

# KEEPING CURRENT

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## Court of Appeal affirms judicial notice of anti-black racism in granting relief from forfeiture

By James R.G. Cook

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In *8573123 Canada Inc. (Elias Restaurant) v. Keele Sheppard Plaza Inc.*, [2021 ONCA 371](#), the Ontario Court of Appeal affirmed an application judge's [decision](#) which stopped a commercial landlord from terminating a tenancy due to the tenant's alleged failure to give timely written notice of its intention to exercise an option to renew the lease. The application judge's [decision](#) was based in part on judicial notice of the existence of anti-black racism in Canada, and racial stereotypes contained in the landlord's evidence filed for the application.

The tenant was a restaurant operated by a husband and wife as a "family business," serving African and Caribbean food in Toronto. They occupied the premises in question pursuant to a lease with a five-year term. There were two options to renew for additional five-year periods. The lease provided that written notice of the exercise of the option was to be made by registered mail at least six months prior to the expiry of the lease.

The tenant failed to provide written notice of its exercise of the option prior to the date set out in the lease.

The landlord kept the tenant as an overholding tenant from August 2017 to May 28, 2020, at which point the landlord terminated the lease.

At a hearing in 2020, the tenant sought relief from forfeiture pursuant to section [98](#) of the Ontario *Courts of Justice Act*. The tenant argued that it had attempted to provide notice to the landlord but that the landlord had ignored its requests.

According to the landlord's own evidence, it wished to replace the tenant with a more "suitable" business. The landlord argued that the tenant was "unattractive", and the tenant's business did not attract "family-oriented customers".

The application judge found that the tenant had initiated the lease renewal process by attempting to contact the landlord and its property manager before and after the deadline to exercise the renewal option. There was evidence that the tenant's calls were not returned and were "studiously avoided" because the landlord and its property manager did not want the tenant to continue to occupy the premises.

The application judge found that both the equities and the balance of convenience weighed in the tenant's favour, based on the following findings, among others:

- The tenant was not in breach of the lease and had never missed a rent payment even during the pandemic (while it operated a take-out service);
- The tenant had made substantial investments in the premises, installing approximately \$150,000 worth of improvements;
- The landlord had established no financial loss as it failed to submit evidence that would accurately compare the revenues between the tenant and any other prospects.

Further, the application judge [found](#) that the affidavits filed by the landlord were “almost a caricature of racially derogatory themes”. The landlord's economic justification for seeking a new tenant, combined with the landlord's statements about the nature of the tenant's clientele, suggested that the landlord's desire to replace the Tenant was motivated by racism, rather than the prospect of higher rent. While the landlord's position may not have been consciously racially motivated, the understanding of these facts was nevertheless relevant to weighing the prejudice to the tenant.

In June 2021, the Court of Appeal dismissed the landlord's appeal. The appeal panel determined that there was evidence to support the application judge's conclusions that the tenant had made diligent and timely efforts to exercise its option to renew, and that the landlord had avoided the tenant's calls. There was evidence of

a lack of responsiveness by the landlord to the tenant's efforts, and an insulting response from the landlord to the tenant's lawyer. Simply put, the application judge was entitled to prefer the tenant's evidence over the landlord's, as he had done.

The Court of Appeal affirmed that the application judge was entitled to take judicial notice of anti-Black racism in Canada. There was language in the landlord's affidavit evidence that suggested its concern to find a tenant that would attract “like minded family-oriented customers” as opposed to a “liquor bar” was stereotypical labelling. The evidence supported the application judge's conclusion that the real issue for the landlord was the fact that the “Tenant is a Black-owned and operated business and caters to an Afro-Caribbean community”.

Accordingly, whether the landlord's racial stereotyping was conscious or not, this was a matter that the court could take account of in the exercise of discretion to grant relief from forfeiture. As the application judge [stated](#), “the societal realities pertaining to Black businesspeople like the Tenants must be factored into the exercise of the Court's discretion in considering equitable remedies like injunctions and relief from forfeiture.” The Court of Appeal summarized its conclusion on the issue as follows:

Based on all the evidence, including the Tenant's evidence and the evidence of the Landlord's own witnesses, the application judge was entitled to conclude that anti-Black racism was relevant to the Landlord's refusal to negotiate a renewal of the lease, regardless of whether the Landlord's actions were consciously motivated by racism.



In the result, the Court of Appeal found no error in the application judge's decision to grant relief from forfeiture. There would be no prejudice to the landlord in renewing the lease, in contrast to the significant damage to the tenant's business if the lease was terminated. The tenant had acted in good faith and demonstrated its intention to renew the lease prior to the expiry of the option. The tenant was therefore entitled to renew the lease and the appeal was dismissed. The Court of Appeal awarded costs to the tenant of \$20,579.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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