

HOLD ON – WHAT’S AN OVERHOLD?

No tenant has a common law right to occupy leased premises following the expiry of the lease, and most leases do not allow it, and yet, sometimes tenants do stay on. If the landlord demands possession and the tenant refuses to vacate, the tenant may be a trespasser and subject to ejection. If the landlord consents to the tenant’s continued occupation after the term expires, the common law generally considers the tenancy to be an “overholding” one.

During an overholding tenancy, typically all the terms of the expired lease continue to apply - except those related to the duration of the term. The common law stipulates a new, shorter term that automatically recurs until one party provides sufficient advance notice of termination.

In essence, when the parties have continued their landlord-tenant relationship beyond the expiry of the lease term, but have not addressed how long this relationship will last, the common law prescribes a short-term “periodic tenancy”, which will continually recur until one party puts an end to it.

Length of the Overhold

When a tenant overholds and a periodic tenancy arises, it can be for a year-to-year, quarter-to-quarter, month-to-month or week-to-week. Knowing which class of periodic tenancy arises is important, as it directly determines the length of notice required to bring the overholding tenancy to an end.

If a lease does not contain an overholding clause or if the clause is unclear, the courts look to the common law to fill in the gaps.

The common law provides that if the expired lease had a term of years, or term of a year or more, at a yearly rent, then the overholding tenancy will have a yearly term. For example, an expired one-year lease will likely overhold on the basis of a yearly tenancy. However, recent case law has

not been uniform on this point, making it somewhat unclear as to which class of periodic tenancy arises. For example, in 2012 the Ontario Court of Appeal stated that if the original lease term was for more than one year, a yearly tenancy arose, whereas if the original lease term was for less than one year, a monthly tenancy arose. In contrast, in 2014, the British Columbia Supreme Court concluded that a monthly tenancy arose at common law where the original lease term was for 25 months (i.e. more than one year) and the rent was payable monthly. Further case law is required to settle the inconsistency.

Terminating the Overholding Tenancy

Either party may terminate an overholding tenancy by giving the correct amount of prior notice. For an overholding yearly tenancy, notice must be provided at least six months’ prior to the end of the overholding lease year. For an overholding monthly tenancy, notice must be provided at least one month prior to the end of the overholding lease month.

Notice brings an end to an overholding tenancy on the expiry of its term. This means that an overholding yearly tenancy that springs up, for example, every April 1 may only be terminated effective March 31 by notice given no later than the prior September 30. Likewise, an overholding monthly tenancy that springs up every 1st of the month, may only be terminated effective the last day of the month by notice given no later than the last day of the preceding month. (Not all monthly tenancies spring up on the 1st of the month; *sometimes* (rarely) they recur every 10th or 15th of the month. The main indicator of this is the date when monthly rent is payable.)

Consenting to Continued Occupation

Acceptance of rent following the end of the term gives rise to a presumption that the landlord consented to the tenant’s continued occupation of the premises and the consequent creation of a new tenancy. However, this presumption is rebuttable. In *Imperial Oil*

Ltd. v Robertson, one month before the end of the term, the landlord gave the tenant notice that it required vacant possession upon the expiry of the lease. At the end of the term the tenant refused to vacate and sent the landlord a cheque for one month's rent. Despite the landlord having instructed its personnel not to accept rent from the tenant, it was nevertheless inadvertently deposited into the landlord's bank account. Shortly thereafter, the landlord returned the rent to the tenant and repeated its demand for vacant possession. The Ontario Court of Appeal stated that if a tenant wishes to remain in possession after the expiry of its lease, it must show that a new tenancy (such as an overholding tenancy) was created. Notably, the Court held that payment and acceptance of rent is an important factor in demonstrating a new tenancy, and furthermore that "if this were the only evidence on the issue, a Court or jury would be entitled to find a new tenancy." However, since "the landlord...made it very plain to the tenant that he was to vacate at the expiry of the lease", no overholding tenancy arose.

In *AIM Health Group Inc. v 40 Finchgate Limited Partnership*, the Ontario Court of Appeal held that for an overholding tenancy to arise, "the landlord must agree that the tenant may stay in the premises".

Customizing Overholding Terms

As outlined above, where the parties have not expressly agreed on the terms of a continued tenancy, the common law on overholding establishes a framework where the landlord-tenant relationship continues past the expiry of the lease. However, where the parties have expressly agreed to the terms of an overhold, courts will enforce the agreement.



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Commercial leases often contain an overholding clause because the common law result is not desirable. Most frequently these clauses stipulate that an overholding tenancy will be monthly and that the rent will be doubled. They may or may not address whether the overholding can only be achieved with the landlord's consent. The parties are entitled to establish their own framework as they see fit. It is important to appreciate that in the absence of contractual terms, the common law will fill the void.

Preventing Overhold

Landlords often worry that a tenant might overhold where the landlord requires vacant possession of the premises immediately following the end of the lease term. Recently, a landlord sought an injunction, as a pre-emptive measure, to ensure the tenant would vacate its premises at the end of its term. The Court denied the landlord's application finding that it was premature and unwarranted. The matter was further complicated by the overholding clause which contemplated two scenarios: the tenant remaining in possession beyond the term **with** the landlord's consent and **without** the landlord's consent. Due to the express terms of the overholding clause, the Court did not apply the *AIM Health Group Inc.* decision, and concluded that the parties were free to devise their own arrangement.

Absent a lease term to the contrary, where a landlord is concerned that a tenant may occupy leased premises following term expiry, it may simply cease the tenant's possession of the leased premises on expiry (i.e. at 11:59 pm on the last day of the term) by changing the locks (consistent with the end of the leasehold interest). If occupation continues on the day after expiry, an overholding tenancy may arise.

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