Downtown Legal Services

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Standard Lease Template Consultations
Residential Tenancies Unit, Market Housing Branch
Ministry of Housing
777 Bay Street, 14th Floor
Toronto, ON M5G 2E5

To whom it may concern,

Downtown Legal Services ("DLS") is a community legal clinic and clinical education program operated by the Faculty of Law at the University of Toronto. We provide free legal services to low-income households, as well as University of Toronto students, in several areas of law including rental housing. Our clinic's Housing Law Division assists residential tenants in Toronto. We provide legal advice and representation to tenants who face eviction, assisting our clients with bringing tenant applications at the Landlord and Tenant Board, and enforcing judgements against our clients' landlords in Small Claims Court.

The purpose of this letter is to provide our comments on the standard lease template now under development by the Ministry of Housing ("the Ministry"). While serving our diverse client base, we regularly encounter landlords operating in contravention of the *Residential Tenancies Act, 2006* ("RTA"). Often, this non-compliance is explicit in the tenancy agreement itself. As such, we believe crafting a strong standard lease template is of critical importance to furthering the purposes of the RTA and ensuring the protection of tenant's rights in Ontario.

Summary of Recommendations

While we generally support the format and content of the standard form lease template proposed in the Ministry's discussion paper, we have a two major recommendations regarding the structure of the Optional Terms section.

1. We recommend that the Ministry adopt a "check-box" approach to the Optional Terms section, rather than a "blank-box" approach that would allow landlords to create their own terms. A "check-box" approach would give the parties flexibility to adapt the template to their unique circumstances, while preventing the insertion of illegal or misleading terms. Asking tenants to read through a "blank-box" to determine which of the landlord's rules are valid is frankly the status quo with respect to landlord-created leases and ss. 3 and 4 of the RTA.

2. We recommend the standard form lease template include a statement specifying that any attached rules or appendices are not a valid part of the lease agreement.

Common lease terms which are inconsistent with the RTA

Throughout our clinic's nearly 45-year history, we have regularly found terms in our clients' landlord-authored leases which are either misleading or void due to inconsistency with the statute. Some of the most common inconsistent clauses include:

- Terms requiring tenants pay damage deposits and other illegal deposits and fees (e.g. cleaning fees, late fees, etc.). These terms are inconsistent with s. 105 of the RTA, which states the only security deposit a landlord can collect is a rent deposit, and s. 134(1) of the RTA, which prohibits a landlord from collecting any fees, premiums, penalties, etc.

- Terms requiring pre-paid rent (other than first and last month's rent). These terms are inconsistent with s. 105 and s. 106 of the RTA. Section 106 prohibits a landlord from collecting a rent deposit that is more than one month's rent.

- Terms requiring post-dated cheques. These terms are inconsistent with s. 108 of the RTA, which explicitly states a landlord or a tenancy agreement shall not require post-dated cheques.

- Terms prohibiting guests or restricting occupancy of the rental unit (e.g. prohibiting overnight guests, requiring landlord permission for new roommates, etc.). As the right to guests and roommates is included in the tenant's right reasonable enjoyment of a unit, these terms breach s. 22 of the RTA and allow the landlord to impose illegal rent increases for additional household members.

- Terms prohibiting pets. These terms are void per s. 14 of the RTA, which specifically states that lease terms prohibiting pets are void clauses.

- Terms imposing maintenance and repair obligations on tenants (e.g. tenant to pay first $75 or $100 of repair costs, repair costs to be deducted from tenant's security deposit, etc.). This is inconsistent with s. 20(1) of the RTA, which stipulates that the landlord is responsible for maintaining and repairing the unit.

- Terms imposing a blanket prohibition on subletting the unit. These terms are inconsistent with the subletting provisions in s. 97 of the RTA. Specifically, s. 97(2) states that "[a] landlord shall not arbitrarily or unreasonably withhold consent to the sublet of a rental unit to a potential subtenant." It is implicit in this section that blanket prohibitions are arbitrary.

- Terms imposing a blanket prohibition on assignment of the unit. Such terms are inconsistent with the assignment provisions in s. 95 of the RTA. Specifically, s. 95(4) provides tenants with the right to seek the landlord's consent to assign, failing which the tenant may give an immediate 30-day notice of termination. Leases that purport to ban assignment are therefore misleading unless they also make clear that the tenant may terminate at any time with 30 days' notice.

These lease terms are void and unenforceable, per s. 4(1) of the RTA, which provides that "[s]ubject to subsection 12.1 (11) and section 194, a provision in a tenancy agreement that is inconsistent with this Act or the regulations is void." Nonetheless, these lease terms mislead tenants about their rights. A significant portion of our clinic's work involves assisting tenants with filing T1 applications at the Landlord and Tenant Board ("LTB") to secure the return of illegal deposits, fees, and pre-paid rent.

