the bylaw requirements are for your municipality. In some municipalities, registration or licensing is a requirement. The fees and process will vary depending on the rules established in each municipality. Visit the Service Directory at www.secondsuites.info, where you will find information for setting up a second suite in your area, local fire safety requirements, your nearest building department, and the local zoning and planning department.

RTA Requirements

Section 20(1) of the *Residential Tenancies Act, 2006*, outlines the landlord's responsibility to repair and states that:

> A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards. 2006, c. 17, s. 20 (1).

Terminating a Tenancy

Under the RTA, there are specific legal ways to terminate a tenancy. Unfortunately, if the bylaw officer determines that your unit is an illegal unit, this does not mean the tenant has to leave immediately. In cases like these, landlords are often found to be caught between two legal requirements: the requirement to comply with the bylaws of the municipality in which your property is located, and the requirement to comply with the rules and procedures under the RTA.

A notice of violation or work order issued by the municipality does not necessarily mean that you can terminate the tenancy. For example, if the notice is asking you to comply with certain municipal property standards, a landlord does not have a choice but to comply and make that unit legal. The tenant does not have to vacate the unit unless the work is so extensive as to require a building permit. If you have received a work order to comply from the City and you require a building permit you may serve the tenant with **Form N13 - Notice to End your Tenancy Because the Landlord Wants to Demolish the Rental Unit, Repair it or Convert it to Another Use**.

The best approach is to speak with your tenant to determine whether they would be willing to leave and sign the **N11: Agreement to End the Tenancy**. You may have to offer an incentive (i.e. money to offset moving costs, etc.) as a good will gesture to secure their agreement.

Tips

- It is the landlord's responsibility to make sure a rental unit is both legal and safe throughout the duration of a tenancy.
- If you are purchasing a property with an existing rental unit, don't assume that it is a legal unit because the rental unit is already in place. Many landlords get into trouble by making this assumption, ensure you do your research to confirm the rental unit is permitted and in compliance with property standards.
- If you are considering adding a secondary suite in your current property, visit www.secondsuites.info and read our Guide to Creating a Secondary Suite to learn about legal and municipal requirements and the process for creating a new rental unit.
- Ensure your rental unit complies with the fire code regulations. Landlords should not put the health and safety of their tenants at risk, the following article describes what could happen if landlords do not comply with the required standards- https://www.msn.com/en-ca/news/canada/rooming-house-owner-ordered-to-pay-dollar13-million-to-parents-of-woman-killed-in-fire/ar-AAJXVtm

Did You Know?

Q: I had a lease with my tenant which has expired and it is now on a month to month basis, I plan on moving in to the unit and will be serving the appropriate notice (Form N12). However, I'm not sure how long I will be living there because of my work situation. What are the consequences if I do not live there for the full twelve months?

Basically, if your tenant discovers that you are not living in the unit they can file an application with the Landlord and Tenant Board claiming that you gave notice in bad faith. The Landlord and Tenant Board will schedule a hearing and you will have to attend and explain your situation and the reason why you are not living there. There is a possibility that the Board would issue an order that the tenant be compensated for their moving expenses, the difference in rent that the tenant has incurred or will incur for a one year period and possibly a fine.

Q: I have a tenant who moved in a few months ago, at the time he could not pay the last month's rent deposit but he promised in writing that he would pay it in installments. As of now he still hasn't made any payment for the last month's rent deposit and has not paid the rent for three months. I have served him the notice of nonpayment of rent (Form N4) and I included the last month's rent deposit that he still hasn't paid. When I went to the hearing at the Landlord and Tenant Board I was told that the Form N4 was invalid because I had included the last month's rent deposit as arrears. What did I do wrong?

Under Section 106 (1) of the *Residential Tenancies Act,* a landlord may require a tenant to pay the last month's rent deposit as long as the landlord does so on or before entering into the tenancy agreement. If the tenant does not pay the deposit prior to moving in, the landlord can no longer require the tenant to pay it and if the landlord does claim it on a notice of early termination for nonpayment of rent, the notice will not be valid because it is not considered arrears of rent.

Q: I have a lease agreement with a tenant in which his mother signed on as a guarantor. The tenant stopped paying rent and I served him the Form N4 and I named the tenant and the guarantor. When I went to the hearing, I was informed that the guarantor is not a tenant and therefore cannot be named on the Order. What can I do now?

You cannot name the guarantor on the notice of nonpayment of rent as they are not considered a tenant. The Landlord and Tenant Board does not issue an order against guarantors because they are not tenants. The only way to proceed in this case is to terminate the tenancy based on nonpayment of rent and then file a claim in Small Claims Court against the guarantor if you cannot collect from the tenant.

Q: I'm renting my house for the first time and I just found out that I have to use a standard lease form. I have reviewed it but there are certain terms that I would like to include that are not in this lease. How would I be able to do this?

