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## "Strange But True Tenancy Laws - A Dilettante's Nightmare"

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## LEASING LAWS

### Strange But True Tenancy Laws — A Dilettante's Nightmare

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Commercial tenancy law is full of idiosyncracies. Leases are a hybrid form of legal relationship reflecting a quirky blend of property conveyancing and contract principles. Often, what you expect is not what you find. Sometimes, the applicable principle seems wrong, or at least arbitrary. Here are some examples.

**Tenant's Right to Reject Mortgagee in Possession as its Landlord.** The recent Ontario Court of Appeal decision, *Goodyear v. Burnhamthorpe*, reminded us that if a mortgagee takes possession of property, it can evict tenants whose leases were entered into after the mortgage.

But those tenants may refuse to recognize the mortgagee as their landlord, and can treat their leases as having ended. Even if a tenant does not reject the mortgagee as its landlord, and instead, pays rent to the mortgagee, it will become a tenant from year to year. Either the tenant or the mortgagee (as landlord) can terminate such a lease on six months' notice effective at the end of one year of the tenancy. (All of this assumes there is no separate agreement between the tenant and the mortgagee requiring them to be bound by the original lease.)

**Leases: Don't Get Frustrated.** In contract law, parties can treat a contract as being ended where circumstances over which neither party has control make the performance of the contract impossible.

For all practical purposes, that principle does not apply to commercial tenancies. If leased premises become useless for the tenant's purposes (for example, by virtue of a fire, or due to governmental action impeding access to the premises) or prohibiting certain uses on the premises, the tenant is not excused from paying rent.

**No Obligation for Landlord to Repair.** There is no implied obligation for the landlord to repair the premises nor to ensure that they are in good repair at the outset of the lease. There are implied obligations for the tenant to repair, but none for the landlord.

Even if a lease exempts the tenant from making certain repairs (for example, structural repairs), the landlord is still not obligated to make those exempted repairs unless it otherwise agrees to perform them.

**Deemed Waiver of Right to Terminate.** If a landlord becomes aware of a default which would entitle it to terminate the lease, and it does something (such as accepting rent that became due after the default) which is not consistent with ending the tenancy, the landlord's right to terminate in respect of the particular default is waived. For example, if, contrary to its lease obligations, a tenant assigned a lease without obtaining the landlord's consent, and the landlord accepted rent that became due after it learned of the assignment, the landlord could not terminate the lease because of the assignment. This applies even if the landlord accepts the rent and deposits it by mistake or accepts rent and states expressly that it reserves its right to terminate the lease.

**Deemed Surrender.** Strangely, recent case law has held that if a landlord and tenant amend a lease by extending the term (where there is no option for extension in the lease) or by expanding the premises (where there is no option for expansion in the lease), the lease is implicitly surrendered and replaced by a new one. This releases the original tenant from obligations after the amendment. Usually, the parties are not aware of this effect.

**Continuing Liability of the Tenant.** A guarantor is released for its liability if the guaranteed contract is changed materially without its consent. When a lease is assigned, the new tenant (the assignee) is liable for the lease obligations, but the original tenant, even after it assigns the lease, continues to be primarily responsible. Except in those limited situations described above, where there is an implied surrender, this responsibility is not affected by later amendments even if they impose additional burdens on the assignee.

**No Damages for Unreasonably Withholding Consent.** Where a landlord, contrary to a lease obligation, unreasonably withholds consent to an assignment or sublease, the landlord is not liable for damages.

Gradually, the courts are mitigating the many anomalies associated with commercial tenancies, but progress is slow. Meanwhile, parties need to deal with the anomalies to achieve reasonable results.