In most of these cases, our clients' landlords refuse to comply with LTB orders to return illegal deposits, fees, and pre-paid rent, requiring enforcement of the LTB order at Small Claims Court. Despite the RTA and the LTB's orders under it, landlords (and tenants, until they speak with us) attach strong normative and cross-cultural importance to the idea that if a clause is written down and signed by both parties, it is binding upon them. We are not entirely unsympathetic to unsophisticated landlords who, for decades, have been invited to create their own lease agreements only to later learn that those documents are largely void as a matter of law. That is why the creation of a province-wide standard form lease is a welcome and needed regulatory development.

In our further experience, existing standard form leases created by large, sophisticated associations of housing providers, such as those offered by the Greater Toronto Apartments Association ("GTAA") and the Ontario Real Estate Association ("OREA"), do not prevent lease terms that are inconsistent with the RTA. In fact, terms of those leases have been themselves found void, after extensive litigation and confusion on the part of many tenants.

For example, the GTAA standard form lease (like others around the province) long purported to have tenants give indefinite future consent to the removal of included utilities, which the LTB found void in *[Tenants of 10 Walmer Road, Toronto, Ontario M5R 2W4] v Walmer Developments Care of Briarlane Rental Property Management* (2 July 2009; King) File No. TST-01693 (appeal dismissed in 2010 ONSC 3789 (Div. Ct.)). That case was litigated by one of our clinic's law students on behalf of approximately 70 tenants for over one year, against a lawyer apparently advancing the mutual position (at that time) of the Federation of Rental Housing Providers of Ontario.

The *10 Walmer Road* case spawned numerous other tribunal proceedings over the next several years, led to an investigation by the Ministry of Government and Consumer Services, and hearings by the Ontario Energy Board. Taken together, this single void lease term – created in fine print by established landlord associations – caused inestimable expense to taxpayers through various Ministries, tribunals, and Legal Aid

Ontario funded services needed to make clear its illegality (beyond those unrepresented tenants who were otherwise coerced into unlawful sub-metering schemes through the same mechanism).

Beyond the standard terms in these industry-created agreements that are themselves void, these leases take a “blank-box” approach to additional rules, allowing landlords to write in their own terms. More often than not, those additional terms and conditions are void. The same is our experience with the appendices that landlords attach to their standard-form leases. In each of these cases, it is sometimes understandable that individual real estate agents or property managers may take the blank box in their GTAA or OREA standard-form lease as an invitation to write whatever clauses they want, regardless of the RTA.

On the other hand, sometimes these void or misleading terms do appear to be created with malicious intent. For example, one of our clients was required to prepay several months of rent and then sign an OREA standard-form lease that contained a typed clause, in the “additional terms” box, stating that the tenant’s prepayment was voluntary. Such a term, inserted by a real estate professional assisting the landlord, is clearly an attempt to circumvent s. 105 and s. 106 of the RTA (which, per the court’s interpretation in *Royal Bank of Canada v. MacPherson* [2009] O.J. No. 3806 and *Corvers v. Bumbia*, 2014 ONSC 7548 permits the tenant’s “voluntary” prepayment of rent, while prohibiting landlords from demanding it). There is little penalty for this sort of maneuvering.

Optional Terms

Based on these issues, we recommend the Ministry pursue a “check-box” rather than a “blank-box” approach to the Optional Terms section of the standard form lease template.

The newly-enacted s. 12.1 of the RTA requires that tenancy agreements for a prescribed class must be in the prescribed form and comply with any prescribed requirements. The clear remedial purpose of s. 12.1 is to give tenants a written lease agreement that they can rely upon as entirely valid and consistent with their legal rights and responsibilities, rather than leaving tenants to go through privately-created lease agreements to identify and argue over the terms that might be void by reason of s. 4 of the RTA.

Accordingly, any standard form lease developed by the Ministry should not allow the insertion of void clauses. We believe that providing a “blank-box” or blank page for landlords to add their own additional clauses will invite the insertion of exactly the kind of void terms that the standard form lease is intended to prevent. This is what we have witnessed in many existing standard form leases. While sophisticated tenants familiar with the RTA will know these clauses are not binding on them, other tenants will believe such clauses reflect their lawful rights and responsibilities. Similarly, if landlords are

allowed to attach rules or appendices to the Ministry's standard form lease, tenants will continue to think that clauses inconsistent with the RTA are binding on them.

Furthermore, by providing a mechanism for landlords to insert illegal terms into the standard form lease agreement, the "blank-box" approach could generate situations where it is unclear whether a landlord has satisfied the s. 12.1(1) requirement to use a standard form. This would create uncertainty as to whether a tenant is in the position to demand a lease in compliance with s. 12.1 and to withhold rent, as per ss. 12.1(5) to (10).