The Standard Form of Lease contains mandatory clauses and standard information. However, landlords can add clauses in Section 15 of the Standard Form of Lease to include certain provisions and responsibilities pertaining to the tenancy agreement or the rental property. The additional terms will still have to be consistent with the law otherwise they may not be enforceable.

Q: I rent the upper floor in my house, the tenants have been there for about a year but two months ago they stopped paying rent and they have also caused damages to the property. They have informed me that they will be moving out but they haven't given any written notice. I'm wondering if I should still give them notice for the arrears of rent and damages or just wait until they leave and then file in Small Claims Court. What would you suggest?

It would be advisable to serve the proper notices for nonpayment of rent (Form N4) and damages (Form N5) while the tenants are still in possession of the unit and then proceed with the applications to the Landlord and Tenant Board to obtain an order for eviction and the arrears of rent and damages. Here is a link to step-by-step instructions on how to complete forms, including Form N4 and Form N5
https://landlordselfhelp.com/landlord-learning-modules/

Q: I have a clause in my lease agreement which states that if the rent is late by more than five days the tenant must pay a late payment fee at the rate of 3%. The tenant is now telling me that he doesn't have to pay a late fee and that it's illegal. Is this true?

The tenant is correct. The law does not allow landlords to charge a penalty or late payment fee. The only charges permitted with respect to rent is for NSF fee charged by a financial institution and payment of an administration charge, not greater than $20, for an NSF cheque.

What's New?

Changes coming to LSHC …

LSHC will be changing how we manage client services beginning in January 2020. The impetus for the change in operating model stems from the 20% reduction in core funding levied earlier this year as a result of provincial funding cuts to Legal Aid.

The impact of the $133,000 funding reduction on LSHC's ability to maintain the same of service delivery was significant and underscored the risk of and potential for insolvency as a result of relying on a single funder. Fortunately, LSHC was able to utilize membership dues which had accrued over several years to top up the funding shortfall 2019-20.

LSHC identified the critical need to explore and implement a sustainable operating model and worked with a corporate strategies to identify viable fundraising options.

In November 2019 LSHC distributed a comprehensive survey to the small landlord community seeking feedback on a variety of funding options aimed to support a more sustainable operating model. The input we gathered offered the following:

- **90%** of survey respondents supported the notion that users should contribute to the organization through the membership program and supported increasing dues. Some raised concern respecting access to service for the small, financially eligible landlords.
- A majority of respondents supported the idea of LSHC exploring opportunities for partnering with organizations linked to the residential rental market that could generate funds.
- A mixed response among survey respondents with respect to the possibility of seeking charitable tax status. Further research is required.

LSHC's Board of Directors passed a resolution for LSHC to launch a mandatory membership program beginning in January 2020. The membership program will grandfather existing lifetime memberships and continue to include an annual membership category. LSHC will create a new category of membership called "ELIGIBLE" which will waive membership dues for those who meet Legal Aid Ontario's financial eligibility guideline.

Eligibility will be determined through a two phase screening process which will include preliminary telephone screening followed by the completion of a written form.

The funds generating through the membership program will allow us to cross-subsidize the operating budget and represents an important step toward enhancing LSHC's ability to continue providing a range of well-rounded services to Ontario's small landlord community. The change will also support our goal of increasing the resources which support the development of a well-informed community that is kept abreast of the changing regulatory environment and overall awareness of how those rules translate to residential tenancies and relationships.

Vacant Home Tax: Back on the table for Toronto property owners?

Toronto Councillor Ana Bailao, who is also the Chair of the Planning and Housing Committee, is urging the city to take another look at the vacant home tax as a tool to increase Toronto's rental housing stock.

LSHC's staff speak with hundreds of small landlords every month, we know there are many vacant rental units across Toronto which have purposely been left vacant due to the lack of protection afforded to small landlords under the *Residential Tenancies Act, 2006*.

Typical examples of why small landlords have opted out of the rental business and prefer to leave units vacant:

- The owner has rented the unit in the past and at one point rented to a tenant who defaulted in the rent. The landlord had to go through the termination process which lasted several months and cost thousands of dollars when lost rent, lost wages, fees, etc. were tallied and prefers not to rent.
- The owner is a senior and does not have the interest, knowledge or financial means to gamble on the business of renting.
- The owner has children that are away at school and return to the family home each year for several months. Since the RTA does not include a provision for a fixed short-term rental agreement that would assure the owner could recover possession of the unit for occupation by the children. Further, the Toronto Short-term Rental Regulation prohibits this owner from offering the unit in the short term rental market because it is a secondary unit.
- A rental unit exists according to the property assessment however, it has not been rented in many years and fails to meet current property standards. The owner lacks the financial resources to bring the unit up to standard and has opted to leave it vacant.

Does the housing crisis trump the rights of property owners that have opted out of the rental business? We're monitoring developments on vacant home tax and will keep you posted on future developments.

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