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ONE SAFE METHOD FOR A LANDLORD TO RECOVER POSSESSION OF COMMERCIAL PREMISES

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Commercial tenancies end for a wide variety of reasons. Leases may expire, a renewal option may not be exercised (or may be exercised improperly), or a tenancy may be terminated by the landlord due to a breach of the lease by the tenant. In some cases, the issue for a landlord is not whether a lease has come to an end but the fact that a tenant refuses to leave – even though their right to lawfully remain on the property has reached an end.

Often a landlord will simply resort to self-help remedies, such as changing the locks and removing the tenant's goods, but what about the uncertain cases? What should a landlord do when the grounds for terminating the lease are in dispute or when the lease term expiry date is uncertain? One wrong move and the landlord could expose itself to a significant claim for damages. When the stakes are high, and the right to evict is uncertain, we often recommend the commercial landlord seek a court order for possession of the premises.

The *Commercial Tenancy Act*, R.S.B.C. 1996 c. 57 *("CTA")* outlines two separate procedures for a type of "fast track" hearing available to a landlord to obtain an order for possession of commercial premises. The choice of procedure usually depends on whether the lease has expired or been terminated before the court proceedings are commenced. The right to obtain an order for possession under the *CTA* is a statutory remedy and the prerequisites of that legislation must be strictly followed. Sections 18 to 21 of the *CTA*, and this article, deal with some of the legal criteria and considerations when using the first, and most commonly used, eviction procedure. This procedure applies when the lease has expired or been terminated.

1. Preconditions to Application

There are generally three pre-conditions to a landlord obtaining an order for possession under section 18(1) of the *CTA*:

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- the lease has been terminated or expired,
- a written demand for possession has been delivered by the landlord to the tenant following the termination or expiry of the lease, and
- the tenant has wrongfully refused to vacate after getting that demand.

In addition to the statutory pre-conditions, the particular lease may have certain procedural requirements with which the landlord must comply. For instance, the lease may require that a notice of default be issued for the non-payment of rent or the non-performance of some other covenant and stipulate a time period within which the tenant has the right to cure a breach. If your lease has such a requirement, then the default notice must be given, and the appropriate time periods complied with, before taking steps under the *CTA*.

2. The Hearing Process

If a landlord can present some basic evidence, in affidavit form, which satisfies the pre-conditions to the application, then the court will grant a date for an inquiry to answer three questions:

- Has the lease expired or been terminated?
- Does the tenant hold possession of the premises against the right of the landlord?
- Has the tenant wrongfully refused to give up possession of the premises?

If the tenant fails to appear at the time and place appointed for the inquiry, then the court may grant the landlord an order for possession, direct the sheriff to remove the tenant and put the landlord into possession of the premises. In British Columbia today, all services which the sheriff used to perform in the eviction process are now performed by a private bailiff. The bailiff is hired and paid by the landlord but operates under the authority of a Writ of Possession issued by the court.

If the tenant appears at the time and place appointed for the hearing, then section 21(2) of the *CTA* contemplates that a form of trial will take place, in a summary manner, where witnesses are called to give evidence and to be cross-examined. While the *CTA* contemplates a court hearing with witnesses, often the hearing will be conducted on affidavit evidence alone, especially where there are no contentious facts or credibility issues.

The proceedings must be commenced, and the hearing must take place, at the court house which is located within the judicial district where the premises are situated.

The costs of the proceedings may be recoverable from the tenant if the Writ of Possession is granted.

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3. Common Defences

A common defence raised by a tenant is the failure of the landlord to separate the first two pre-conditions set out in section 18(1) of the *CTA* (i.e. terminate the lease by one letter and then deliver the demand for possession in a second, subsequent letter). If a landlord fails to separate those two steps then the legal process will have to be re-started after the proper notices have gone out.

Another common defence raised by a tenant is the acceptance of rent by the landlord, after the lease has expired or been terminated. By accepting rent the landlord will create a new tenancy which can only be terminated on fresh notice, or will reinstate the old lease. The proper course for a landlord to follow when trying to evict a tenant is not to accept any rent, after the lease has expired or been terminated, but to claim damages for the tenant's use and occupation of the premises (i.e. as if the tenant were a trespasser).

Perhaps the most common defence raised by a tenant, to a landlord's action for possession, is the "relief from forfeiture" defence. Essentially, if the tenant is found to be in breach of the lease it asks the court to exercise a discretionary power to give the tenant a second chance to stay in the premises. Generally speaking, the power of the court to grant relief under the *Law and Equity Act*, R.S.B.C. 1996 c. 253 ("*LEA*") is discretionary and no party is entitled to relief from forfeiture as a matter of right.

While the wording of section 24 of the *LEA* suggests that there aren't any limits on the court's power to relieve against penalties and forfeitures, over the years the courts have interpreted that power to only grant relief where:

- the forfeiture was in essence a right given to the landlord to secure payment of a specific sum of money for arrears of rent or taxes, or
- the tenant's breach was caused by reason of fraud, accident, surprise or mistake.

Where the court has granted a tenant relief from forfeiture one time, the court cannot grant the tenant relief, a second time, for breach of the **same** covenant: section 28 of the *LEA*. This restriction on the court's ability to grant relief from forfeiture is only applicable if we are dealing with breach of the same covenant in two separate instances. The court could, however, grant relief from forfeiture a second time if it did not relate to the same breach or default as was involved in the first instance.

4. The Remedy Sought

In order to take advantage of this "fast track" summary procedure, the landlord can only ask for the one remedy which the judge is authorized to grant under section 21(3) of the *CTA*, i.e. a writ of possession. Although section 21(3) of the *CTA* only authorizes a court to make an order for possession, section 22 of the

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Act makes it clear that this limitation does not prejudice or affect any other rights or remedies which the landlord may want to pursue, in addition to gaining possession. The most significant of these other rights and remedies is a claim for damages.

Where a dispute exists between a landlord and tenant over the right to possession of premises, even where a lease has been terminated or expired, it can be worthwhile for a landlord to take advantage of the above procedure. Obtaining a writ of possession provides certainty that the court has endorsed the landlord's position and limits any claims for damages by a tenant alleging they were removed from the premises in wrongful circumstances.

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