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ANTI-BLACK RACISM AND RELIEF FROM FORFEITURE

In June 2021, the Court of Appeal for Ontario affirmed a lower court decision taking *judicial notice* of anti-Black racism in a tenant's application for relief from forfeiture. This powerful decision stands out for the Court's willingness to address anti-Black racism and to recognize hardships repeatedly encountered by Black businesspeople.

Elias Restaurant v. Keele Sheppard Plaza Inc

The Tenant, Elias Restaurant, served African/Black/Caribbean cultural food and catered to primarily Black customers. The Tenant was a family-operated business that took an assignment of the Lease in 2013 and upon taking possession, installed approximately $150,000 worth of improvements in the premises. The Lease was for a five-year term ending on July 31, 2017, with two 5-year options to extend the term. The deadline to exercise the first option was January 31, 2017. The Tenant missed the cut-off date but remained in possession after July 31, 2017.

The Tenant was not silent about wishing to exercise its option to renew. However, because it found a 2016 announcement of new ownership to be confusing as to where notices should be sent, it did not send a notice. As the deadline approached, the Tenant called the Landlord and the Property Manager. Its calls were ignored. The Tenant's lawyer attempted to call the Property Manager. He was met with a demand to prove that he was acting on behalf of the Tenant. Eventually, it became obvious that the Landlord did not want the Tenant to renew.

According to the Landlord, the Lease went into overhold mode.

The Tenant never missed a rent payment. It continued to operate, and its business was successful. Even when the COVID-19 pandemic hit in March 2020, rent was paid.

The Landlord purported to terminate the Tenant's overholding tenancy in May 2020. The Tenant applied to Superior Court for relief from forfeiture and an injunction preventing the Landlord from evicting the Tenant.

The Lower Court

Relief from forfeiture is a discretionary and fact-sensitive remedy. When granting it, Courts consider (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the forfeited property and the damages caused by the breach.

The Landlord's evidence before the lower Court showed a desire to replace the Tenant with one that would attract a "different clientele". Despite being a family-run business open to all customers, the Landlord maintained that the Tenant's business failed to attract "like minded family-oriented customers". The Landlord attested that the Tenant's customers were conducting "undesirable activities" and seemed "quite unlike, in a negative way, the usual clientele visiting other tenants".

The Tenant argued that the Landlord's true position was not that the business failed to attract family-oriented customers, but rather that it attracted the *wrong kind* of family-oriented customers. The Tenant contended that at least one other tenant of the plaza, also operated by persons of colour, failed to renew their lease after facing similar treatment from the Landlord and/or Property Manager.

The Tenant perceived that the Landlord was attempting to gradually change the plaza in a "racially defined manner".

The Court addressed the Tenant's need for equitable relief.

In analysing the prejudice faced by each of the parties, the Court held that the type of prejudice claimed by the Landlord could not carry weight in the outcome of the dispute. The Court described the Landlord's evidence of the Tenant's clientele as "almost a caricature of racially derogatory themes". It agreed with the Tenant that the motivation for the Landlord's actions was that the Tenant was a Black-owned business catering primarily to the Afro-Caribbean community.

In balancing the equities, the lower Court invoked the *doctrine of judicial notice* regarding anti-Black racism in Canada.

Generally, the *doctrine of judicial notice* permits the Court to inform itself of any material matter without requiring the parties to present evidence to prove its existence. It is used to take formal notice of facts that are so generally accepted as to be beyond the subject of debate among reasonable people.

The Court held that "the existence of anti-Black racism in Canadian society is not the subject of debate among reasonable people".

In doing so, the Court recognized discrimination is often more nuanced than express actions or words. Whether the Landlord would admit to or was cognizant of its biased behaviour was irrelevant to the Court.

The Court held that the Tenant met the test for relief from forfeiture. It noted that while one single adjudication could not "possibly address society's many challenges with respect to racial justice", the Court could not ignore them. It found that the Landlord would not suffer irreparable harm if the Tenant were allowed to remain as a rent-paying tenant of the premises. Enforcing the termination would amount to an enforcement of anti-Black racism. By contrast, denying relief to the Tenant would cause it to lose the goodwill associated with its well-established business and its substantial investment in the premises. Moreover, the Tenant had continued to pay rent. The Court noted that the Tenant and its customers "would also suffer the indignity of being excluded from the Premises based on what can be seen as a form of bias which Ontario law rejects". Before arriving at its conclusion, the Court took the time to analyse the Landlord's stereotypical portrayal of the Tenant's customers, of the "Othering" of minority people, and of the … "long history of discrimination, oppression, and marginalization" of members of Black communities. The Court quoted the Prime Minister of Canada's recent observation that Black entrepreneurs require "justice against a system that has locked out far too many Black entrepreneurs and denied them the same opportunities as other Canadians".

The Court's award of relief not only established the 5-year renewal term but also served to restore the Tenant's second 5-year renewal option under the Lease.

The Court of Appeal

The Landlord appealed to Ontario's highest court. The Court of Appeal affirmed the lower Court's decision. It held that the application judge's observations with respect to the relevance of anti-Black racism to the Landlord's refusal to negotiate a renewal, regardless of whether the Landlord's actions were consciously motivated by racism, was appropriate. The appeal was dismissed, and the Landlord was ordered to pay the Tenant's costs.

Lessons Learned

This case highlights some of the issues that Black businesspeople face in Canadian society. In the context of commercial tenancies, there is another lesson to be learned: conflict in tenancy relationships may veer into the realm of societal injustice. Landlords and tenants should recognize the impacts of discrimination on their business dealings.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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