Ultimately, a standard-form lease agreement that offers space for the possible insertion of void or misleading terms would not comport with the legislative purpose of with newly-enacted s. 12.1. The Ministry should pursue an approach to a standard form lease template that would render the creation of non-compliant leases rare or impossible.

We recognize that the standard form lease must provide some flexibility so that landlords can provide information specific to the rental unit in question, such as the appliances and services included in the rent. We do not oppose the inclusion of blank boxes wherein the landlord may list services or facilities that are included or excluded from the rent, beyond responsibility to pay for vital services (which should be listed beside checkboxes). But as to freestanding rules: the Ministry is in a better position than self-represented tenants (and, apparently, established landlord industry associations) to identify the few possible rules or clauses that, while not found in the RTA, are not inconsistent with it, either. The Ministry should also include a statement on the lease explicitly stating that attached rules and appendices are not part of the lease.

Providing a list of prohibited/illegal conditions in the standard form lease template will not resolve the problems we identify above with the "blank-box" approach, nor is it likely to decrease the number of disputes at the LTB. Plain statutory language in the RTA highlighting void terms has deterred neither landlords nor their industry associations from including these terms in their lease agreements to date. A list of prohibited conditions will not necessarily prevent landlords from inserting or attaching void terms, particularly for tenants who exercise their right to request a standard-form lease because of suspicion about the structure and content of a prior, non-standard agreement.

We make this submission while acknowledging that newly-enacted s. 241.1 para. 3 (i) of the RTA contemplates that the Minister may, when prescribing the requirements for a tenancy agreement, provide that a tenancy agreement may include additional terms, but only if they are not inconsistent with the mandatory terms in the tenancy agreement. While this would seem to give the Minister the ability to take a "blank-box" approach to a standard form lease, we note the following:

- this is an optional power; not a mandatory legislative requirement,

- it need not be used for every part of the residential rental sector, and

- established associations of private, corporate landlords and real estate agents (such as GTAA and OREA) have failed to demonstrate that they can be trusted to author additional lease terms that are both non-void and non-misleading.

The new standard-form lease provisions are a necessary response to the misleading and void clauses that these market actors have written into their standard-form leases for the past several decades, and not a vehicle for them to continue doing so.

As such, we submit that the regulatory power in s. 241.1 para. 3 (i) should be used sparingly. For example, the "blank-box" approach may be appropriate for standard form leases for particular sectors that do not have a history of authoring leases inconsistent with the RTA. Alternatively, it could be employed on a question-by-question basis to allow landlords to freely list the included or excluded services and facilities (although vital services should be addressed using the "check-box" approach).

To conclude, the "blank-box" approach should not be used broadly in standard form leases designed for all landlords in all sectors of Ontario. To allow landlords, including large corporate landlords of purpose-built rental apartment buildings and those involved with professional real estate associations, broad discretion to write in their own terms will likely result in standard form leases inconsistent with the RTA and non-compliant with s. 12.1. Moreover, a list of prohibited conditions is also not likely to deter landlords from attempting to surreptitiously act contrary to the RTA, as in the illegal deposit example that we have provided above. Contradictory lease terms create confusion and uncertainty for tenants: not only about the specific terms of the lease, but also whether they have the option of relying upon ss. 21.1(5) through (10) of the RTA.

Rights, Responsibilities and Prohibited Conditions Section

We agree that the standard form lease should include language that clarifies the rights and responsibilities of landlords and tenants, such as the landlord's responsibilities for maintaining and repairing the unit (s. 20(1) of the RTA), when a landlord may enter the unit (s. 27 of the RTA), legal rent increase limits (s. 119(1) and s. 120(1) of the RTA) and required notice of a rent increase (s.116 of the RTA), among other rights and responsibilities. We believe it would also be beneficial to direct parties to the LTB in the event of disputes regarding these rights and responsibilities.

Again, in our view, including a list of prohibited conditions in this section, or elsewhere in the standard form lease, is not likely to resolve the issues we note above regarding a "blank-box" approach to the Optional Terms section. A "check-box" Optional Terms

section is the approach more likely to produce lease agreements that comply with s. 12.1 and which will best fulfill the purpose of the RTA as a whole.

We would welcome the opportunity to provide further input or clarify any of the foregoing submissions, and thank you for your consideration in this matter.

Sincerely,

DOWNTOWN LEGAL SERVICES
Per:

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CB/AR/BR

CC: Federation of Metro Tenants' Associations
Advocacy Centre for Tenants Ontario
Community Legal Education Ontario
Clinic Resource Office – Legal Aid Ontario